

██████████
Person with Management and Control
Wonderschool (Throsby) Pty Limited
RE: Wonderschool Throsby

Email: ██████████@wonderschool.com.au
Cc: ██████████@wonderschool.com.au

Dear ██████████

Decision to Issue Compliance Notice

1. As you may be aware, the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance, recently conducted enquiries relating to serious incident occurring at Wonderschool Throsby SE-40017295 (the Service), operated by Wonderschool (Throsby) Pty Limited, PR-40019138 (the Provider).
2. The Authority was advised of the serious incident by the Provider via Notification of Incident NOT-40483714 on 30 October 2020.
3. I am satisfied that the Service was not complying with the provisions of the *Education and Care Services National Law Act (ACT)* (the Law) and the *Education and Care Services National Regulations 2011* (the Regulation) in respect to operating and education and care service.
4. Web addresses to the Law and Regulations are provided for your convenience at the end of this Decision.

Facts

5. On 30 October 2020, the Authority received a Notification of Incident (NOT-40483714) submitted by the Provider. The Notification reported that a child, known to be ██████████ (4 years old), was given normal pasta by an educator when she has a known allergen to wheat. Refer Notification of Incident and attached evidentiary documents at [Attachment A](#).
6. On 5 November 2020, the Authority received a Notification of Complaint (NOT-40485134) submitted by the Provider. The complaint by the parents of ██████████ was in relation to the incident of 30 October 2020 - NOT-40483714. ██████████ parent alleges that the incident of 30 October 2020 was because of a lack of care in the room that ██████████ was enrolled in. Refer Notification of Complaint and attached evidentiary documents at [Attachment B](#).

7. On 2 November 2020, additional information was requested from the Provider. Additional information was submitted on 4, 9, 12 and 16 November 2020. Refer additional information at Attachment C.
8. Additional information indicated that there were identified failings from the Nominated Supervisor, in relation to enrolment processes, and educator failings, in relation to ensuring that the meal being served to [REDACTED] was free from known allergens.

Law

9. Provisions of the *Law* relevant to the assessment engaged the following:

Section 167(1) and (2) of the *Law* - Offence relating to protection of children from harm and hazards

The approved provider, and the nominated supervisor, 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 170(1) – Policies and procedures to be followed

The approved provider of a centre-based service must take reasonable steps to ensure that nominated supervisors and staff members of, and volunteers at, the service follow the policies and procedures required under Regulation 168.

Obligations upon Regulatory Authority, Providers and Services

10. 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”.
11. 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.
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 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*.

14. 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.
15. 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.

Reasons and Decision

16. The Authority has considered all the information supplied by the Provider, and I am satisfied that the provision of a known allergen to ██████ on 30 October 2020, resulting in an anaphylactic reaction, was not ensuring that every reasonable precaution was taken to protect the child from harm and hazard likely to cause injury or illness, in contravention of section 167 of the *Law*.
17. Evidence supporting the substantiation of offences under the *Law* is as follows:
 - a) Notifications of Incident and Complaint submitted by the Provider to the Authority (Attachments A and B); and
 - b) Additional information via recorded enquiries made by the Provider internally with staff members which were submitted to the Authority (Attachment C).
18. Additional information identified that appropriate procedures relating to enrolments and managing children's dietary requirements were not followed adequately by the Nominated Supervisor or educators. In addition, I am satisfied that failings regarding communication within the Service between the educators, the nominated supervisor and the kitchen contributed to ██████ suffering an anaphylactic reaction.
19. As you are aware, such an allergic reaction can be fatal to a young child. The fact that ██████ was enrolled without updated risk management and action plans, as well as with only an expired EpiPen on site, further demonstrates that every reasonable precaution was not taken to protect the child from harm and hazard likely to cause injury or illness.
20. Considering the evidence obtained via the Notification of Incident and additional information, the seriousness of the incident 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.
21. 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.
22. The Compliance Notice is Attachment D to this decision letter. You are required to take steps directed in the Notice to comply with the relevant provisions.
23. You must produce evidence of the steps required by the times indicated for each step within the Notice at Attachment D.

Appeal Rights

24. 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).
25. 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

26. The Education and Care Services National Law applies to you as a provider and any service you operate. 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>.
27. The National Law is made up of an Act and Regulations which 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 or Compliance Notice please contact Assistant Director Janine Fairburn on telephone (02) 6205 4390 or email janine.fairburn@act.gov.au.

Yours Sincerely



Clare Brookes
Senior Director
Children's Education and Care Assurance
Early Childhood Policy and Regulation
ACT Education Directorate

02 December 2020