

[REDACTED]
Person with Management or Control

Affinity Education Group Limited

RE: Papilio Early Learning Barton

Email: [REDACTED]

Dear [REDACTED]

Decision to issue Administrative Action

1. As you may be aware, the ACT Regulatory Authority (the Authority), also known as the Children's Education and Care Assurance (CECA), recently investigated suspected offences at Papilio Early Learning Barton SE-00009874 (the Service) operated by Affinity Education Group Limited PR-40001112 (the Provider).
2. Web addresses to the *Education and Care Services National Law Act (ACT)* (the Law), and the *Education and Care Services National Regulations 2011* (the Regulations) are provided for your convenience at the end of this Decision.

Facts

3. On 28 August 2023, the Authority received a complaint from a member of the public alleging that an educator was intoxicated while working with children. Due to the seriousness of the allegation, and the high risk of harm to children, the Authority determined to investigate.
4. On 29 January 2024, the Authority sent the Provider a Show Cause Notice (the Notice) for the purpose of affording an opportunity to respond to the allegations and to ensure procedural fairness. Refer copy of the Notice (minus attachments due to size, noting that these can be provided to you again upon request) at Attachment A.

5. The Notice outlined the grounds for issue, and the evidence relied on by the Authority advising of the allegations. In addition, the Notice outlined the compliance actions being considered by the Authority should the allegation be substantiated.

Allegations

Allegation One

6. On 28 August 2023, the Provider failed to ensure that every reasonable precaution was taken to ensure that children being educated and cared for by the service were free from harm or any hazard likely to cause injury by allowing educator, [REDACTED] to work directly with children while intoxicated, in breach of *Regulation 83* and engaging a contravention of section 167(1) of the *Law*.

Allegation Two

7. By 5 September 2023, the Provider failed to notify the Regulatory Authority of certain information in relation to the Service. The information being that a serious incident occurred at the Service resulting in emergency services attending at 6.15pm on 28 August 2023, to attend to an educator at the service. The circumstance of the educator posed a risk to the health, safety or wellbeing of children who were in attendance at the Service.
8. On 12 February 2024, the Authority received the Provider's response to the Notice along with supportive documentation (Attachments A through E). Refer Attachment B.

Law

Section 167(1) of the *Law* - Offence relating to protection of children from harm and hazards

The Approved Provider of an education and care service must ensure that every reasonable precaution is taken to protect children being educated and care for by the service from harm and from any hazard likely to cause injury.

Penalty: \$10 000, in the case of an individual

\$50 000, in any other case.

Regulation 82 - Tobacco, drug and alcohol-free environment

The approved provider of an education and care service must ensure that children being educated and cared for by the service are provided with an environment that is free from the use of tobacco, illicit drugs and alcohol.

Regulation 83(1) - Staff members and family day care educators not to be affected by alcohol or drugs

The approved provider of an education and care service must ensure that a nominated supervisor or a staff member of, or volunteer at, the service is not affected by alcohol or drugs (including prescription medication) so as to impair the person's capacity to supervise or provide education and care to children being educated and cared for by the service.

Penalty: \$2200.

Section 174(2) of the Law – Fail to notify certain information to Regulatory Authority

The Approved Provider of an education and care service must notify the Regulatory Authority of the following information in relation to an approved education and care service-

- (a) any serious incident at the approved education and care service;
- (b) any complaints alleging—
 - (i) that a serious incident has occurred or is occurring while a child was or is being educated and cared for by the approved education and care service; or
 - (ii) that this Law has been contravened;
- (c) information in respect of any other prescribed matters.

Penalty: \$4500, in the case of an individual.

\$22 900, in any other case.

Section 174(4) of the Law – Fail to notify certain information to Regulatory Authority

A notice under subsection (2) must be in writing and be provided within the relevant prescribed time to –

- a) The Regulatory Authority that granted the service approval for the education and care service to which the notice relates.

Regulation 175(2)(c) – Prescribed information to be notified to the Authority

For the purposes of section 174(2)(c) of the Law, the following matters are prescribed-

- (c) Any circumstance arising at the Service that poses a risk to the health, safety or wellbeing of children attending the service.

Regulation 176(2)(b) – Time to notify certain information to regulatory Authority

For the purposes of section 174(4) of the Law, a notice must be provided-

- (b) In case of a notice under section 174(2)(b) or a notice of a matter referred to in regulation 175(2)(b), within 24 hours of the complaint or incident.
- (c) In any other case, within 7 days of the relevant event or within 7 days of the approved provider becoming aware of the relevant information.

