

██████████
Person with Management and Control
Kids Club Early Childhood Learning Centres Pty Ltd
RE: Kids Club Rivett Early Learning Centre

Email: ██████████

Dear ██████████

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 investigated complaints alleging that the safety, health and wellbeing of children was compromised at Kids Club Rivett Early Learning Centre SE-40012143 (the Service), operated by Kids Club Early Childhood Learning Centres Pty Ltd PR-40001605 (the Provider).
2. I am satisfied that the Provider did not comply with the provisions of the *Education and Care Services National Law (ACT)* (the *Law*) and the *Education and Care Services National Regulations* (the *Regulations*).
3. Web addresses for the *Law* and *Regulations* are provided for your convenience at the end of this notice.

Facts

4. On 27 August 2020, the Authority received a direct complaint regarding inadequate staffing at the Service on 11 and 27 August 2020, together with other matters such as the signing-in system not always working.
5. Due to the risk of harm to children when staffing is inadequate and children inadequately supervised, the Authority investigated.
6. During the investigation, evidence was gathered which supported the following allegations:

a) **Allegation One**

It is alleged that, between 3 August 2020 and 28 August 2020, the Provider failed to ensure adequate staffing at all times children were being educated and cared for, in contravention of section 169(1) of the *Law*, engaging further contraventions of sections 165(1) and 167(1) of the *Law*.

b) **Allegation Two**

It is alleged that, between 28 September 2019 and 1 May 2020 (a period exceeding three months), the Provider failed to ensure that all educators working directly with children met prescribed qualification requirements in that ██████████ did not have an approved qualification and was not actively working towards an approved qualification.

c) Allegation Three

It is alleged that the Provider failed to notify the Regulatory Authority of all complaints that the Law had been contravened between 3 August 2020 and 31 August 2020, in contravention of section 174 of the *Law*

d) Allegation Four

It is alleged that the Provider failed to maintain staff records for all educators who were working directly with children at the Service between 3 August 2020 and 28 August 2020 (inclusive), in contravention of section 175 of the *Law*.

e) Allegation Five

It is alleged that the Provider failed to take reasonable steps to maintain accurate working directly with children records and child attendance records between 3 August 2020 and 28 August 2020, in contravention of Regulation 177(2).

7. On 10 November 2020, a Show Cause Notice (SCN) was issued to the Provider. Refer Attachment A.
8. There were three grounds for issuing the SCN, being:
 - a) Staffing and supervision, including qualifications of staff;
 - b) Failure to notify the Authority of complaints;
 - c) Inadequate record-keeping.
9. The SCN outlined the evidence obtained during the investigation and attached copies of relevant documentation, including analysis of prescribed records, obtained pursuant to powers in section 215 of the *Law*. The SCN advised that the Authority was considering compliance action based on evidence that there had been contraventions of the *Law* identified during the Authority's investigation.
10. On 7 December 2020, a response was received by email from the Provider (Response). Refer Attachment B for the Response.

Law and Regulations

Legislative Provisions Relevant to Allegation One

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 cared 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 the 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 151 –Record of educators working directly with children

The approved provider of a centre-based service must keep a record of educators working directly with children that includes the following information -

- a) The name of each educator who works directly with children being educated and cared for by the service;
- b) The hours that each educator works directly with children being educated and cared for by the service.

Regulation 123(1) –Educator to child ratios – centre-based services

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 in a jurisdiction, the relevant ratio (if any) set out in Chapter 7 for that jurisdiction.

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.

Legislative Provisions Relevant to Allegation Two

Section 169(2) – Offence relating to Staffing Arrangements

An approved provider of an education and care service must ensure that each educator educating and caring for children for the service meets the qualification requirements relevant to the educator's role as prescribed by the national regulations.

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

Regulation 126 – Centre-based services – general educator qualifications

- (1) The qualification requirements for educators a centre-based service educating and caring for children preschool age or under are as follows –
 - (a) At least 50 per cent of the educators who are required to meet the relevant educator to child ratios for the service must have, or be actively working towards, at least an approved diploma level education and care qualification; and
 - (b) All other educators who are required to meet the relevant educator to child ratios for the service must have, or be actively working towards, at least an approved certificate III level education and care qualification.

- (1A) The qualification requirements in subregulation (1)(b) do not apply to an educator if the educator has been employed by an approved provider on a probationary basis for not more than 3 months, at one or more centre-based services operated by the approved provider.

