

██████████
Person with Management and Control
Wonderschool (Conder) Pty Ltd
RE: Wonderschool Conder

Email: ██████████

Dear ██████████

Decision to Issue Compliance Notice

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 has recently investigated matters relating to Wonderschool Conder SE-40018302 (the Service), operated by Wonderschool (Conder) Pty Ltd PR-40022037 (the Provider), which engaged suspected offences being contravened.
3. The Regulatory 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 7 April 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:

First Set of Grounds – Supervision and Protection from Harms

Allegation One – Section 165, 167 of the Law

It was alleged that, on 17 November 2021, the Provider failed to ensure adequate supervision of all children being educated and cared for in that, for an unknown time leading

up to approximately 15:00, ██████████ engaged in inappropriate physical contact under a jetty unnoticed by educators, in contravention of section 165(1) of the *Law*, engaging a further contravention of section 167(1) of the *Law*.

Allegation Two– Sections 165, 167 of the *Law*

It was alleged that, on 22 November 2021, from approximately 16:27 to 17:16, the Provider failed to ensure adequate supervision of all children being educated and cared for in that:

- a. ██████████ were unaccounted for during approximately four minutes from 16:27 to 16:31 (**First Instance**); and
- b. ██████████ were unaccounted for during a period of approximately 45 minutes from 16:31 to 17:16, with no attempt to locate them until the arrival ██████████ parent, and located alone in a preschool storeroom (**Second Instance**);

in contravention of section 165(1) of the *Law*, engaging a further contravention of section 167(1) of the *Law*.

Allegation Three– Sections 165, 167 of the *Law*

It was alleged that, in the late morning on an unknown date (possibly 13 December 2021), the Provider failed to ensure adequate supervision of all children being educated and cared for in that, ██████████ left the Service through a gate in the big yard and were located outside by an educator, in contravention of section 165(1) of the *Law*, engaging a further contravention of section 167(1) of the *Law*.

Allegation Four– Sections 165, 167 of the *Law*

It is alleged that, at approximately lunch time on 22 November 2021, the Provider failed to ensure adequate supervision of all children being educated and cared for in that ██████████ ██████████ were unsupervised in the bathroom, engaging in inappropriate physical contact, after which ██████████ was located unsupervised in the hallway outside the kitchen, in contravention of section 165(1) of the *Law*, engaging a further contravention of section 167(1) of the *Law*.

Second Set of Grounds – Notification Requirements

Allegation Five – section 174 of the *Law*

It is alleged that the Provider failed to notify the Regulatory Authority of a serious incident which took place on an unknown date (possibly 13 December 2021) involving ██████████ ██████████ being missing and unaccounted for over an unknown period, in contravention of section 174 of the *Law*.

Third Set of Grounds – Record-Keeping

Allegation Six– Inaccurate Prescribed Records

It is alleged that the Provider failed to take reasonable steps to ensure that a prescribed record (being Working Directly with Children Records) was accurate, in contravention of Regulation 177(2).

7. On 12 April 2022, the Provider requested an extension of time to respond to 5 May 2022, which was granted.
8. On 5 May 2022, the Provider and Nominated Supervisor submitted a joint response with identified attachments. Refer copy Response (minus attachments due to size, noting they can be produced on request) at Attachment B
9. The Provider confirmed on 16 May 2022 that they had no additional material to include in the Response and later attended a separate meeting with the Authority to discuss concerns regarding regulatory practice.
10. Evidence submitted by the Provider as part of the Response included (below is not an exhaustive list, however all submitted documents were considered by the Authority):
 - a. Big yard supervision plan;
 - b. Staff meeting agendas with supervision as a discussion topic for 25/03/20, 29/4/20, 20/7/20, 27/01/21, 24/02/21, 8/7/21 (with identical agendas for other groups through July 2021), 27/10/21, and 24/11/21 (after the incidents in Allegations One and Two)
 - c. Emails to staff relevant to supervision, including policy update;
 - d. Jetty photographs and Photographs of latches and locks on Junior Preschool storeroom door;
 - e. Contract (document Z) and statement of employment of “non-contact support” [REDACTED] from 18/10/21 to 26/11/21 (no Appendix A job description was included);
 - f. Staff Code of Conduct and Supervision Policy;
 - g. Table of steps taken since the incident in Allegation Two;
 - h. Opening Checklist for weeks commencing 6, 13 and 20 December 2021;
 - i. Payroll/roster summary for 29/11/21 to 24/12/21;
 - j. New employee induction checklist (reviewed 16/11/20);
 - k. New Nominated Supervisor Induction checklist (reviewed 16/11/20);
 - l. Nominated Supervisor (100% by [REDACTED]) and Person in Day-to-Day Charge (100% by [REDACTED]) quizzes;
 - m. Email to staff regarding use of OWNA (4/2/22), with subsequent leadership meeting and Email correspondence regarding options for working directly with children records;