Obligations upon Regulatory Authority

9. Section 3 of the *Law* sets out objectives and guiding principles of the *Law*. Relevant to this decision is the objective at section 3(2)(a), namely
‘To ensure the safety, health and wellbeing of children attending education and care services; ...’
10. There are two relevant guiding principles at sections 3(3)(a) and (f), namely:
 - (a) that the rights and best interests of the child are paramount; ...
 - (f) that best practice is expected in the provision of education and care services.
11. Section 260 of the *Law* sets out the functions of the Regulatory Authority, which includes:
 - (c) to monitor and enforce compliance with this *Law*;
 - (d) to receive and investigate complaints arising under this *Law*.
12. The *Law* works to protect a particularly vulnerable part of our society — children — when they are in the care of people other than their parents or guardians. The *Law* authorises providers and services to participate in a regulated environment and requires those participants to comply with the *Law*.
13. A key object of the *Law* is to protect children in the context of education and care services. The Authority looks to exercise its powers to emphasise and require best practice, as the *Law* requires, which is also inherently in the best interests of children.

Decision

14. After careful consideration of the Provider’s response and all available evidence, the Authority is satisfied that, on the balance of probabilities, there is sufficient evidence to substantiate contraventions of s167(1) and 174(2) of the *Law* in this instance.

15. Regarding Allegation One, ensuring that no child is being cared for by an educator who is intoxicated by alcohol, or drugs is viewed as being a reasonable precaution to take to protect children from harm likely to cause injury.
16. The Authority is satisfied that the Provider, on 28 August 2023, did not ensure that a staff member of the Service was not affected by alcohol or drugs (including prescription medication) so as to impair the person's capacity to supervise or provide education and care to children being educated and cared for by the service, in breach of *Regulation 83*, and giving rise to a contravention of 167(1) of the *Law*.
17. Ensuring that no child is being cared for by an educator who is intoxicated by alcohol or drugs is viewed as being a reasonable precaution to take to protect children from harm likely to cause injury.
18. The Authority recognises that policies and procedures were in place at the time of this extraordinary event, however the Nominated Supervisor and the educators who were present at the time of the incident were not confident and competent in responding to an emergency situation.
19. Additionally, the Nominated Supervisor chose to leave the Service knowing that educators were concerned for the health and welfare of [REDACTED] and educators present at the incident did not know how to call emergency services by dialling "000" and were unaware of the process to follow in an emergency.
20. Regarding Allegation Two, the Authority is satisfied that that the Provider failed to notify the Authority of a complaint alleging contravention of the *Law*. It is noted that the Provider accepted that by failing to notify the Authority of the complaint, the Provider contravened section 174(2) of the *Law*.
21. The Regulatory Authority requests that the Provider takes steps to review their policies to ensure:
 - a. That a process is implemented to ensure that Nominated Supervisors and Educators at the Service feel confident in their capability to manage emergency situations;

- b. All educators have the knowledge and capacity to respond to emergency situations in real situations, not just at the point of induction; and
 - c. That all staff have continued currency of knowledge in managing an emergency and that this is monitored by the Provider on a regular basis.
22. The *Law* outlines a range of statutory actions which may be taken by the Authority in response to non-compliance. The Authority has the flexibility to choose the most appropriate action to support you to achieve compliance and improve outcomes for children.
23. Considering the evidence, the Provider's response to the Show Cause Notice, the objectives and guiding principles of the *Law*, the compliance history of the Service, the steps taken by the Provider to mitigate risk of a similar incident, and the environment at the time relevant to the matters, the Authority has decided to issue this administrative action rather than take statutory compliance actions.
24. This Decision is issued to remind the Provider that at all times, that they must take all reasonable precautions to ensure that staff have the confidence and capability to deal with emergency situations to protect children from harm and hazard likely to cause injury – both physically and psychologically.
25. This outcome will be recorded on the Service's file and may be considered in any future applications for approvals, amendments, or waivers. This decision may also be considered in determining any future regulatory action, should there be future breaches of the *Law* or *Regulations*.

Legislation

26. The Education and Care Services National Law applies to you as a provider and any service you operate.
27. The National Law is applied in the ACT by the Education and Care Services National Law (ACT) Act 2011 <http://www.legislation.act.gov.au/a/2011-42/default.asp> . The *Law* and *Regulations* can be viewed at: <http://www.acecqa.gov.au/national-law> and <http://www.legislation.nsw.gov.au/#/view/regulation/2011/653>.

28. Should you have any questions about this Decision please contact A/g Assistant Director-
Investigations at nicole.withers@act.gov.au

Yours Sincerely,



Jo Williams

Director- Regulatory Operations

Education and Care, Regulation and Support

2 May 2024