

Mr [REDACTED]
Person with Management or Control
Kids Biz Holidays & Sports Pty Ltd
RE: Kids Biz OSHC Holy Family & Kids Biz Holidays and Sports
Email: [REDACTED]@kidsbizoshc.com.au

Dear Mr [REDACTED]

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 (CECA). 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 assessed notified incidents relating to Kids Biz Holiday and Sports SE-00009688 and Kids Biz OSHC – Holy Family SE-00009685 (the Services), operated by Kids Biz Holidays & Sports Pty Ltd PR-00008211 (the Provider).
3. The Regulatory Authority is satisfied that the Provider was not complying with the provisions of the *Law* in respect to these matters. Web addresses to the *Law* and associated *Regulations* are provided for your convenience at the end of this Decision.

Facts

4. On 16 January 2024, the Authority received a Notification of Incident (NOT-40943853) from the Provider, advising of an allegation that a child, known to be [REDACTED], who was attending Kids Biz Holiday and Sports was missing and unaccounted for during an excursion to Canberra Zoo & Aquarium on 15 January 2024. Refer copy NOT-40943853 and submitted incident report at Attachment A.
5. On 17 January 2024, additional information was requested via email from the Provider relevant to the matter. The Provider submitted additional information via the ACECQA portal on 18 January 2024 and included:
 - a) Child attendance and Staff Roster records for 15 January 2024;
 - b) Excursion Risk management Plan Zoo and National Zoo and Aquarium – Staff Guide;
 - c) Copies of email correspondence to family; and
 - d) Further information regarding NOT-40943853.Refer copies of information submitted at Attachment B.
6. On 25 January 2024, the Authority received a Notification of Incident (NOT-40947765) from the Provider, advising of an allegation that a child, known to be [REDACTED] who was attending Kids Biz OSHC – Holy Family was missing and unaccounted for during an excursion to Limelight Cinemas on 24 January 2023. Refer copy of NOT-40947765 and submitted incident report at Attachment C.

7. On 29 January 2024, additional information was requested via email from the Provider relevant to the matter. The Provider submitted additional information via the ACECQA portal on 1 February 2024 and included:
 - e) Child attendance and Staff Roster records for 24 February 2024;
 - f) Excursion Risk management Plan Limelight and Limelight – Staff Guide;
 - g) Copies of email correspondence to family; and
 - h) Further information regarding NOT-40947765.Refer copies of information submitted at [Attachment D](#).
8. On 31 January 2024, the Authority received a direct complaint regarding the matter notified via NOT-40947765. The complainant raised concerns in relation to how the Provider had responded to the matter and was not ensuring risks related to inadequate supervision were being managed appropriately.

Law

9. Provisions of the *Law* relevant to the matters raised via the Notified Incidents include the following:

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: \$11 400, in the case of an individual
 \$57 400, 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.

Obligations upon Regulatory Authority

10. 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*".
11. 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.*
12. 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.*

13. 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*.
14. 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.
15. 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

16. The Authority has considered all available information, and is satisfied on the balance of probabilities, contraventions of sections 165(1) and 167(1) of the *Law* are engaged by Notified Incidents NOT-40947765 and NOT-40943853.
17. In relation to Kids Biz Holidays and Sports, NOT-40943853, the Authority is satisfied, on balance of probabilities, that [REDACTED] was not adequately supervised. The Authority is satisfied that this contributed to the six-year-old being left unsupervised, and unaccounted for, at the penguin enclosure, and subsequently returned to the OSHC group by a member of the public on 15 January 2024 supporting the substantiated breach of section 165(1) of the *Law*.
18. The Authority is satisfied that due to failings in the provision of adequate supervision, along with failings in communications between staff to alert the matter to the coordinator, the Provider has not ensured reasonable precautions were taken to protect children from harms and hazards likely to cause injury and illness, as required by section 167(1) of the *Law*.
19. The Authority noted that the Provider engaged minimum regulated ratio levels to be maintained at the excursion. The fact that additional educators were not engaged above ratio to ensure adequate supervision would be maintained in a riskier environment such as an excursion to a public zoo further supports substantiated contraventions of sections 165 and 167 of the *Law* in this instance.
20. The Authority notes that should the member of the public who located [REDACTED] had a different agenda than to return her to her OSHC group, the consequences of this incident could have been catastrophic.
21. In relation to Kids Biz OSHC – Holy Family, NOT- 40947765, the Authority is satisfied, on balance of probabilities, that [REDACTED] was not adequately supervised, resulting in the six-year-old being unsupervised and unaccounted for at Limelight Cinema’s for a period of time on 24 January 2024 supporting the substantiated breach of section 165(1) of the *Law*.
22. The Authority is satisfied that due to failings in the provision of adequate supervision, along with failings in checking all areas of the bathrooms and performing full head counts, the Provider has not ensured reasonable precautions were taken to protect children from harms and hazards likely to cause injury and illness, as required by section 167(1) of the *Law*.

23. The Authority is satisfied that due to the similar nature of incidents occurring across different services, posing high risk due to the environments that children of six years of age were unaccounted for and unsupervised, that concerns are raised regarding the Provider's governance and monitoring of educator practices, especially when educating and caring for children on excursion.
24. 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 by the service are adequately supervised at all times that the children are in the care of that service.
25. A Provider's obligation under section 167 of the *Law* is positively and strongly framed – the provider 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.
26. Ensuring that educator practice prevents a child being left unsupervised or unaccounted for is viewed as being a reasonable precaution to take to protect children from harm likely to cause injury.
27. 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 the Provider chose and consented to participating in the education and care of children and has a responsibility to comply with the standard of care under the *Law*.
28. Considering the information submitted by the Provider, the level of seriousness of the contravention, and the objectives and guiding principles of the *Law*, the Authority has decided that issuing a Compliance Notice is appropriate and in the best interests of children.
29. 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.
30. The Compliance Notice is provided at Attachment E to this decision letter. You are required to take steps directed in the Notice to comply with the relevant provisions. You must produce evidence of the steps required by **the times indicated for each step within the Notice at Attachment E**.

Review Rights

31. 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).
32. 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

33. The *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>.
34. 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>
35. Should you have any questions about this Decision or Compliance Notice please contact me at nicole.withers@act.gov.au.

Yours Sincerely,



Nicole Withers
A/g Assistant Director
Children's Education and Care Assurance
Education and Care Regulation and Support

23 February 2024