



Ms [REDACTED]  
Former Nominated Supervisor  
Guardian Community Early Learning Centres Pty Ltd  
RE: Guardian Childcare & Education Gungahlin

Email: [REDACTED]

Dear Ms [REDACTED]

### **Decision to Issue Caution**

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 suspected offences at Guardian Childcare & Education Gungahlin SE-40005341 (the Service), operated by Guardian Community Early Learning Centres Pty Ltd PR-00000823 (the Provider).
2. The suspected offences related to failure to adequately supervise children and take reasonable precautions to protect children from harm and hazards on 6 November 2020.
3. Web addresses for the *Education and Care Services National Law Act (ACT)* (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 injury had occurred at the service. On the information than to hand, it was determined by the Authority that there was insufficient evidence to raise a reasonable suspicion of an offence under the *Law*.
5. Further relevant information was received by the Authority on 18 February 2021, and it was then determined to investigate suspected offences of inadequate supervision and failure to take reasonable precautions to protect children from harm and from hazard likely to cause injury.
6. Throughout the course of the investigation, the Authority obtained evidence from numerous sources, including documentation and witness statements obtained voluntarily and under section 215 of the *Law*.

7. Such evidence suggested a failure to ensure adequate supervision of [REDACTED] and a failure to take reasonable precautions to protect him from harm and hazards likely to cause injury, during the afternoon of 6 November 2020. Evidence gathered also supported an offence of failing to ensure staffing was adequate on 6 November 2020
8. On 12 May 2021, the Authority issued you with a Show Cause Notice (SCN). Refer [Attachment A](#) for the SCN. Due to size, attachments to the SCN have not been included with this Caution but can be provided upon request.
9. On 27 May 2021, you provided a written response to the Authority (Written Response). Refer [Attachment B](#) for a copy of the Written Response.
10. On 16 June 2021, you contacted Authorised Officer Tanya Masterman to advise that you wished to provide additional information. A recorded interview was conducted on 29 June 2021 (Verbal Response) for that purpose and a copy of the recording was provided to you on a universal serial USB stick. An additional copy can be made available to you on request. During the interview you were offered the chance to comment on an amended ratio analysis which noted additional educators who had not initially been included at certain times. Refer [Attachment C](#) for a copy of that analysis.

### **Consideration of Response**

#### **Allegation One**

11. It was alleged that, on Friday 6 November 2020, you as Nominated Supervisor 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(2) of the *Law*..

#### **Allegation One – Relevant Legislation**

##### **Section 165(2) of the *Law* - Offence to inadequately supervise children**

A nominated supervisor 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.

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

A nominated supervisor of an education and care service must ensure that every reasonable precaution is taken to protect children being educated and cared for by the service from harm and from any hazard likely to cause injury.

**Section 169(3) of the Law - 169 Offence relating to staffing arrangements**

A nominated supervisor of an education and care service must ensure that, whenever children are being educated and cared for by the service, the relevant number of educators educating and caring for the children is no less than the number prescribed for this purpose

Allegation One – Evidence and Submissions

12. The Authority's records indicated that you were the nominated supervisor of the Service at the relevant time.
13. Evidence gathered relevant to Allegation One consisted of:
  - a. documentation produced by the Provider under section 215 of the *Law*, including prescribed records and documentation relevant to the injury of [REDACTED];
  - b. voluntary witness statement from [REDACTED] parent, a redacted copy of which was provided with the SCN; and
  - c. witness statements obtained under section 215 of the *Law*, relevant extracts of which were included in the SCN.
14. Regarding Allegation One, you advised in your Written Response that you had no knowledge of the injury until the following Monday when the complaint was received. In your Verbal Response you provided additional information regarding [REDACTED] [REDACTED] that afternoon.
15. The Authority has also considered that the Responsible Person ([REDACTED]) did not advise you of any problem and did not notice the head injury herself. The head injury was noticed by the room leader, [REDACTED] and another educator, who did not take appropriate steps. The Authority notes that appropriate performance measures were taken regarding those educators, with which you were involved.
16. You did not expressly admit or deny Allegation One, however, you did not produce any evidence to refute the allegation as put forward in the SCN. Rather, the evidence provided was by way of mitigation and explanation.
17. Under section 165(2) of the *Law*, it is a nominated supervisor's responsibility to ensure adequate supervision of all children being educated and cared for by the Service. It is an offence of strict liability. 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(2).