Law

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

Legislation Relevant to Allegations One, Two, Three and Four

Section 165(1) of *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, 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.

Legislation Relevant to Allegation Five

Section 174 – 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: \$4000, 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.

Legislation Relevant to Allegation Six

Regulation 177 – Prescribed enrolment and other documents to be kept by approved provider

- (1) For the purposes of section 175(1) of the Law, the following documents are prescribed in relation to each education and care service operated by the approved provider –
- (h) in the case of a centre-based service, a record of educators working directly with children as set out in regulation 151.
- (2) The approved provider of the education and care service must take reasonable steps to ensure the documents referred to in subregulation (1) are accurate.

Penalty: \$2000

Obligations upon Regulatory Authority, Providers and Services

12. 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”.

13. 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.*
14. 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.*
15. 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*.
16. 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.
17. 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

18. The Authority has considered all evidence gathered via the investigation process, inclusive of the response to the Notice, and is satisfied that, on balance of probabilities, the following allegations are substantiated/not substantiated on the balance of probabilities as specified:
 - a. Allegation One – section 165(1) of the *Law* **substantiated**; section 167(1) not substantiated as engaged in this instance.
 - b. Allegation Two – sections 165(1) and 167(1) of the *Law* **substantiated.**
 - c. Allegation Three – sections 165(1) and 167(1) of the *Law* **substantiated.**
 - d. Allegation Four – no offence substantiated.
 - e. Allegation Five – no offence substantiated.
 - f. Allegation Six – contravention of *Regulation 177(2)* **substantiated.**
19. In relation to Allegation One:
 - a. the Authority is satisfied on the balance of probabilities that, on 17 November 2021, the Provider failed to ensure adequate supervision of all children being educated and cared for

in that, for an unknown time leading up to approximately 15:00, [REDACTED] engaged in inappropriate physical contact under a jetty unnoticed by educators, in contravention of section 165(1) of the *Law*.

- b. however, the Authority is not satisfied on the balance of probabilities that the required threshold to substantiate an additional offence under section 167(1) was met in this instance. However, the Authority takes the opportunity to clarify to the Provider that the suspected section 167(1) was not directly related to the activity engaged in by the children, but to the lack of supervision. The Authority agrees that a degree of exploratory physical contact between children is developmentally normal for children of this age, however it is not appropriate to allow children to continue to engage in such conduct unobserved and unsupervised.
20. In the Response, the Provider denied the offence, submitting the following points (relying on both the Nominated Supervisor section of the Joint Response, with some additional points):
- a. Witness A was arguably physically present with the children in the vicinity of the jetty and actively engaged in education and care with the children. The Authority notes Witness A's evidence that they lay down and looked under the edge of the jetty due to a "feeling" and that is how [REDACTED] were discovered, with it being unclear how long they had been under the jetty unobserved, and without knowledge they were there. Information disclosed by [REDACTED] suggests that it may have been some time. The Authority acknowledges the calm manner that the incident was dealt with by Witness A;
 - b. A supervision plan had been developed in February 2020, remaining unchanged and displayed around the Service;
 - c. Effective supervision had been discussed at multiple staff meetings during 2020 throughout 2021; and email communication had been sent in 2020, and professional development attended on 6 October 2021. The Authority has not considered material concerning supervision that is dated after 17 November 2021, except as being relevant to compliance action, as those steps were taken after the first of the incidents;
 - d. Adequate staff were rostered. The Authority notes that is not clear how many educators were actually working directly with children, due to likely inaccuracies in working directly with children records but, given the nine additional staff indicated by the Authority's ratio analysis, the Authority agrees that staffing likely exceeded the prescribed minimum;
 - e. The space under the jetty is small and means restricted movement, making it challenging for the children to remove their pants as alleged by Witness B (the Authority notes it was stated that [REDACTED] pants were "half pulled down"), the area under the jetty is observable from various points in the yard. The Authority notes that all witnesses raised the jetty as being difficult to adequately supervise, and the photograph at Attachments T and U show that the sides appear to be obstructed by

rocks. It is acknowledged that a site visit was not conducted during the investigation; this was due to COVID-safe procedures;