Legislative Provisions Relevant to Allegation Three

Section 174– Offence to fail to notify certain information to the Regulatory Authority

- (2) An approved provider must notify the Regulatory Authority of the following information in relation to an approved education and care service operated by the approved provider-
 - (b) any complaints alleging –
 - (i) that a serious incident has occurred or is occurring while a child was or is being educated and cared for by the approved education and care service; or
 - (ii) that this Law has been contravened.

- (4) A notice under subsection (2) must be in writing and be provided within the relevant prescribed time to –
 - (a) the Regulatory Authority that granted the service approval for the education and care service to which the notice relates.

Regulation 176 – Time to notify certain information to Regulatory Authority

- (2) For the purposes of section 174(4) of the Law, a notice must be provided –
 - (b) in case of a notice under section 174(2)(b) or a notice of a matter referred to in regulation 175(2)(b), within 24 hours of the complaint or incident.

Legislative Provisions Relevant to Allegation Four

Section 175(1) of the Law – Offence relating to requirement to keep enrolment and other documents

An approved provider of an education and care service must keep the prescribed documents available for inspection by an authorised officer in accordance with this section.

Penalty: \$4000, in the case of an individual.
\$20 000, in any other case.

Regulation 177(1) – Prescribed enrolment and other documents to be kept by approved provider

For the purposes of section 175(1) of the Law, the following documents are prescribed in relation to each education and care service operated by the approved provider –

- (e) in the case of a centre-based service, a staff record as set out in regulation 145.

Regulation 145 – Staff record

- (1) The approved provider of a centre-based services must ensure that a staff record is kept for that service in accordance with this Division.
- (2) The staff record must include –
 - (a) the information about nominated supervisors set out in regulation 146; and
 - (b) The information about staff members set out in regulation 147; and
 - (c) The information about the educational leader set out in regulation 148; and
 - (d) The information about volunteers set out in regulation 149(1).

Regulation 147 – Staff members

The staff record must include the following information in relation to staff members:

- (a) The full name, address and date of birth of the staff member;
- (b) Evidence –
 - (i) of any relevant qualifications held by the staff member; or
 - (ii) if applicable, that the staff member is actively working towards that qualification as provided under regulation 10;
- (c) evidence of any approved training (including first aid training) completed by the staff member;
- (d) if the education and care service is located in a jurisdiction with a working with children law or a working with vulnerable people law, a record of the identifying number of the current check conducted under that law and the expiry date of that check, if applicable, unless paragraph (e) applies.

Legislative Provisions Relevant to Allegation Five

Regulation 177 – Prescribed enrolment and other documents to be kept by approved provider

- (1) For the purposes of section 175(1) of the *Law*, the following documents are prescribed in relation to each education and care service operated by the approved provider: ...
 - (h) in the case of a centre-based service, a record of educators working directly with children as set out in regulation 151...
 - (k) a children’s attendance record as set out in regulation 158;
- (2) The approved provider of the education and care service must take reasonable steps to ensure the documents referred to in subregulation (1) are accurate.

Penalty: \$2000

Consideration of Provider's Response to Allegations

Allegation One – section 169(1) NOT substantiated; sections 165(1) and 167(1) substantiated

29. In relation to Allegation One, the SCN referred to evidence consisting of a ratio analysis prepared from working directly with children records and child attendance records produced by the Provider under section 215 of the *Law*. The SCN contained extracts of witness statements, also obtained under section 215. As explained to witnesses when asked to comment (and as appears in the SCN), the accuracy of ratio analysis is dependent on the accuracy of a Provider's prescribed records.
30. In the Response, the Provider submitted that the ratio analysis was flawed for three reasons, being:
- a) Staff were not included where they had not signed out on OWINA at the end of a shift;
 - b) Ages of children were assumed from the rooms in which they appeared on child attendance records;
 - c) Time sheets for staff who were working directly with children but not signed into OWINA (being ██████████, ██████████ and ██████████) was not taken into account.
31. A ratio analysis is not intended to be a definitive source of evidence but, rather, can indicate trends dependent on the accuracy of records. It is used in conjunction with other evidence such as witness statements.
32. Wherever staff have signed in but not signed out again and were not included in ratio count, that is noted on the ratio analysis sheet, so as not to be misleading. A time sheet that merely records paid hours does not record the details required for a working directly with children record. Staff may be on a paid break, or undertaking programming, administration, cleaning, or other activities that do not meet the definition of working directly with children in *Regulation 13*. For this reason, notes are made on the ratio analysis, rather than making assumptions that a staff member was working directly with children with no evidence to support it.
33. The Provider has carried out its own analysis and listed educators "utilised" on particular days. It seems that the Provider's analysis may have been prepared from time sheets. For the above reasons, that is not accurate. It is also noted that the Provider has included staff members who were not working directly with children. The Authority is aware that ██████████ is the chef, for example. According to his staff record, he holds a Certificate IV in Hospitality and no early childhood qualification. Working directly with children records show him signing into the centre, but never signing into a room. Accordingly, he cannot be included in ratio.
34. For Monday 10 August 2020, the Authority's analysis included a maximum of 11 educators. The Provider contends that there were 15 educators, including ██████████, ██████████, ██████████ and ██████████, and included them in the Provider's ratio analysis, presumably relying on time sheets. As stated, ██████████ is the chef and cannot be included in ratio. The Authority carried out a compliance audit at the Service on that day and is aware that ██████████ and ██████████ were in the office with an Authorised Officer during that time, so it is not clear why the Provider is contending they were working directly with children.
35. A further example is 27 August 2020. The Authority's analysis included a maximum of nine educators. The Provider contends that there were 12 educators, which have been included in the Provider's ratio analysis, presumably relying on time sheets. ██████████ was the chef and cannot be included. Other educators did

