



ACT
Government

Education and Training

Ms [REDACTED]
Person with Management or Control
Guardian Community Early Learning Centres Pty Ltd
RE: Guardian Childcare & Education Gungahlin

Email: [REDACTED]@guardian.edu.au
compliance@guardian.edu.au

Dear Ms [REDACTED]

Decision to Issue Administrative Action

1. As you are aware, Authorised Officers from the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance, recently investigated a complaint alleging that the *Education and Care Services National Law (ACT)* (the *Law*) was contravened at Guardian Childcare & Education Gungahlin SE-40005341 (the *Service*), operated by Guardian Community Early Learning Centres Pty Ltd PR-0000823 (the *Provider*).
2. The complaint related to inadequate supervision and failure to take reasonable precautions to protect children from harm and from hazards likely to cause injury, on 6 November 2020.
3. Web addresses for the *Law* and the *Education and Care Services National Regulations 2011* (the *Regulations*) are provided for your convenience at the end of this decision.

Background

4. On 9 November 2020, the Provider notified the Authority of a complaint that a serious incident had occurred on 6 November 2020. Additional information was obtained from the Provider, which led to the Authority determining that there was insufficient evidence to raise a reasonable suspicion of an offence and the matter was closed, which was advised to the Provider on 8 February 2021. The delay in advising the Provider of that outcome was due to an administrative oversight.
5. Additional information was received by the Provider on 18 February 2021, which resulted in the Authority re-opening the matter and commencing an investigation into suspected offences under sections 165 and 167 of the *Law*.
6. During initial stages of the investigation, evidence was obtained which supported a reasonable suspicion of a suspected offence under section 169 of the *Law*, which was then included in the investigation.

7. Throughout the course of the investigation, the Authority obtained evidence from numerous sources, including documentation and witness statements obtained under section 215 of the *Law*, and a voluntary witness statement. Such evidence suggested two allegations that supported offences under the *Law* :
8. On 11 May 2021, the Authority issued the Provider with a Show Cause Notice (SCN). Refer Attachment A for the SCN. Attachments to the SCN have not been included with this Decision but can be produced upon request.
9. On 2 June 2021, the Provider produced a response to the SCN (Response). Refer Attachment B for the Response. Attachments to the Response have not been included with this Decision but can be produced upon request.

Consideration of Response

Allegation One – Inadequate Supervision

10. It is alleged that, on Friday 6 November 2020, the Provider failed to ensure adequate supervision of all children being educated and cared for in that [REDACTED] sustained a significant facial injury which was not witnessed by educators, no first aid was administered, and parents were not promptly contacted, in contravention of section 167(1) of the *Law*.

Allegation One – Relevant Legislation

11. Provisions of the *Law* relevant to Allegation One are:

Section 165(1) of the *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 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.

Allegation One – Evidence and Submissions

12. Evidence gathered relevant to Allegation One consisted of prescribed records, the Provider's investigation documentation, and witness statements obtained by the Authority, relevant extracts (or copies where appropriate) of which were included with the SCN.
13. It was noted that the Provider took disciplinary action against two educators as a result of the incident on 6 November 2020.
14. In the Response, the Provider acknowledged that █████ sustained a significant injury and that there was a failure of educators at the Service to witness the incident, apply first aid, and contact the parent. The allegation was not refuted, but the Provider produced substantial supporting evidence relating to steps taken in response to improve educator practices around supervision, notifications, and management of injuries.
15. Although it appears that educator failure contributed to the circumstances, under section 165(1) of the *Law*, it is a provider's responsibility to ensure adequate supervision of all children being educated and cared for by the Service. Ensuring adequate supervision of children is also a reasonable precaution to protect children from harm and from hazards likely to cause injury, so a failure to ensure adequate supervision engages an offence under section 167(1).

Allegation One – Authority's Finding

16. For the reasons outlined above, the Authority is satisfied that the following contravention of the *Law* have been substantiated on the balance of probabilities:
 - a. Failing to ensure adequate supervision of all children being educated and cared for by the Service on 6 November 2020, in contravention of section 165(1) of the *Law*; and
 - b. Failing to take reasonable precautions to protect children being educated and cared for by the Service from harm and from any hazard likely to cause injury on 6 November 2020, in contravention of section 167(1) of the *Law*.

Allegation Two – Inadequate Staffing

17. It was alleged that, on 6 November 2020, the Provider failed to ensure adequate staffing at all times during which children were being educated and cared for by the Service, in contravention of section 169(1) of the *Law*, engaging further contraventions of s 165(1) and 167(1).

Allegation Two – Relevant Legislation

Section 165(1) of the *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 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 169(1) of the *Law* - Offence relating to staffing arrangements

An Approved Provider of an education and care service must ensure that, whenever children are being educated and cared for by a service, the relevant number of educators educating and caring for the children is no less than the number prescribed for this purpose.

Penalty: \$10 000, in the case of an individual
\$50 000, in any other case.

Regulation 123 (1) and (2) –Educator to child ratio-centre – based service

(1) The minimum number of educators required to educate and care for children at a centre-based service is to be calculated in accordance with the following ratios—

- (a) for children from birth to 24 months of age—1 educator to 4 children;
- (b) for children over 24 months and less than 36 months of age—1 educator to 5 children;
- (c) for children aged 36 months of age or over (not including children over preschool age)—1 educator to 11 children;
- (d) for children over preschool age, 1 educator to 15 children.

