

Ms [REDACTED]
Director of School Improvement Tuggeranong
Person with Management or Control
ACT Education Directorate
RE: Gordon Primary School Preschool Unit

Email: [REDACTED]@act.gov.au
CC'd: [REDACTED]@act.gov.au

Dear [REDACTED]

Decision to Issue Compliance Notice

1. As you are aware, Authorised Officers from ACT Regulatory Authority (the Authority) also known as Children's Education and Care Assurance, recently conducted an investigation into an allegation of inappropriate discipline on 4 May 2020 at Gordon Primary School – Preschool Unit, SE-00011193 (the Service) operated by ACT Education Directorate, PR-00006465 (the Provider).
2. I am satisfied that the Provider did not comply with the provisions of the *Education and Care Services National Law Act (ACT)* (the *Law*) and the *Education and Care Services National Regulations* (the *Regulations*).
3. Web addresses for the *Law* and the *Regulations* are provided for your convenience at the end of this notice.

Facts

4. On 12 June 2020 the Authority received a Notification of Incident (NOT-40446918) from the Provider regarding the allegation of a Learning Support Assistant's (LSA) conduct toward a child of the Service.
5. The Notification advised that, on the 4 May 2020, a child being educated and cared for at the Service, was detained on the veranda of the school as a disciplinary measure by the LSA, being an employee of the Provider.
6. Due to the risk of harm to children when subjected to inappropriate discipline, the Authority determined that an investigation be conducted on the basis of suspected offences under the *Law*.
7. Evidence gathered during the investigation included documentation from the Provider furnished under section 215 of the *Law* and statement evidence from witnesses.
8. On 17 September 2020, a Show Cause Notice (the Notice) was issued to the Provider by email. Refer Attachment A.

9. The Notice outlined the evidence obtained during the investigation and included provisions of the *Law and Regulations*.
10. The Notice advised that the Authority was considering compliance action based on evidence that contraventions of the *Law* were identified during the Authority's investigation.
11. The grounds related to the inappropriate discipline toward a child by an LSA and a failure to notify the Authority of the alleged conduct.
12. The Notice advised of the following allegations which related to the Provider failing to ensure that no child was subjected to inappropriate discipline and a failure to notify the Authority within the prescribed time:
 - a) It was alleged that the Provider failed to ensure that no child being educated and cared for by the Service was subjected to discipline, considered unreasonable in the circumstances, on 4 May 2020, in contravention of Section 166(1) of the *Law* giving rise to a contravention of section 167 (1). (Allegation One);
 - b) It was alleged that the Provider failed to notify the Regulatory Authority on or after 6 May 2020 of a complaint alleging that the *Law* had been contravened, in that a child being educated and cared for by the Service had been inappropriately disciplined. (Allegation Two).
13. The Provider's response to the Notice was received on 8 October 2020, within the permitted timeframe, which was extended by several days with the agreement of the Authority. Refer Attachment B.

Law and Regulations

Legislative Provisions Relevant to Allegation One

Section 166 (1) of the *Law* – Offence to Use Inappropriate Discipline

The approved provider of an education and care service must ensure that no child being educated and cared for by the service is subjected to-

- a) any form of corporal punishment; or
- b) any discipline that is unreasonable in the circumstances.

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.

Legislative Provisions Relevant to Allegation Two

Section 174(2)(c) of the Law provides that an approved provider must notify the Regulatory Authority of any information in respect to prescribed matters.

Regulation 175(2)(c) provides that for the purposes of section 174(2)(c) of the Law, the following matter is prescribed – any circumstance arising at the service that poses a risk to the health, safety or wellbeing of a child or children attending the service.

Section 174(4)(a) of the Law provides that a notice under subsection (2) must be in writing and be provided within the relevant prescribed time to the Regulatory Authority that granted the service approval for the education and care service to which the notice relates.

Regulation 176(2)(c) provides that for the purposes of section 174(4) of the Law, a notice must be provided - in any other case, within 7 days of the approved provider becoming aware of the relevant information.

(For clarification, 'any other case' constitutes a notification of a matter under Regulation 175(2)(c).)

