



Mr [REDACTED]

Email [REDACTED]@gmail.com

Dear Mr [REDACTED]

DECISION TO ISSUE PROHIBITION NOTICE

1. As a delegate of the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance (CECA), I am satisfied that there may be an unacceptable risk of harm to a child or children if you were allowed to be involved in the provision of education and care to children.
2. The Authority has investigated an allegation that you used corporal punishment upon an 11-year-old child, on 11 May 2023 at YWCA Hawker School Age Care SE-0009734 (the Service) operated by The Young Women's Christian Association of Canberra PR-00005876 (the Provider).
3. Web addresses to the *Education and Care Services National Law Act (ACT)* (the *Law*) and the *Education and Care Services National Regulations* (the *Regulations*) are provided for your convenience at the end of this Decision.

Facts

4. On 12 May 2023, the Authority received a notification from the Provider alleging that you used inappropriate discipline on an 11-year-old child. Due to the risk of harm to children when subjected to inappropriate discipline, the Authority determined to conduct a formal investigation.
5. Witness evidence and relevant documents support that on 11 May 2023, you took hold of a child by the ribs and shook her sufficiently to cause her pain and discomfort, in an attempt to have her listen to you.
6. On 25 July 2023, the Authority issued you with a Show Cause Notice (the Notice). The Notice included evidence being relied on by the Authority for decision making and advice as to proposed compliance actions being considered if the allegation, and engaged offence under the Law were substantiated. Refer Attachment A for a copy of the Notice (minus attachments).

7. The allegation put to you in the Notice was as follows:
It is alleged that on 11 May 2023, you, [REDACTED] as an educator employed at the Service, subjected a child, believed to be [REDACTED] 11 years old), to corporal punishment, in that you shook her to get her attention, causing her pain and discomfort, contravening section 166(3) of the *Law*.
8. On 15 August 2023, you responded by via email, to the Notice, by the due date, extended by agreement. Refer Attachment B.

Law

9. The evidence obtained during the Authority's enquiries into the matter, and as provided to you via the Notice, engages the following sections of the *Law*:

Section 166 of the Law – Offence to Use Inappropriate Discipline

- (3) A staff member of, or a volunteer at, an education and care service must not subject any child being educated and cared for by the service to-
 - (a) any form of corporal punishment; or
 - (b) any discipline that is unreasonable in the circumstances.

Section 182 of the Law – Grounds for issuing prohibition notice

- (1) The Regulatory Authority may give a prohibition notice to a person who is in any way involved in the provision of an education and care service if it considers that there may be an unacceptable risk of harm to a child or children if the person were allowed-
 - (a) To remain on the education the education and care service premises; or
 - (b) To provide education and care to children.
- (2) For the purpose of subsection (1), a person may be involved in the provision of an approved education and care service as any of the following-
 - (a) An approved provider;
 - (b) A nominated supervisor;
 - (c) An educator;
 - (d) A family day care educator;
 - (e) An employee;
 - (f) A contractor;
 - (g) a volunteer;
 - (h) a person who was formerly a person referred to in paragraphs (a) to (g) in relation to the approved education and care service -

or in any other capacity

Section 183 of the Law – Show cause notice to be given before prohibition notice

- (1) Before giving a person a prohibition notice, the Regulatory Authority must give the person a notice (a *show cause notice*) –
 - (a) stating that the Regulatory Authority proposes to give the person a prohibition notice; and
 - (b) stating the reasons for the proposed prohibition; and
 - (c) inviting the person to make a written submission to the Regulatory Authority, within a stated time of at least 14 days, about the proposed prohibition.

- (2) Subsection (1) does not apply if the Regulatory Authority is satisfied it is necessary, in the interests of the safety, health or wellbeing of a child or children, to immediately issue a prohibition notice to the person.

Obligations upon Regulatory Authority

10. The starting point for the Authority is the *Law*. 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; ...'
11. The relevant guiding principle at sections 3(3)(a) namely:
 - a.) that the rights and best interests of the child is paramount; . . .
12. 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.
13. 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*.
14. 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.
15. The *Law* is predominantly a protective law and the exercise of powers in this type of regulatory context is recognised by Courts as not being punitive. In the case of *New South Wales Bar Association v Evatt* [\[1968\] HCA 20](#) the High Court set out in clear terms that action to enforce professional standards is protective.