(2) If children being educated and cared for at a centre-based service are of mixed ages the minimum number of educators for the children must meet the requirements of subregulation (1) at all times.

Regulation 122 –Educators must be working directly with children to be included in ratios

An educator cannot be included in calculating the educator to child ratio of a centre- based service unless the educator is working directly with children at the service.

Regulation 13 – Meaning of *working directly with children*

For the purpose of these Regulations a person is working directly with children at a given time if at that time the person –

- a) is physically present with the children; and
- b) is directly engaged in providing education and care to the children.

Allegation Two – Evidence and Submissions

18. Evidence relevant to Allegation Two consisted of working directly with children records and child attendance records obtained under section 215 of the *Law*, and witness statements, relevant extracts of which were included.
19. Prescribed records were analysed, indicating that the Service was inadequately staffed under the roof for most of 6 November 2020. A copy of the analysis was included in the SCN.
20. Witness statements indicated that two educators may have been undertaking activities other than working directly with children whilst signed in on records. However, those educators were included in the analysis regardless. Former nominated supervisor, [REDACTED] [REDACTED] was also included in the analysis, the assumption being that she was working directly with children although no witnesses had mentioned her as doing so.
21. In the Response, the Provider did not expressly refute the allegation, nor produce any evidence to refute it. However, the Provider did refer to a review of staffing arrangements as part of a Plan of Action and included some documentation supporting recruitment, and in relation to the new Centre Manager, who commenced employment in early May 2021. It is noted that [REDACTED] remains the Nominated Supervisor.

Allegation Two – Authority’s Finding

22. For the reasons outlined above, the Authority is satisfied that the following contraventions of the *Law* have been substantiated on the balance of probabilities:
 - a. Failing to ensure adequate staffing at all times during which children were being educated and cared for by the Service on 6 November 2020, in contravention of section 169(1) of the *Law*, engaging the following further offences;

- b. Failing to ensure adequate supervision of all children being educated and cared for by the Service on 6 November 2020, in contravention of section 165(1) of the *Law*; and
- c. Failing to take reasonable precautions to protect children being educated and cared for by the Service from harm and from any hazard likely to cause injury on 6 November 2020, in contravention of section 167(1) of the *Law*.

Reasons

23. For the reasons outlined above, the Authority finds contraventions of sections 165, 167, and 169 of the *Law* have been substantiated. It is therefore necessary that the Authority consider what, if any, compliance action is required to ensure the health, safety and wellbeing of children is protected.

Obligations upon Regulatory Authority, Providers and Services

24. 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; ...'

25. There are two relevant guiding principles at sections 3(3)(a) and (f), namely:

(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.

26. 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*.

27. 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*.

28. 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.

29. The *Law* outlines a range of statutory actions which may be taken by the Authority in response to non-compliance, for example fines or compliance notices through to suspension

of your service approval and/or prosecution. Many of these options allow the Authority to publish details of your non-compliance.

Decision

30. Considering the evidence, the objectives and guiding principles of the *Law*, and the steps taken by the Provider in response to the incident, the Authority has determined to issue this Administrative Letter.
31. The comprehensive steps taken by the Provider in response to the incident and the SCN, including implementation of a Plan of Action, oversight by Quality Manager [REDACTED], facilitation of regular meetings for management staff, engagement of an experienced Centre Manager, more meaningful engagement with the Service's QIP, additional professional learning for educators in core areas, and implementation of new supervision strategies, largely meet the expectations of the Authority.
32. It is noted that within the Plan of Action, the Provider included "Continued Meeting of Ratios" as an area of development, to be undertaken via daily checks throughout the day, a process that educators call down when ratios are at risk, and a process of review to be included as part of the work being undertaken by the Quality Manager. However, the supporting documentation for that area of development consisted of an email of 31 May 2021 which did not expressly refer to staffing numbers. The only other documentation directly relevant to staffing numbers was evidence of induction of two new educators, [REDACTED] and [REDACTED]. It is not clear if they are additional educators or replacements.
33. In relation to the substantiated offence of inadequate staffing under section 169 of the *Law*, the Authority requires evidence to demonstrate how the Provider will ensure that the Service will be adequately staffed at all times during which children will be educated and cared for, including in the event of unexpected absences. The Authority understands that a staffing tool is used at Service level to calculate adequate staffing and requires the Provider to produce evidence that the staffing tool, if used, is accurate.
34. The Authority requires that the Provider, within 14 days of the date of this Administrative Action, provide evidence demonstrating that appropriate policies, procedures, and tools (if applicable) are in place. Such evidence should be directed to Senior Investigator, Tanya Masterman via email to tanya.masterman@act.gov.au, or alternatively to:

Tanya Masterman, Senior Investigator
Children's Education and Care Assurance
PO Box 158
CANBERRA, ACT 2601.

35. The substantiated breaches of sections 165, 167, and 169 of the *Law* have been recorded on the Service file and may be considered by the Authority when considering any further applications for service approvals in the ACT.

Legislation

36. 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>.

37. 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>

38. If you have any questions in relation to this letter, please contact Authorised Officer Tanya Masterman by email at tanya.masterman@act.gov.au.

Yours sincerely



Jo Williams
Director
Children's Education and Care Assurance
Education and Care Regulation and Support
ACT Education Directorate
20 July 2021