not sign in on OWNA and time sheets do not record time spent working directly with children. However, the Authority's analysis indicates times when the Service was under ratio by up to four educators, so even including the educators who did not sign in on OWNA does not alleviate the indicated staffing issue.

36. Regarding the ages of children, the notice under section 215 required the Provider to produce child attendance records, including details of how the children are grouped in their rooms. The Provider submitted in its Response that children appear in child attendance records under rooms they were initially enrolled in, rather than rooms they are in now. Accordingly, the Provider did not produce the documents required under the section 215 notice. The Authority is entitled to assume that the records produced by the Provider are accurate, as accuracy is a specific requirement under the *Regulations* and, under section 295 of the *Law*, it is an offence to produce false or misleading information to the Authority.
37. Witnesses were generally able to give evidence concerning staffing within their rooms only, reflected on the Authority's analysis where records were accurate. For example, one witness gave evidence of being in Ocean room with 20 toddlers and one other educator on Friday 14 August 2020. That was corroborated by the other educator, albeit they could only recall it was a Thursday or Friday. It was also reflected on the ratio analysis for 14 August 2020.
38. Regarding the morning of 11 August 2020, the Provider denied that [REDACTED] had 12 babies on her own, as was stated by a witness. However, that is reflected in the ratio analysis. Witness evidence regarding having more than four babies with one educator in Rainforest 1 is also reflected in the ratio analysis, as is having more than ten toddlers with two educators in Ocean 1, on multiple occasions.
39. Regardless, due to the poor quality of the Provider's working directly with children records and child attendance records, the value of the Authority's ratio analysis is limited. The Provider's substitute analysis is not accepted as accurate for the reasons outlined above. Witnesses generally had no knowledge regarding staffing levels over the Services as a whole as opposed to within rooms.
40. For those reasons, I find that the allegation of inadequate staffing in contravention of section 169(1) of the *Law* (which is viewed on an "under-the-roof") basis, cannot be substantiated. Please note this is not a finding that staffing was adequate, but a finding that there is insufficient weight of evidence to substantiate the offence.
41. However, I find that offences of inadequate supervision in contravention of section 165(1) of the *Law* and failure to take reasonable precautions to protect children from harm and from hazards likely to cause injury in contravention of section 167(1) of the *Law* have been substantiated, by reason of corroborated evidence of having insufficient staffing within rooms, on numerous occasions within the relevant period.

Allegation Two - Substantiated

42. Regarding Allegation Two, the SCN referred to evidence consisting of [REDACTED] staffing record and witness statements corroborating that [REDACTED] had been working as an educator, including as a Room Leader in Rainforest 1, for a period of approximately seven months without actively working towards a qualification.
43. The Provider has not expressly admitted or denied the allegation but has referred to [REDACTED] extensive health issues which necessitated a long absence in late 2019, and intermittent issues in early 2020. The Authority was aware of [REDACTED] health issues and extended absence.

44. Whilst the Authority has sympathy for [REDACTED] situation, that does not remove the Provider's obligation to ensure all educators meet qualification requirements. It is not appropriate to continue to engage a room leader who had no qualification and was not actively working towards one. Additionally, [REDACTED] could not have been included in ratio, once the three month grace period expired.

45. The Authority finds that an offence under section 169(2) of the Law has been substantiated.

Allegation Three – Substantiated

46. In relation to Allegation Three, the SCN attached copies of email complaints and documents produced by the Provider under section 215 of the Law. The allegation in the SCN did contain a typographical error, referring to 38 August 2020 instead of 28 August 2020; apologies for any inconvenience.

47. No complaints were notified to the Authority by the Provider within the relevant time period of 3 and 28 August 2020.