- f. The notification should have focussed solely on the wellbeing of [REDACTED] and whether or not he was at risk of sexual abuse. The Authority advises that is not restricted to using notified information for the specific purpose intended by the Provider. The notified incident raised reasonable grounds to suspect that children had been inadequately supervised, and it was appropriate that it form part of the investigation. Any concerns for the safety and wellbeing of [REDACTED] at home are within the scope of CYPs, rather than CECA, and it was confirmed that a report had been lodged as a precaution;
 - g. Educators undergo a two-day induction, Nominated Supervisors have a six week induction, required records were accessible and educators were regularly reminded to uphold compliance.
21. A Provider's obligation under section 165 of the *Law* is positively and strongly framed– the provider must ensure that all children being educated and cared for are adequately supervised at all times. Adequate supervision is the minimum threshold that must be met to ensure compliance. Whilst it is acknowledged that appropriate policy, procedure and a plan were in place, and discussions held at staff meetings, the Provider has acknowledged elsewhere in the Response that educators do not willingly engage with resources available to them, despite every reasonable measure taken by the Provider. Whilst those steps are relevant to informing any compliance action, they do not refute the offence in this instance.
22. However, due to the steps taken by the Provider to attempt to ensure supervision was adequate at all times, as outlined in the Response, the Authority is not satisfied that an offence under section 167(1) is engaged in this instance.
23. In relation to Allegation Two, the Authority is satisfied on the balance of probabilities that, on 22 November 2021, from approximately 16:27 to 17:16, the Provider failed to ensure adequate supervision of all children being educated and cared for in that:
- a. [REDACTED] were unaccounted for during approximately four minutes from 16:27 to 16:31 (**First Instance**); and
 - b. [REDACTED] were unaccounted for during a period of approximately 45 minutes from 16:31 to 17:16, with no attempt to locate them until the arrival of [REDACTED] parent, and located alone in a preschool storeroom (**Second Instance**);
- in contravention of section 165(1) of the *Law*. In this instance, an additional offence under section 167(1) of the *Law* was also substantiated as engaged.
24. In the Response, the Provider admitted the incident, but denied the offence, submitting the following points in addition to those already raised regarding steps in place to ensure supervision:
- a. The incident resulted from [REDACTED] failing to follow [REDACTED] expectations, which was beyond the scope of the Provider or Nominated Supervisor;

- b. There were six additional educators over the prescribed minimum. The Authority agrees that staffing on an “under the roof” basis exceeded the prescribed minimum based on records submitted but notes that there was no Preschool educator after 4:30pm (with up to 5 children) and only one Junior Preschool educator after 4:30pm (with up to 13 children). Whilst it is expected that all educators monitor all children when grouped together, that is often not what takes place, particularly when educators may be unfamiliar with children from other rooms, and families are collecting children, sometimes without communication;
 - c. Steps had been taken to improve practices (including reinforcement of existing measures, such as ratio checks requiring matching children to names, which evidence indicated were not being followed);
 - d. The gate was exchanged for a higher one with added Perspex and locks were added to storeroom doors;
 - e. CCTV of the incident was reviewed to improve practice.
25. The Authority reiterates the Provider’s responsibility under section 165. Children were missing for a significant period of time, no educators noticed they were missing (with the possible exception of one educator suspecting ██████ was unaccounted for, but took no steps in response), no headcounts or monitoring of child numbers was taking place, and two of the three children immediately returned through the gate after having been guided back to the big yard once.
26. Although procedures may have been in existence, they were not being followed, and witnesses stated that they did not do head counts before that incident. In this instance, the Authority has determined that an offence under section 165(1) is substantiated, in addition to an offence under section 167(1).
27. In relation to Allegation Three, the Authority is satisfied on the balance of probabilities that, in the late morning on an unknown date (possibly 13 December 2021), the Provider failed to ensure adequate supervision of all children being educated and cared for in that, ██████ and ██████ left the Service through a gate in the big yard and were located outside by an educator, in contravention of section 165(1) of the *Law*. In this instance, an additional offence under section 167(1) of the *Law* was also substantiated.
28. In the Response, the Provider admitted the incident, but denied the offence, submitting the following points in addition to those already raised regarding steps in place to ensure supervision:
- a. Every reasonable precaution to implement adequate supervision and protect children from harm was taken. The measures included having effective opening routines that outlined that the gate padlocks needed to be checked. This was completed for the month of December. Adequate staffing arrangements were in place for the number of children in attendance.
 - b. The Nominated Supervisor does not refute that the gate was left without the padlock securely attached, allowing ██████ S to leave the licensed premises. This gate

