

Ms [REDACTED]
Nominated Supervisor
RE: Gungahlin Montessori Academy

Email [REDACTED] [live.com.au](#)

Dear Ms [REDACTED]

Decision to Issue Formal Caution

1. As you are aware, the ACT Regulatory Authority (the Authority) also known as Children's Education and Care Assurance (CECA), investigated suspected offences relating to a child being smacked by an educator at Gungahlin Montessori Academy - SE-40020141 (the Service) operated by Gungahlin Montessori Academy Pty Ltd - PR-40017814 (the Provider), on 11 October 2023.
2. The Authority is satisfied on balance of probabilities that you, whilst in the capacity as the Nominated Supervisor of the Service, have contravened provisions of the *Education and Care Services National Law (ACT)* (the *Law*).
3. Web addresses to the *Law* and the *Education and Care Services National Regulations (the Regulations)* are provided for your convenience at the end of this decision.

Facts

4. On 11 October 2023, the Authority received a notification (NOT-40911319) alleging an educator, M [REDACTED] had smacked a child [REDACTED] on the back.
5. Due to the risk of harm and hazards to children, likely to cause injury resulting from inappropriately disciplined, the Authority determined to investigate.
6. On 15 February 2024, the Authority sent you, as the identified Nominated Supervisor of the Service, a Show Cause Notice (the Notice), advising that the Authority had determined there was sufficient evidence to support a case to answer regarding a suspected offences under the *Law*.
7. The Notice outlined the grounds for issue, relevant evidence supporting the suspected contraventions of the *Law*, and potential compliance actions being considered if the allegations were substantiated. Refer copy of Notice (minus attachments which can be provided again upon request) at Attachment A.
8. The Notice set out the following allegations for your response:

Allegation One

It is alleged that on 11 October 2023, you, as nominated supervisor failed to ensure that no child being educated and cared for by the Service, was subjected to any form of corporal punishment,

in that, a child believed to be [REDACTED] (3:7) was slapped on the back by an educator, contravening section 166(2) of the *Law*, and giving rise to a contravention of 167(2) of said *Law*.

Allegation Two

It is alleged that by 11 October 2023, you, as nominated supervisor failed to ensure that reasonable precaution was taken to protect children from and any form of hazard likely to cause injury, in that there were insufficient supports for educators and a child, believed to be [REDACTED] (3:7), with challenging behaviours and complex needs, contravening section 167(2) of the *Law*.

9. On 29 February 2024 your response to the Notice was included in the response from the Provider. Refer copy of response (minus attachments) at Attachment B. It was confirmed that this was agreed as your response to the Notice via email on 8 March 2024 – refer Attachment Ba

Law

10. The following provisions of the *Law* were engaged by the investigation and Decision.

Section 166(2) of the Law - Offence to use inappropriate discipline.

A nominated supervisor of an education and care service must ensure that no child being educated and cared for by a service is subjected to any form of corporal punishment or any discipline that is unreasonable under the circumstances.

Penalty: \$11 400, in the case of an individual

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: \$11 400, in the case of an individual

Obligations upon Regulatory Authority

11. 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*".
12. The guiding principles of the National Quality Framework at sections 3(3)(a) and (f) of the *Law* have specific 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.*
13. 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.*

14. 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*.
15. 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.
16. 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

17. The Authority has considered all evidence gathered via the investigation process, inclusive of the response to the Notice, and is satisfied on the balance of probabilities, allegations are proven, therefore substantiating contraventions of sections 166(2), 167(2) of the *Law*.
18. Your response did not expressly deny or concede the allegations as specified in the Notice, however, appeared to explain the circumstances in mitigation. You did not contest the occurrence of the incident as outlined in the notification. Attachments included in the Provider response were also taken in consideration by the Authority in your deliberations.
19. Discipline is defined as any strategy employed by an educator with the intention of changing a child's behaviour. Discipline that is inappropriate within the meaning of section 166 of the *Law* includes any form of physical punishment or any behaviour management strategy likely to cause emotional or physical harm to a child. Examples include smacking, yelling, physically dragging a child, unreasonable restraint of a child, using threatening or humiliating language, isolating, or shaming children.
20. This finding is supported by the evidence gathered via the child's own disclosure and witness accounts that clearly describes [REDACTED] being subjected to inappropriate discipline by educator [REDACTED] whilst enrolled at the Service, thus supporting the allegations as detailed.
21. Within the Response were Provider attachments outlining the following:
 - (a) Circle of safety training;
 - (b) Self-paced online training;
 - (c) 2IC attended the room to support educators;
 - (d) Strategies were in place for [REDACTED];
 - (e) Nominated Supervisor attended and conducted care meetings;
 - (f) Professional development opportunities offered to staff.
22. The Authority is satisfied your response did not contain sufficient evidence demonstrating that you, as the Nominated Supervisor, were ensuring that no child was subjected to inappropriate discipline, or that educator practice was monitored or mentored to ensure educator awareness,

understanding or implementation of expected practice relating to discipline, or behaviour guidance/management of children, was appropriate.

23. A Nominated Supervisor's obligation under section 166 of the *Law* is positively and strongly framed– a nominated supervisor must ensure that all children being educated and cared for by the Service are not subjected to inappropriate conduct amounting to discipline, unreasonable in the circumstances.
24. Ensuring that no child is subjected to corporal punishment, or discipline unreasonable in the circumstances, via regular monitoring and mentoring of educator practice, and understanding and awareness of expectations set out in policy and procedure is viewed as being a reasonable precaution to take to protect children from harm likely to cause injury in compliance with s167 of the *Law*.
25. People and entities that choose to participate in regulated activities have a legal responsibility and an obligation to accept the consequences of that responsibility. In this case, as a Nominated Supervisor, you chose and consented to participating in the education and care of children and have a responsibility to comply with the standard of care under the *Law*.
26. However, in considering the evidence, the objectives and guiding principles of the *Law*, and your response to the incident on the day, the Authority has decided to issue this Caution Letter rather than statutory compliance action.
27. The Authority notes that this is the second Caution Letter issued to you relating to a non-compliance, and has carefully considered the evidence, objectives, and guiding principles of the *Law*.
28. In issuing this Caution Letter the Authority advises that further substantiated non-compliance, similar or not, may result in statutory action.
29. To support you in your role as a nominated supervisor and understand better the expectations of the *Law* regarding your role and inappropriate discipline, please find attached relevant ACECQA resources at Attachment Ca and Cb. Additional resources to assist you can be found at <https://www.acecqa.gov.au/resources> .
30. This Decision will be recorded on file and may be considered in determining if any statutory action is to be taken, should further breaches of the *Law* or associated *Regulations* be found against you.

Legislation

31. 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>.
32. 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>

33. If you have any questions relating to this letter, please contact Authorised Officer Brian Cropper by way of email at brian.cropper@act.gov.au.

Yours sincerely



Janine Fairburn
Assistant Director
Children's Education and Care Assurance
Education and Care Regulation and Support

4 April 2024