Reasons

16. Having considered all available evidence, your response to the Notice, and the likelihood of risk to children, I am satisfied that there may be an unacceptable risk of harm to a child or children if you were allowed to provide education and care to children.
17. Corporal or physical punishment is defined by the UN Committee on the Rights of the Child, which oversees the Convention on the Rights of the Child, as “any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light.”
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 section 166 of the *Law* includes any form of physical punishment or any behaviour management strategy likely to cause emotional or physical harm to a child.
19. During the investigation, the Authority obtained statements and documents which support your use of corporal punishment, by way of holding a child by the ribs and shaking her sufficiently to cause her pain and discomfort, in an attempt to have her listen to you.
20. In addition, I am satisfied that your conduct towards the child was for a disciplinary purpose and being unreasonable in the circumstances. As such, I am satisfied that you have contravened section 166(3) of the *Law*.
21. Your response to the Notice does not expressly refute the allegations, rather outlines the behaviour of the child that instigated your decision to discipline the child in the manner that you did.
22. The Authority does note your apology for the incident, however, concern is sufficiently raised regarding your conduct, inclusive of making a conscious decision to return back to Service, after initially leaving, for the purpose of confronting the child.
23. I am satisfied that on the balance of probabilities, there is reasonable, reliable, and credible evidence to substantiate this allegation, which further supports my determination that there may be an unacceptable risk of harm to a child or children if you are allowed to be involved in the provision of education and care.
24. Considering the evidence and information available, and the objectives and guiding principles of the *Law*, the Authority has decided to issue you a Prohibition Notice, pursuant to sections 182 and 183(2) of the *Law*, to come into effect on the date of this Decision.
25. This notice prohibits you from providing education and care to children for an education and care service; being engaged as an educator, family day care educator, employee, contractor, or staff member of, or being a volunteer at, an education and care service; or carrying out

any activity relating to an education and care service. Please refer a copy of the Prohibition Notice at Attachment C.

26. The Authority may consider a cancellation of the Prohibition Notice in the future based on an application that provides information as set out in Section 186 of the *Law* and *Regulation* 189.
27. Section 186 of the *Law* permits a person for whom the prohibition notice is in force to apply to the Regulatory Authority to cancel the notice.

Section 186 of the Law - Cancellation of prohibition notice

- (1) If the Regulatory Authority is satisfied there is not a sufficient reason for a prohibition notice to remain in force for a person, the regulatory Authority must cancel the prohibition notice and give the person notice of the cancellation.
- (2) A person may for whom a prohibition notice is in force may apply to the Regulatory Authority to cancel the notice.
- (3) The applicant must-
 - (a) be in writing; and
 - (b) include the prescribed information; and
 - (c) be signed by the person.
- (4) The person may state in the application anything the person considers relevant to the Regulatory Authority's decision about whether there would be an unacceptable risk of harm to children if the person were-
 - (a) To remain at the education and care service premises; or
 - (b) To provide education and care to the children.
- (5) The application may include a statement setting out any changes in the person's circumstances since the prohibition notice was given or since any previous application under this section that would warrant the cancellation of the notice.

Regulation 189 Application to cancel prohibition notice

For the purpose of section 186(3) (b) of the *Law*, the following information is prescribed-

- (a) the applicant's name;
- (b) contact details for the applicant, including an address for service of the decision;
- (c) a statement setting out the grounds for the application to cancel the prohibition notice.

Review rights

28. In accordance with section 192 of the *Law* a decision to give prohibition notice is a reviewable decision for external review. A person who is the subject of a reviewable decision for an external review may apply to the relevant tribunal or court for a review of the decision. For the ACT this is the ACT Civil and Administrative Tribunal. Such application must be made within 30 days after the day on which you receive the prohibition notice.

29. The *Law* applies to you as a former educator. 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>
30. The *Law* and *Regulations* may 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 Prohibition Notice please contact Brian Cropper via email at brian.cropper@act.gov.au.

Yours Sincerely



Jo Williams
Director – Regulatory Operations
Children’s Education and Care Assurance
Education and Care Regulation and Support

4 September 2023