48. The Provider responded that the email complaints in Attachment C to the SCN were not passed to the Centre Director or Area Manager. It is noted that those complaints were both emailed directly to the Provider's enquiries email address. It is the Provider's obligation to notify complaints to the Authority and it is not relevant that they were not sent to the Centre Director or Area Manager.

49. Regarding the matters outlined in Attachment D, it seems they were concerns raised about supervision of children and should have been notified to the Authority. Even if parents were satisfied with the Provider's response to their concerns, that does not negate the need to notify the Authority that a complaint was made.

50. I find the offence of failing to notify complaints in contravention of section 174 of the Law to be substantiated.

Allegation Four – Substantiated

51. In relation to Allegation Four, the SCN attached an analysis of staff records that were produced by the Provider under section 215 of the Law.

52. In the Response, the Provider produced an updated staff record table, together with relevant documents, including copies of qualifications and evidence of working towards qualifications, the latter of which were all dated in late November/early December, after the SCN was received.

53. The Provider also stated that it was not their practice to hold staff records for Agency educators and submitted that it was a practice "previously approved by the Department". It is not clear what the Provider means by "the Department" and there may have been confusion with another jurisdiction.

54. The Authority (which is within the ACT Education Directorate) has never approved that practice and requires Providers to maintain staff records for all staff members, whether they are permanent, casual, agency or volunteers. It is not appropriate to rely on a third party to ensure that educators working directly with children have requisite working with vulnerable people registration and qualifications. It is the Provider's obligation to maintain a complete staff record.

55. I find the offence of failing to maintain staff records, in contravention of section 175(1) of the Law substantiated.

Allegation Five – Substantiated

56. In relation to Allegation Five, the SCN referred to evidence consisting of copies of prescribed records (being working directly with children records and child attendance records) and “Additional Staff Attendance Information” produced by the Provider and included relevant extracts of witness statements.
57. In the Response, the Provider disagreed that required records were inaccurate and stated that, if an educator did not log on to OWNA, there were other options such as rosters and time sheets, to record movement of educators.
58. Whilst time sheets and rosters are given as examples in the regulations, they can only be used if they do record times during which educators are working directly with children, as opposed to hours for which they are carrying out paid work. Otherwise, they do not meet the requirements of Regulation 151. For example, an educator may spend two hours programming and not working directly with children, but that is not generally reflected on a time sheet and not always on a roster.
59. The Provider also stated that there were multiple options for recording child attendance, such as paper records or Qikkids.
60. The Authority did not contend that there were no other options for recording times educators were working directly with children and child attendance. There may well have been such options. However, they were not utilised and it is the Provider’s obligation to take reasonable steps to ensure that records are accurate.
61. The records produced are inaccurate or incomplete on their face and the inaccuracies are corroborated by witness statements.
62. I find that the Provider has failed to take reasonable steps to ensure working directly with children records and child attendance records are accurate, in contravention of Regulation 177(2).

Obligations Upon Regulatory Authority

63. 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”.
64. 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.*
65. 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*.
66. 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.

67. 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.

Previous Compliance History

68. The following Service compliance history is noted:
- a. 9 May 2019 – Administrative compliance action for offences under sections 165 and 167 of the *Law*;
 - b. 3 October 2019 – Emergency Action Notice for child attendance records;
 - c. 25 February 2020 – Administrative compliance action for offences under sections 174, Regulations 126, 158 and 150; and
 - d. 22 April 2020 – Administrative compliance action for offences under sections 165, 167, 173 and 174.

Decision

69. Considering the evidence obtained in the investigation, the Response, the Service’s previous 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.
70. The Provider has previously been the subject of administrative compliance actions for similar offences at the Service and it was noted that in those decisions that compliance action may escalate if further offences were substantiated. The Provider has also been the subject of an emergency action notice due to inaccurate child attendance records.
71. The Authority is empowered to issue a compliance notice under section 177 of the *Law*.

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.
72. 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.
73. You must provide evidence of the steps required by the time indicated within the Notice at Attachment C.

74. Please direct the Provider's response to compliance notice via email to Senior Investigator Tanya Masterman at tanya.masterman@act.gov.au or by post to:

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


Right of Review

75. 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 the 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).
1. 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

76. 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>.
77. 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>
78. Should you have any questions about this Decision, please contact Tanya Masterman on telephone (02) 6205 2012 or email tanya.masterman@act.gov.au

Yours Sincerely



Clare Brookes
Senior Director
Children's Education and Care Assurance
Early Childhood Policy and Regulation
ACT Education Directorate

8 February 2021.