was most likely left unlocked by the gardener that accessed the yard on the weekend and the educator completing the opening checklist failed to effectively conduct the check.

- c. Given the children were observed only a short distance from the gate suggests that the active supervision was effectively implemented and protected the children from the risk the unlocked gate posed. Indeed, [REDACTED] was physically present with the children and actively engaged in education and care at the time that the incident occurred.
 - d. The investigation by the Approved Provider demonstrated that educator [REDACTED] [REDACTED] witnessed the incident, on the day in question went home unwell at 10:17 a.m. without reporting the incident through the appropriate channels.
29. The Authority reiterates the Provider's responsibility under section 165. Children were able to leave the premises prior to an educator being aware of the fact, supporting that supervision was not adequate, and if adequate, the Authority determines that this incident could have been prevented.
 30. Although procedures and processes may have been in existence, they were again not being followed, and this resulted in the gate not being checked via the opening checklist. It is a responsibility of the Provider to ensure that educators are following all policies and procedures, this is a reasonable precaution taken to protect children. In this instance, the Authority has determined that an offence under section 165(1) is substantiated, in addition to an offence under section 167(1).
 31. In relation to Allegation Six, the Authority is satisfied that the Provider failed to take reasonable steps to ensure that a prescribed record (being Working Directly with Children Records) was accurate, in contravention of Regulation 177(2).
 32. In the Response, the Provider has denied the allegation and submits that:
 - a. Compliance monitoring is taken seriously;
 - b. [REDACTED] was expected to be working directly with children;
 - c. Compliance monitoring software has been implemented and expectations around accurate records was discussed in a meeting on 6 April 2022 (this was subsequent to all relevant incidents).
 33. The Authority has considered those matters submitted by the Provider, but notes that:
 - a. Working directly with children records submitted to the Authority under section 215 were inaccurate (at a time when the Provider had viewed the CCTV and was aware that [REDACTED] [REDACTED] was cleaning), despite a request to ensure accuracy being included in the section 215 Notice. A reasonable step would have been to review before submission;
 - b. No witnesses interviewed were aware of any requirement to sign out when undertaking cleaning duties, and two had no knowledge of what constituted "working directly with

children". A reasonable step to ensure accurate records is to ensure that all educators are aware of those matters.

34. Considering the evidence obtained and the level of seriousness of the contraventions, I have decided that that issuing a Compliance Notice is appropriate and in the best interests of children. In making this decision, I have also taken into consideration the Service's previous compliance history.
35. 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.
36. The Compliance Notice is Attachment C to this decision letter. You are required to take steps directed in the Notice to comply with the relevant provisions.
 37. You must produce evidence of the steps required by **the times indicated for each step within the Notice at Attachment C.**

Review Rights

38. 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).
39. 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

40. The Education and Care Services National Law applies to you as an approved 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>.
41. The National Law is made up of an Act and Regulations which can be viewed at:
 - <http://www.cecqa.gov.au/national-law>, and
 - <http://www.legislation.nsw.gov.au/#/view/regulation/2011/653>

42. Should you have any questions about this Decision or Compliance Notice please contact Assistant Director Janine Fairburn via email at janine.fairburn@act.gov.au.

Yours Sincerely



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

11 July 2022