



Ms [REDACTED]
Person with Management or Control
The Young Women's Christian Association of Canberra
RE: YWCA Kingsford Smith School Age Care

Email: [REDACTED]@[ywca-canberra.org.au](mailto:[REDACTED]@ywca-canberra.org.au)

Dear Ms [REDACTED]

Decision to issue Administrative Action

1. I am a delegate of the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance. The Authority is the regulator of education and care services in the ACT and has the responsibility of monitoring and enforcing compliance with the *Education and Care Services National Law (ACT)* (the *Law*), together with receiving and investigating complaints arising under the *Law*.
2. As you are aware, the Authority recently investigated suspected offences under the *Law* relating to the operation of YWCA Kingsford Smith School Age Care - SE-00009735 (the Service) operated by The Young Women's Christian Association of Canberra – PR-00005876 (the Provider).
3. The Authority is satisfied that the Provider was not complying with the provisions of the *Law* in respect to this matter. Web addresses to the *Law* and associated Regulations are provided for your convenience at the end of this Decision.

Facts

4. On 26 July 2022, the Authority sent the Provider a Show Cause Notice (the Notice) advising the Provider that the Authority had determined that there was sufficient evidence to support a case to answer for the Provider regarding suspected offences under the *Law*.
5. The Notice outlined the grounds for issue, relevant evidence supporting suspected contraventions of *Law*, and potential compliance actions being considered if allegations were substantiated. Refer copy of Notice (minus attachments due to size, noting they can be produced on request) at Attachment A.
6. The Notice advised that evidence obtained during the investigation supported allegations of offences under the *Law* as follows:

Allegation One

It is alleged that between 24 and 28 January 2022 inclusive, the Provider failed to ensure that every reasonable precaution was taken to protect children of the Service from harm and any form of hazard likely to cause injury. Specifically, it is alleged that educators were not provided with relevant formalised strategies and plans, adequately communicated to staff, to guide and support children with challenging behaviours or needs, believed to be [REDACTED], [REDACTED] and [REDACTED], contravening s167(1) of the *Law*.

Allegation Two

It is alleged that between 24 and 28 January 2022 inclusive, the Provider failed to ensure that every reasonable precaution was taken to protect children of the Service from harm and any form of hazard likely to cause injury, in that, [REDACTED] was not recorded as having attended the Service, as required by *Regulation 158*, contravening *Regulation 177* and engaging a contravention of section 167(1) of the *Law*.

Allegation Three

It is alleged that by 5 February 2022, the approved Provider failed to notify the Regulatory Authority of a complaint that the *Law* had been contravened. In that the Provider received a written letter on 3 February 2022, outlining a complaint alleging that inappropriate and inadequate strategies were used to support children with challenging behaviours, including a child believed to be [REDACTED], contravening s174(2)(b)(ii) of the *Law*.

7. On 10 August 2022, the Provider submitted a response via email. Refer copy Response at Attachment B (1) and (2).

Law

8. Provisions of the *Law* relevant to the investigation engaged the following:

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 174(2) of Law - Offence to fail to notify certain information to Regulatory Authority

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.

Obligations upon Regulatory Authority, Providers and Services

9. 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"*.
10. The guiding principles of the National Quality Framework at sections 3(3)(a) and (f) of the *Law* have particular application in this instance, being:
 - (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 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*.
13. 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.

14. 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.

Decision and Reasons

15. The Authority has considered all the information supplied by the Provider and is satisfied that there is sufficient evidence to substantiate Allegations 1 and 3 on balance of probabilities – engaging substantiated offences under section 167 and 174 of the *Law* in this instance.
16. In relation to Allegation One, the Authority is satisfied, on the balance of probabilities, that the Provider has not ensured reasonable precautions were taken to protect children from harms and hazards, between 24 and 28 January 2022 inclusive, engaging a contravention of section 167(1) of the *Law*.
17. Specifically, the contravention is engaged due to Provider not ensuring that educators were aware of and understood individual children’s needs, support plans or provided with clear strategies to guide challenging behaviours and additional needs of identified children between 24 and 28 January 2022 inclusive.
18. The Authority acknowledges that the Provider refutes this allegation and advised of strategies and plans utilised at the Service and how they are communicated, however, there was no evidence submitted to support that educators engaged between 24 and 28 January 2022 were provided with these strategies and plans, or that it was ensured that they were aware of the plans and understood how guidance strategies were to be implemented.
19. The Provider’s admission that the staffing arrangements utilised to manage the impact of Covid-19 at the time was not ideal, and it did result in many educators, who were not familiar with service operations or children attending the service, being required to be rostered on in absence of regular educators. This admission was reflected in the statements of witnesses who attested that they were unfamiliar with the Service, the children, and processes for managing the behaviours of individual children during this time.
20. The Authority appreciates that the Covid-19 pandemic has impacted ‘usual’ operation of approved services and government alike since 2020. The Authority has taken additional steps over this time to support and inform the sector of changes in reporting and operation as these changes have occurred to proactively guide compliance adherence during challenging times. However, compliance with the *Law* is not negated by Covid-19

and ultimately remains the responsibility of those choosing to engage within the education and care sector

21. In relation to Allegation Two, the Authority is not satisfied that there is sufficient evidence to support a breach of *Regulation 177* to further engage a contravention of section 167(1) of the *Law* in this instance.
22. In relation to Allegation Three, the Authority is satisfied that the Provider failed to notify the Regulatory Authority of a complaint that the *Law* had been contravened. In that the Provider received a written letter on 3 February 2022, outlining a complaint alleging that inappropriate and inadequate strategies were used to support children with challenging behaviours, including a child believed to be [REDACTED], contravening s174(2)(b)(ii) of the *Law*.
23. The contravention is supported by admissions by the Provider in their response that a verbal complaint was received by the Provider on 27 January 2022 and followed up in writing on 3 February 2022. This is further supported by evidence provided in the Notice via Attachments B and C.
24. The complaint raised allegations that food was inadequate and breaching *Regulation* requirements, that children were at risk due to inadequate and non-inclusive management of children's behaviours. The Authority is satisfied that these are allegations that the *Law* was being contravened, and as such should have been notified to the Authority as per requirements set out under *Regulation 174* within 24 hours of receipt of the allegations.
25. 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.
26. Considering the evidence, the objectives and guiding principles of the *Law*, the compliance history of the Service, and 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.
27. This Decision is issued to remind the Provider, that always, educators need to be adequately informed and guided in relation to the individual needs of children, challenging behaviour support, and support plans in place for children with additional needs, to protect children from harm and hazard likely to cause injury, both physically and psychologically.

28. In addition, this is as a reminder that as a Provider, it is imperative to ensure that nominated supervisors and educators, at all times, are aware of and understand the policies, procedures, plans & processes, and expectations of the Provider, and the *National Law*, in relation to the operation of the Service, and in their roles of educating and caring for children.
29. The substantiated contraventions have been recorded on your Service file and may be considered by the Authority in determining the action to be taken, should further similar breaches of the *Law* or *Regulations* be substantiated.

Legislation

30. 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> . 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>
31. Should you have any questions about this Decision please contact Authorised Officer, Brian Cropper at brian.cropper@act.gov.au.

Yours Sincerely,



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

12 September 2022