

Ms [REDACTED]
Person with Management or Control
Community Services #1 Incorporated
RE: Birralelee Early Education and Care Centre

Email: [REDACTED]

Dear Ms [REDACTED]

Decision to Issue Compliance Notice

1. As you are aware, Authorised Officers from the ACT Regulatory Authority (the Authority), also known as Children’s Education and Care Assurance, recently assessed a Notification of Serious Incident (NOT-40762560) concerning Birralelee Early Education and Care Centre SE-00014243 (the Service), operated by Community Services #1 Incorporated PR-00005865 (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). Web addresses for the Law and the Regulations are provided for your convenience at the end of this notice.

Facts

3. On 18 August 2022, a Notification of Serious Incident (NOT-40762560) was submitted to the Authority by the Provider advising that on 18 August 2022, a 3year old child, known to be [REDACTED], suffered an anaphylactic reaction requiring urgent emergency medical attention, after being provided with a known allergen, being milk. Refer copy of Notification and Incident report at Attachment A.
4. Initial enquires were made by the Authority in relation to the Notification, with the Provider forwarding additional information on 23 August 2022. The response submitted by the Provider via email consisted of:
 - a) a medical management, risk minimisation and communication plan;
 - b) signed acknowledgements by staff of plan; and
 - c) copy of email communication with staff.
5. Furthermore, the response advised that the Service’s procedure was under review, involving a rewrite and consultation with educators to ensure a comprehensive understanding of procedure, as well as advise that the Provider is working with ‘Allergy Aware’ to refine staff’s allergy awareness and to prevent and manage anaphylaxis. Refer response at Attachment B.

Law

6. Legislative Provisions Relevant to the Notification are as follows:

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.

Obligations upon Regulatory Authority

7. 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".

8. 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.

9. 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*.
10. 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.
11. 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

12. I am satisfied that the very nature of the NOT-40762560, and information subsequently obtained via initial enquiries by the Authority, supports the Provider has failed to take reasonable steps to protect children from harm and hazard likely to cause injury, in contravention of section 167(1) of the *Law*.

13. Specifically, reasonable steps did not appear to have been taken to protect [REDACTED] from being given a known allergen resulting in anaphylaxis, posing significant risk to his health, safety and wellbeing.
14. When assessing this matter, the Authority noted that the educators did not appear to be adequately aware of the child's allergy to not only prevent provision of the allergen to [REDACTED] but also, they appeared not experienced enough to manage the [REDACTED] reaction of the allergen. The Authority was satisfied that inadequate communication of children's allergy and medical needs are indicated by incident and contributed to the incident occurring.
15. The Authority further notes that at the time of incident, information supports that the educators did not appear experienced or knowledgeable with the administration of an EpiPen and steps required after adrenaline is injected, as the parents had to advise educators on arrival that an ambulance was necessary after an EpiPen is administered (identified via the Incident report).
16. Additionally, the Authority noted that [REDACTED] Medical Management, Risk Minimisation and Communication plan did not include any identified risk assessment, strategies to reduce the risks of an allergic reaction or identified roles of responsibility under the Risk Minimisation section of the plan, further supporting the substantiation of the section 167 offence in this instance.
17. Considering the information obtained via the notification of serious incident, the severity of risk posed to the child, the Service 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.
18. The Authority is empowered to issue a compliance notice under section 177 of the *Law*:

Section 177 – 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.
19. The compliance notice is Attachment C to this Decision letter. You are required to take the steps directed in the Notice to comply with the relevant provisions.

20. You must produce evidence of the steps required by **the time indicated within the Notice at Attachment C**. Evidence is to be forwarded to Authorised Officer, Vittorio Colosimo, via email at vittorio.colosimo@act.gov.au.

21. Alternatively, evidence information can be forwarded via post to –

Children’s Education and Care Assurance
Attention: Vittorio Colosimo
ACT Education Directorate
GPO Box 158 Canberra ACT 2601

Rights of Review

22. 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).

23. 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

24. 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>.

25. 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>

26. Should you have any questions about this Decision, or the Compliance Notice please contact Vittorio Colosimo on email vittorio.colosimo@act.gov.au.

Yours Sincerely



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

12 September 2022