ACT Government
Education

Mr [redacted]
Person with Management and Control
Affinity Education Group Limited
RE: Papilio Early Learning Yarralumla

Email: [redacted]@affinityeducation.com.au
[redacted]@affinityeducation.com.au

Dear Mr [redacted]

Show Cause Notice – Potential Compliance Action

1. As you may be aware, the ACT Regulatory Authority (the Authority) also known as Children's Education and Care Assurance, are investigating suspected offences under the *Education and Care Services National Law (ACT)* (the *Law*) relating to the operation of Papilio Early Learning Yarralumla SE-00009805 (the Service), operated by Affinity Education Group Limited, PR-40001112 (the Provider).

2. Web addresses to the *Law* and the *Education and Care Services National Regulations* (the *Regulations*) are provided for your convenience at the end of this notice.

3. The Authority has determined that there is sufficient evidence to support a case to answer for the Provider regarding suspected offences under the *Law*. However, the Authority's final determinations will not be made until the Provider has had an opportunity to respond to the allegations and evidence obtained by the Authority.

4. This is the reason for sending this Show Cause Notice (Notice) to you. Detailed instructions of how to respond appear at the end of this Notice.

5. The Authority is considering compliance action based on suspected contraventions of the *Law* and *Regulations*. If substantiated, the allegations may constitute offences under sections 165(1), 167(1), s169(1), s174 and 217 of the *Law* (or any combination of them).

6. If, after considering all available evidence, the Authority finds any offences are substantiated on the balance of probabilities, it will need to consider whether compliance action is required. All such determinations are made via the Authority's case management processes, involving a dedicated case management committee.

7. If any offences under the *Law* are substantiated, the Authority considers many factors when determining appropriate action, the focus being on ensuring future compliance and improved outcomes for children, rather than punishment. Potential compliance actions appear at the end of this Notice.

Grounds for issuing Show Cause Notice

8. The evidence obtained during the investigation support offences under the *Law* within the following areas:

a) Failure to ensure all children are adequately supervised at all times;

b) Failure to protect children by taking reasonable precautions;

c) Failure to ensure adequate staffing arrangements;

d) Failure to comply with a requirement under s215 of the *Law*; and

e) Failure to notify certain information to the Authority.

Background to Investigation.

9. On 17 May 2022, the Authority received a direct complaint relating to the operation of the Service, and in particular, allegations of inadequate staffing arrangements and inadequate supervision.

10. Specifically, it was alleged that between 29 November 2021 and 21 December 2021, the Service was not resourced appropriately to support and guide the challenging needs of children's behaviours in the preschool rooms.

11. Furthermore, it was alleged that educators were not provided adequate training and supports to guide specific children's behaviours which contributed to children and educators being placed in risk situations resulting in injury.

12. Due to the risk of children being exposed to harms and hazards if not adequately supervised, or appropriate supports in place to guide behaviour, the Authority determined to investigate.

Allegations:

Allegation One – Sections 165(1) and 167(1) of Law

It is alleged that, on multiple occasions between 29 November 2021 to 21 December 2021, the Provider did not ensure that all children being educated and cared for by the service were adequately supervised at all times that the children were in the care of that service., in contravention of section 165(1) of the *Law,* engaging a further contravention of 167(1) of the *Law.*

Allegation Two – Section 169(1) of Law

It is alleged that, on multiple occasions between 29 November 2021 to 21 December 2021, the Provider, by not meeting minimum regulated ratio requirements as outlined in *Regulation* 123, has not ensured that adequate staffing arrangements were in place at all times that children were being educated and cared for at the Service, in contravention of section 169(1) of the *Law*.

Allegation Three – Section 167(1) of Law

It is alleged that, on multiple occasions between 29 November 2021 to 21 December 2021, the Provider, by not ensuring appropriate supports were in place to guide children's behaviours, did not take every reasonable precaution to protect children being educated and cared for by

the service from harm and from any hazard likely to cause injury, in contravention of section 167(1) of the *Law.*

Allegation Four – Section 174 of Law

It is alleged that the Provider did not notify the Regulatory Authority of a complaint alleging the *Law* has been contravened, in contravention of section 174 of the *Law*

Allegation Five – Section 217 of Law

It is alleged that the Provider failed to comply with a requirement made under section 215 of the *Law*, to the extent that the Provider is capable of complying with that requirement, in contravention of section 217 of the *Law.*

Evidence Relevant to the Allegation One and Allegation Two

13. On 16 June 2022, a notice allowable under section 215 of the *Law* (215 Notice) was sent to the Provider requiring information and documentation to be forwarded to the Authority. Refer Attachment A.