18. The obligations of a Nominated Supervisor remain during periods of absence from the Service.

Allegation One – Authority’s Finding

19. 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 supervision of all children being educated and cared for by the Service on 6 November 2020, in contravention of section 165(2) 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(2) of the *Law*.

Allegation two

20. It is alleged that, on 6 November 2020, you as nominated supervisor 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(3) of the *Law*, engaging further contraventions of s 165(2) and 167(2).

Allegation Two – Relevant Legislation

**Section 165(2) of the *Law* - Offence to inadequately supervise children**

A nominated supervisor 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

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

A 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

**Section 169(3) of the *Law* - Offence relating to staffing arrangements**

A nominated supervisor 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

**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

21. Evidence gathered relevant to Allegation Two consisted of:
  - a. documentation produced by the Provider under section 215 of the *Law*, working directly with children records and child attendance records;
  - b. witness statements obtained under section 215 of the *Law*, relevant extracts of which were included in the SCN.
22. In your Written Response, you referred to three additional educators who were working directly with children during the afternoon of 6 November 2020 and provided analysis tables.

23. You further advised in the Verbal Response that you had used the 'staffing calculation tool' to determine adequate staffing ratios at the Service. The Authority has also taken into consideration your mistaken belief that the Service was in ratio on 6 November 2020 and that you would not have left for [REDACTED] if you had known otherwise.
24. During the Verbal Response, you stated that, when you calculated staffing numbers, you must have done them (the calculations) incorrectly and did not refute the amended ratio analysis at Attachment C.
25. In your Written and Verbal Responses, you referred to your history as acting nominated supervisor, including the lack of training and support you received whilst you were in the role and your increased understanding of ratios and supervision principles since the incident.
26. Under section 169(3) of the *Law*, a nominated supervisor must ensure that, whenever children are being educated and cared for by the service, the relevant number of educators educating and caring for the children is no less than the number prescribed in Regulation 123. Failing to ensure adequate staffing engages additional offences under sections 165(2) and 167(2) of the *Law*. As mentioned above, those obligations apply even during absences from the Service.

#### Allegation Two – Authority's Finding

27. 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(3) 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(2) 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(2) of the *Law*.

#### Reasons

28. Given offences under sections 165(2), 167(2) and 169(3) have been substantiated, it is necessary that the Authority consider what, if any, compliance action is required in order to ensure the health, safety and wellbeing of children is protected.

Obligations upon Regulatory Authority, Providers, Services and Nominated Supervisors

29. 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; ...'*

30. 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.

31. 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.

32. 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*.

33. 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

**Decision**

34. Considering the evidence, the objectives and guiding principles of the *Law*, the fact that you have no previous compliance history, and the mitigating circumstances outlined above, the Authority has decided to issue this Caution rather than statutory compliance action.

35. In making this Decision, the Authority has taken into account your relative inexperience and stated lack of support in the role of Nominated Supervisor, that the Responsible Person did not advise you of the incident on 6 November 2020, that you demonstrated an improved awareness of when educators can be included within ratio, you have acknowledged that you do not currently have the required experience and knowledge to be in a role as nominated supervisor, and are currently in an assistant director role where you are receiving appropriate support and mentoring.

36. For these reasons, the Authority will not be taking any statutory compliance action against you. However, this Caution Letter is to emphasise to you the obligations of a nominated supervisor in ensuring that all children being educated and cared for by the Service are adequately supervised at all times, that reasonable precautions are taken to protect all children from harm and hazards, and to ensure that staffing levels meet the prescribed minimum whenever children are being educated and cared for.
37. The substantiated breaches of sections 165(2), 167(2) and 169(3) have been recorded against your compliance history and may be taken into account by the Authority in the event of any further substantiated breaches of the *Law* in the ACT.

**Legislation**

38. 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>.
39. 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>
40. If you have any questions in relation to this letter, please contact Authorised Officer Tanya Masterman by email at [tanya.masterman@act.gov.au](mailto: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