



██████████
Nominated Supervisor

RE: Holy Family Catholic Primary School Care Out of School Hours

Email: ██████████@cg.catholic.edu.au

Dear Ms ██████████

Decision to issue Caution Letter

1. I am a delegate of the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance. As you are aware, 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. The Authority recently assessed a Notification of Incident (NOT-40690781) relating to the operation of Holy Family Catholic Primary School Care Out of School Hours, SE-00009685 (the Service), operated by Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn, PR-40001112 (the Provider).
3. The Notification related to an incident occurring on 17 March 2022 involving an enrolled child, known to be ██████████ (age 11 yrs), being missing/unaccounted for during a period of between one and three hours, which supported offences under the *Law*.
4. The Regulatory Authority is satisfied that you, in capacity as the Nominated Supervisor was not complying with the provisions of the *Law* in respect to this matter. Web addresses to the *Law* and associated *Regulations* are provided for your convenience at the end of this Decision.

Facts

5. On 6 May 2022, the Authority sent you a Show Cause Notice (the Notice) advising you that the Authority had determined that there was sufficient evidence to support a case to answer for the Nominated Supervisor regarding suspected offences under the *Law*. However, the Authority's final determinations would not be made until the Provider had an opportunity to respond to the allegations and evidence obtained by the Authority.
6. The Notice outlined the grounds for issue, relevant evidence supporting suspected contraventions of the *Law*, and potential compliance actions if allegations were substantiated. Refer copy of Notice (minus attachments due to size, noting on request can be produced again) issued at Attachment A.

7. The Notice advised that evidence obtained during the assessment supported the following offences under the *Law*:

Allegation One – Sections 165, 167 of the *Law*

It is alleged that, on 17 March 2022, the Nominated Supervisor failed to ensure that all children being educated and cared for at the Service were adequately supervised at all times, contravening s165(2) of the *Law*, and engaging a further contravention of 167(2) of the *Law*.

Allegation Two – Section 169 of the *Law*

It is alleged that, on 17 March 2022, the Nominated Supervisor failed to ensure that the relevant number of educators educating and caring for children was no less than the number prescribed for this purpose under *Regulation 260*, in contravention of section 169(3) of the *Law*.

8. In addition, and in conjunction, to the above allegations, the Authority also raised concerns around your fitness and propriety in the role of Nominated Supervisor, which requires adequate ability to manage and supervise an education and care service.
9. On 27 May 2022, you submitted to the Authority a response to the Notice with attached supportive evidence. Refer a copy of the response (minus attachments due to size, noting on request can be produced again) at Attachment B.
10. Evidence submitted by you as part of the response included:
 - a) Your reply to the Notice (Attachment B);
 - b) Statement in the matter from you;
 - c) Copy of your resume; and
 - d) Copy of Services Lost Child Procedure.

Law

11. The facts as outlined in the Notice engaged the following:

Legislation Relevant to Allegation One

Section 165(2) of *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, in the case of an individual

\$50 000, in any other case.

Section 167(2) of 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, in the case of an individual
\$50 000, in any other case.

Legislation Relevant to Allegation Two

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

A Nominated Supervisor of an education and care service must ensure that every 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 260 – Educator to child ratio – children over preschoolage – centre-based services

- (1) This regulation is in place of regulation 123(1)(d).
- (2) The educator to child ratio for children over preschool age at a centre-based service is 1 educator to 11 children.

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

- (3) 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 purposes 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.

Obligations upon Regulatory Authority, Providers and Services

12. 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”.

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

14. 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.*
15. 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*.
16. 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.
17. 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.

Decision and Reasons

18. The Authority has considered all the information, inclusive of your response to the Notice, and is satisfied that, on balance of probabilities, Allegations One and Two are substantiated on the balance of probabilities, being in contravention of sections 165(2), 167(2) and 169(3) of the *Law*.
19. In relation to substantiated contraventions of section 165 and 167 of the *Law*, the Authority is satisfied that the very nature of the incident satisfies contravention of s165 and s167 in this instance.
20. Although it is noted that you attest that the child was not unsupervised for very long, so therefore not at risk, the Authority notes that this determination by the Provider has been reached after making enquires. At the time of the incident the child was not accounted for approximately one hour by the Service – you, as the Nominated Supervisor, did not know until speaking with the parents that the child had been in their care the whole time, therefore the inherent risk was raised until this time.
21. In addition, due to no educator witnessing the child leave with the mother, and there being a lack of understanding by you, as the Nominated Supervisor of appropriate steps to implement to either account for the child sooner by an parent or to refer the matter to ACT Policing, the Authority is satisfied that not all reasonable precautions had been taken to protect the child from harm or hazard likely to cause injury.
22. The Authority notes that, should the child have left the Service for any other reason or been taken from the Service by an unauthorised person, the consequences could have

been catastrophic. Until advised directly by the mother of the series of events occurring with pick up, neither yourself nor the Provider had knowledge of whether the child was safe or not.

23. In relation to section 169 of the *Law*, the Authority is satisfied, on the balance of probabilities, that you did not, as the Nominated Supervisor, ensure that, on 17 March 2022, the relevant number of educators educating and caring for the children was no less than the number prescribed for this purpose.
24. The Authority noted the admissions made, however also noted that there appeared to be inconsistency between the Provider and yourself regarding how many children were in attendance on the day itself.
25. The decision to substantiate s169 of the *Law* has been made in consideration of the Attendance data submitted by the Provider which highlights 36 children in attendance on 17 March 2022 with the COOSH Roster reflecting three educators rostered to work directly with children, as two educators were identified as sick for 17 March 2022.
26. In relation to concerns raised around your fitness and propriety in the role of Nominated Supervisor, including your ability to manage and supervise an education and care service, the Authority is satisfied that evidence submitted by your response, and information received from the Provider allay these concerns.
27. The *Law* outlines a range of statutory actions which may be taken by the Authority in response to non-compliance. The Authority has the flexibility to choose the most appropriate action to support you to achieve compliance and improve outcomes for children.
28. Considering the evidence, the objectives and guiding principles of the *Law*, the compliance history of the Service, and the steps taken by yourself and the Provider to mitigate risk of a similar incident and subsequent non-compliances, the Authority has decided to issue this caution rather than statutory compliance action.
29. This Decision is issued to remind you of your obligations as a Nominated Supervisor. An expectation under the *National Law* is that staffing, and supervision levels need to meet the emotional, developmental, and physiological needs of all children at all times. These staffing and supervision levels may need to be adapted to be above minimum regulated ratio levels to protect children from harm and hazard likely to cause injury – both physically and psychologically.
30. In addition, this Decision is issued to remind you of your obligation to ensure that you are aware of and understand all policies and procedures implemented at the Service, the expectations of the *National Law*, and the expectations of the Provider in relation to

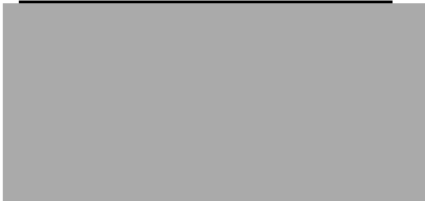
keeping children safe, supervised, and engaged when being educated and cared for by the Service.

31. The substantiated contraventions have been recorded on your file and may be considered by the Authority in any future similar breaches of the *Law* or *Regulations* be substantiated.

Legislation

32. The *Law* applies to you as a nominated supervisor employed within the early education and care sector.
33. 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>.
34. 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>
35. If you have any questions in relation to this letter, please contact me by email at janine.fairburn@act.gov.au.

Yours sincerely



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

10 June 2022