14. Some required information was forwarded on 30 June 2022; however, it was noted that the 215 Notice had not been fully complied with. Further correspondence was sent to address this on 30 June 2022, 29 July 2022, and 15 August 2022. A full response complying with the 215 Notice was received by 17 August 2022. Refer copies of relevant correspondence at Attachment B.

15. Utilising child attendance records and working directly with children records, submitted by the Provider in response to the 215 Notice, the Authority undertook an analysis of staffing arrangements between 29 November 2021 and 21 December 2021. Refer Analysis at Attachment C.

16. During the investigation, the Authority obtained numerous witness statements, relevant extracts from which appear below, with personal information redacted where appropriate. Please note that witness statements were obtained utilising powers under section 215 of the *Law,* imposing obligations to attend and provide evidence before the Authority.

17. Relevant extract from Witness A's statement includes the following:

[redacted]

18. Excerpts from Witness B's statement include:

19. Excerpts from Witness C's evidence include:

20. Excerpts from Witness D's evidence include:

21. Excerpts from Witness E's evidence include:

Legislation Relevant to Allegation One and Two

Section 165(1) of the *Law* - Offence to inadequately supervise children
The Approved Provider of an education and care service must ensure that all children being educated and cared for by the service are adequately supervised at all times that the children are in the care of that service.

Penalty: $10 000, in the case of an individual
$50 000, in any other case.

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.

Section 169(1) of the *Law* - Offence relating to adequate staffing arrangements
An approved provider of an education and care service must ensure that, whenever children are being educated and cared for by the service, the relevant number of educators educating and caring for the children is no less than the number prescribed for this purpose.

Penalty: $10 000, in the case of an individual
$50 000, in any other case.

Regulation 123 (1) and (2) –Educator to child ratio-centre – based service

(1) The minimum number of educators required to educate and care for children at a centre-based service is to be calculated in accordance with the following ratios—

(a) for children from birth to 24 months of age—1 educator to 4 children;

(a) for children over 24 months and less than 36 months of age—1 educator to 5 children;
(b) for children aged 36 months of age or over (not including children over preschool age)—1 educator to 11 children;
(c) for children over preschool age, 1 educator to 15 children.

(2) If children being educated and cared for at a centre-based service are of mixed ages the minimum number of educators for the children must meet the requirements of subregulation (1) at all times.

Regulation 122 –Educators must be working directly with children to be included in ratios
An educator cannot be included in calculating the educator to child ratio of a centre- based service unless the educator is working directly with children at the service.

Regulation 13 – Meaning of *working directly with children*
For the purpose of these Regulations a person is working directly with children at a given time if at that time the person –

a) Is physically present with the children; and
b) Is directly engaged in providing education and care to the children.

<u>Contravention supported by Allegation One and Two</u>

22. Evidence gathered appears to support a contravention of section 165(1) of the *Law,* engaging a further contravention of section 167(1) of said *Law.*

23. Evidence gathered appears to support a contravention of section 169(1) of the Law, supported by breaches of Regulation 123 and Regulation 122.

<u>Evidence Relevant to the Allegation Three</u>

24. In response to the 215 Notice, on 5 July 2022, the Provider submitted behaviour support plans for two children, known to be [redacted] and [redacted] Refer copies of plans submitted at <u>Attachment D</u>.

25. During the investigation, the Authority obtained numerous witness statements, relevant extracts from which appear below, with personal information redacted where appropriate. Please note that witness statements were obtained utilising powers under section 215 of the *Law,* imposing obligations to attend and provide evidence before the Authority.

26. Relevant extract from Witness A's statement includes the following:

[redacted]

[redacted]

27. Excerpts from Witness B's statement include:

28. Excerpts from Witness C's evidence include:

29. Excerpts from Witness D's evidence include:

30. Excerpts from Witness E's evidence include:

Legislation Relevant to Allegation Three

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.

Contravention supported by Allegation Three

31. Evidence gathered appears to support a contravention of section 167(1) of the Law.

Evidence Relevant to the Allegation Four

32. On 30 June 2022, in response to Point 7 of the 215 Notice (refer Attachment A), the Provider submitted an emailed complaint/concern relating to a child being bitten at the Service. Refer copy of submitted information at Attachment E.