Consideration of Provider's response to the Notice

Allegation One – Fail to ensure child not subjected to inappropriate discipline.

14. In relation to Allegation One, the Show Cause Notice referred to evidence obtained from the Provider under section 215 of the *Law* including prescribed records and Providers internal investigation.
15. In the response, the Provider included two annexures titled School Bulletin Notice and Notification types and timeframes, advising the following (in summary):
 - a. *In April 2020 all public schools in the ACT transitioned to remote learning because of the Covid-19 pandemic. Gordon Primary School was designated a Safe and Supervised Site for students unable to learn remotely.*
 - b. *The School has appropriate strategies to mitigate risk of harm to children including the Education Directorates Enterprise Agreement and Reportable Conduct Scheme.*
 - c. *The preliminary assessment was undertaken to gather information to determine whether the matter met the threshold for misconduct and reportable conduct and warranted further investigation or can be resolved through other remedial action.*
 - d. *The preliminary assessment determined that the disciplinary measure undertaken by the LSA was outside the scope of his role and considered to be inappropriate behaviour towards a student however based on the information available at the time, did not meet the threshold for reportable conduct.*

- e. *The School is confident that reasonable steps have been taken to prevent (LSA) from engaging in further incidents similar to this and that remedial action has been taken.*
- f. *significant planning has taken place by the Directorate should the Directorate need to transition to remote learning again.*

16. Although the Authority acknowledges the challenges faced by the Provider due to the COVID 19 pandemic in May 2020 and the introduction of the Safe Supervised School model, it notes with concern the following in relation to the response:

- a. The response does not include any recognition of potential harm to the child as a result of the escalating conduct of the LSA, including the use of a bear hug to restrain him and excessive length time (circa 15 minutes) of the occurrence.
- b. At no time during the extended period was there any intervention or support offered by any other staff employed by the Provider.
- c. The LSA would not normally be responsible for the supervision of children without a qualified teacher being present.
- d. There is no evidence the Provider ensured the obligations and requirements of staff under the *National Law* were reinforced, inclusive of steps to protect children from harm and hazard, during any induction of staff into the Safe and Supervised Site.
- e. There is no evidence that identifies any risk assessment or strategies were considered, or steps undertaken by the Provider to mitigate the risk of reoccurrence of the alleged conduct upon the Provider becoming aware of the incident.
- f. The Provider highlights the Reportable Conduct Scheme as a strategy to mitigate risk of harm to children, however, has not provided evidence of compliance with the scheme's procedures including reporting obligations under section 17G of the *Ombudsman Act 1989*.
- g. The response to the Show Cause Notice showed a lack of knowledge about the Providers obligations in the context of the *National Law*.

17. Having considered the weight of evidence relevant to Allegation One and the Provider's response to the Show Cause Notice, I am satisfied that Allegation One is substantiated on the balance of probabilities.

18. "Discipline" is any strategy employed by an educator with the intention of changing a child's behaviour. Discipline that is inappropriate within the meaning of the *Law* includes any form of physical punishment or any behaviour management strategy

likely to cause emotional or physical harm to a child, such as yelling, using threatening or humiliating language, isolating, or shaming children.

19. I am therefore satisfied that the Provider has contravened section 166(1) of the *Law* by failing to ensure that no child being educated and cared for by the Service was subjected to discipline, considered unreasonable in the circumstances, on 4 May 2020.