33. Relevant extract from Witness A's statement includes the following:

[redacted]

34. Excerpts from Witness C's statement include:

[redacted]

Legislations Relevant to Allegation Four

Section 174 of *Law* - Offence to fail to notify certain information to Regulatory Authority

(2) An approved provider must notify the Regulatory Authority of the following information in relation to an approved education and care service operated by the approved provider—

(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: $4 000, in the case of an individual

$20 000, in any other case.

(4) 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.

Contravention supported by Allegation Four

35. Evidence gathered appears to support a contravention of section 174 of the *Law*.

Evidence Relevant to the Allegation Five

36. On 16 June 2022, a notice allowable under section 215 of the *Law* (215 Notice) was sent to the Provider requiring information and documentation to be forwarded to the Authority. Refer Attachment A.

37. Some required information was forwarded on 30 June 2022, however, it was noted that the 215 Notice had not been fully complied with. Further correspondence was sent to address this on 30 June 2022, 29 July 2022, and 15 August 2022.

38. A final response to the 215 Notice was received by 17 August 2022, however it was noted that not all records were able to be submitted. Refer copies of relevant correspondence at Attachment B.

Legislations Relevant to Allegation Five

Section 217 of the *Law* - Offence to fail to comply with notice or requirement
A person must not refuse or fail to comply with a requirement under section 215 or 216 to the extent that the person is capable of complying with that requirement.
Penalty: $8 000, in the case of an individual
$40 000, in any other case.

Contravention supported by Allegation Five

35. Evidence gathered appears to support a contravention of section 217 of the *Law*.

Potential Compliance Action

39. The Authority reiterates that no decision has been made at this time – this letter is a step in the investigation process. However, procedural fairness requires that the Authority take this opportunity to advise you of potential compliance actions, if any offences are substantiated. Potential compliance actions include:

    a. Non-statutory Administration Action (similar to a caution) with no further action;

    b. Non-statutory Administrative Action with measures to be taken and evidence produced;

    c. A Compliance Notice under section 177 of the *Law*, if the Authority is satisfied that the Service is not complying with the *Law;* or

    d. Conditions on Service Approval under section 55 of the *Law*.

40. In arriving at a decision concerning compliance action, if warranted, the Authority considers many factors, such as severity of non-compliance and the compliance history of the Provider and Service. A compliance notice requires specific steps to be undertaken by the Provider to demonstrate to the Authority how compliance with the *Law* and *Regulations* will be achieved and maintained. It is tailored in each circumstance to address the specific non-compliance identified because of the investigation.

41. In your response, you may wish to make suggestions as to how this can be demonstrated. The Authority is not bound by any suggestions but will consider them as part of the Authority's

case management process. Alternatively (or additionally), the Authority may place a condition on the Service Approval to address the specific non-compliance identified because of the investigation.

Right of response

42. As mentioned previously, this letter is your opportunity to respond to the allegations and evidence set out in this Notice. You may, within 14 days of receiving this Notice, make a written submission for the Authority's consideration in deciding if any offences are substantiated and, if so, whether any compliance action should be taken.

43. At Attachment F to this Notice is a '4 Step Guide to Responding to a Show Cause Notice' to assist in the development of your submission. Please direct your written submission via email to vittorio.colosimo@act.gov.au or by post to

    Children's Education and Care Assurance -
    Attention Vittorio Colosimo
    GPO Box 158, Canberra ACT 2601.

Caution

44. I am informing you that the excerpts of statements of witness taken for the purpose of the Authority's investigation are included in the interests of procedural fairness. The statements taken during the investigation are protected disclosures under section 296 of the *Law*.

45. The *Law* provides, at section 297, for the protection of persons who make protected disclosures from serious detrimental action against reprisal.

46. Please also be aware that it is an offence under section 295 of the *Law* to provide the Authority with false or misleading information or documents.

47. The *Law* applies to you as a provider and any service you operate. The *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.

48. 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

49. Should you have any questions about this Show Cause Notice please contact Senior Investigator Vittorio Colosimo, via email at vittorio.colosimo@act.gov.au.

    Yours sincerely

    Jo Williams
    Director
    Children's Education and Care Assurance
    Education and Care Regulation and Support
    ACT Education Directorate
    21 November 2022