Allegation Two – Fail to notify Regulatory Authority

20. In relation to Allegation Two, the Show Cause Notice referred to internal Provider emails submitted to the Authority pursuant to section 215 Notice and witness statement excerpts.
21. In the response, the Provider included two annexures titled School Bulletin Notice and Notification types and timeframes, advising the following (in summary):
- a. *A preliminary assessment was conducted in line with the Educations Directorate’s Enterprise Agreement and the matter reported to People and Performance.*
 - b. *The school acted quickly to ensure safety for the students and address the allegations.*
 - c. *The fact that a notification was made, although late, demonstrates the willingness to comply with the National Law and Regulations.*
 - d. *Due to the fast-paced changes and complexities in managing students and staff from multiple sites, timely reporting obligations and undertaking the preliminary assessment were delayed.*
 - e. *Strategies will be implemented to ensure the Preschool Unit(s) within my jurisdictions are fully aware of their reporting obligations under the National Law and Regulations.*
22. The Authority again notes the challenges faced by the Provider during the COVID 19 pandemic, however, identifies the following with regard to matters raised:
- a) The process for investigation of misconduct allegations under the Educations Directorate’s Enterprise Agreement is separate and additional to the Provider’s obligations to notify the Authority of any circumstance arising at the service that poses a risk to the health, safety or wellbeing of a child.
 - b) There is a weight of evidence to indicate a lack of knowledge and procedure in relation to *National Law and Regulation* regarding reporting obligations.
 - c) Strategies proposed by the Provider to ensure compliance with the *National Law and Regulations* appear to be restricted and to not apply to all Services of the

Provider – only those services overseen by the Director of School Improvement Tuggeranong.

- d) Although the Provider was aware of the allegation of inappropriate discipline on or by the 6 May 2020, the Authority was not notified until the 29 May 2020 by way of email enquiry, outside the timeframe required under the *Law*.
23. Having considered the evidence relevant to Allegation Two and submissions of the Provider, I am satisfied that Allegation Two has, on the balance of probabilities, been substantiated.
24. I am therefore satisfied that the Provider has contravened 174 (2)(c) of the of the *Law* by failing to report the conduct of the LSA on 4 May 2020 to the Authority within the required time.

Obligations upon Regulatory Authority

25. The foundation for the Authority's obligations is the *Law*. Section 3 of the *Law* sets out objectives and guiding principles. 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”.

26. 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.

27. The *Law* works to protect a particularly vulnerable group in 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*.
28. A key objective 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.
29. The *Law* is predominantly a protective law and the exercise of disciplinary powers in this type of regulatory context is recognised by Courts as not being punitive: *New South Wales Bar Association v Evatt* (1968) 117 CLR 177.

Compliance History

30. In determining appropriate compliance action, I have considered the compliance history of the Service, and the Provider – inclusive of the compliance backgrounds of approved

services operated by the Provider within the ACT. Refer compliance history at [Attachment C](#).

Decision

31. Considering the evidence obtained in the investigation, the Provider's response to the Show Cause Notice, the Provider's compliance history, and the objectives and guiding principles of the *Law*, I have determined that issuing a compliance notice would be appropriate and in the best interests of children.
32. The Authority is empowered to issue a compliance notice under section 177 of the *Law*

Section 177 of the *Law* – Compliance notices

- (1) This section applies if the Regulatory Authority is satisfied that an education and care service is not complying with any provision of this Law.
 - (2) The Regulatory Authority may give the approved provider a notice (a **compliance notice**) requiring the approved provider to take the steps specified in the notice to comply with that provision.
 - (3) An approved provider must comply with a compliance notice under subsection (2) within the period (being not less than 14 days) specified in the notice.
Penalty: \$6 000, in the case of an individual
\$30 000, in any other case.
33. The Compliance Notice is [Attachment D](#) to this Decision. You are required to take the steps directed in the Compliance Notice to comply with the relevant provisions.
 34. You must produce evidence of the steps required by **the time indicated within the Notice at Attachment D**.
 35. The Authority will also be maintaining its auditing of the Service, along with all approved services operated by the Provider, to ensure compliance is appropriately monitored, to ensure the health, safety and wellbeing of children being educated and cared for.

Rights of Review

36. A decision to issue a compliance notice is a **reviewable decision** as defined in Section 190 of the *Law*. Under section 191 of the *Law*, you may apply for an internal review of this decision. Any application must be lodged within 14 days after you are notified of the decision (or, if not notified, within 14 days after becoming aware of the decision).
37. An application for review may be made by completing the form AR01 Application for Internal Review of Reviewable Decision which can be obtained from the ACECQA website.

Legislation

38. 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>.
39. 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>
40. Should you have any questions about this Decision, or the Compliance Notice please contact me at clare.brookes@act.gov.au.

Yours Sincerely



Clare Brookes
Senior Director
Early Childhood Policy and Regulation
ACT Education Directorate

7 December 2020