



Mr [REDACTED]  
Person with Management and Control  
Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goulburn  
RE: Holy Family Catholic Primary School Care Out of School Hours

Email: [REDACTED]@cg.catholic.edu.au  
[REDACTED]@cg.catholic.edu.au

Dear Mr [REDACTED]

### Decision to issue Administrative Action

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 [REDACTED] (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 the Provider 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 the Provider a Show Cause Notice (the Notice) advising the Provider that the Authority had determined that there was sufficient evidence to support a case to answer for the Provider 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 Provider failed to ensure that all children being educated and cared for at the Service were adequately supervised at all times, contravening s165(1) of the *Law*, and engaging a further contravention of 167(1) of the *Law*.

Allegation Two – Section 169 of the *Law*

It is alleged that, on 17 March 2022, the Provider 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(1) of the *Law*.

Allegation Three – Section 167 of the *Law*

It is alleged that, on 17 March 2022, the Provider failed to take reasonable steps to ensure children were protected from harm and hazard likely to cause injury or illness, in that inadequate procedures were in place to guide educator response to a child being missing and/or unaccounted for after having been signed in, or when parents are unable to be contacted within a reasonable timeframe to verify child's location, in contravention of section 167(1) of the *Law*.

Allegation Four – Section 175 of *Law*, *Regulation 177(2)*

It is alleged that, on 17 March 2022, the Provider failed to take reasonable steps to ensure prescribed records were able to be kept and maintained accurately, specifically in relation to inability to record accurate child attendance due to a broken iPad, in contravention of section 175 of the *Law*, and *Regulation 177(2)*.

Allegation Five – Section 174(2) of *Law*

It is alleged that, on 17 March 2022, the Provider failed to notify the Regulatory Authority of a serious incident at the Service within 24 hours, as prescribed under *Regulation 176(2)(b)*, in contravention of section 174 of the *Law*.

8. On 27 May 2022, the Provider 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.
9. Evidence submitted by the Provider as part of the response included:
  - a) Provider response letter to Notice (Attachment B);
  - b) Statement in the matter from [REDACTED];
  - c) Statement in the matter from [REDACTED];
  - d) Copies of Emails;
  - e) Attendance data for 17 March 2022; and
  - f) Copy of Services Lost Child Procedure.

## Law

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

### Legislation Relevant to Allegation One

#### **Section 165(1) of 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 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.

### Legislation Relevant to Allegation Two

#### **Section 169(1) of the Law - Offence relating to staffing arrangements**

The Approved Provider 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 preschool age – 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.

### Legislation Relevant to Allegation Three

#### **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.

### Legislation Relevant to Allegation Four

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

The 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 – Prescribed enrolment and other documents to be kept by approved provider**

(4) 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 –

(k) A child’s attendance record as set out in regulation 158.

(5) The approved provider of the education and care service must take reasonable steps to ensure the documents referred to in sub regulation (1) are accurate.

Penalty: \$2000

#### **Regulation 158(1) – Children’s attendance record to be kept by approved provider**

The approved provider of an education and care service must ensure that a record of attendance is kept for the service that -

- (a) Records the full name of each child attending the service; and
- (b) Records the date and time each child arrives and departs; and
- (c) Is signed by one of the following persons at the time that the child arrives and departs –
  - i. The person who delivers the child to the education and care service premises or collects the child from the education and care service premises;
  - ii. A nominated supervisor or an educator.

### Legislation Relevant to Allegation Five

#### **Section 174 of Law - Offence to fail to notify certain information to 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—

- (a) any serious incident at the approved education and care service;
  - (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.
  - (c) information in respect of any other prescribed matters.
- Penalty: \$4 000, in the case of an individual  
\$20 000, in any other case.

- (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(2) – Time to notify certain information to Regulatory Authority**

- (2) For the purposes of section 174(4) of the Law, a notice must be provided—
- (a) in the case of a notice under section 174(2)(a)—
    - (ii) in the case of any other serious incident, within 24 hours of the incident or the time that the person becomes aware of the incident.
  - (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.

**Obligations upon Regulatory Authority, Providers and Services**

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 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.*
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.

### **Decision**

17. The Authority has considered all the information supplied by the Provider, inclusive of the response to the Notice, and is satisfied that, on balance of probabilities, allegations One, Two, Three and Five are substantiated, being in contravention of sections 165(1), 167(1), 169(1) and 174(2) of the *Law*.
18. The Authority noted that the Provider has admitted to all allegations put to them in the Notice response.
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 the Provider attests 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 – the Director 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 the Director of appropriate steps to implement to either account for the child sooner 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, the Service and Provider had no knowledge of whether the child was safe or not.
23. Furthermore, the Authority notes that direction for how to manage the situation was given by the school's principal to the Director. The Authority's expectation is that the Provider's person with management and control or primary contact would have been engaged for direction in such a matter. The Authority recommends that if the school's principal is to be called on to direct the Nominated Supervisor in courses of action, the principal should be

nominated as a person with management and control and an application lodged to the Authority to ensure fitness and propriety under the *Law*.

24. In relation to section 169 of the *Law*, the Authority is satisfied, on the balance of probabilities that, on 17 March 2022, the Provider did not ensure that the relevant number of educators educating and caring for the children was no less than the number prescribed for this purpose.
25. The Authority noted the admissions made by the Provider, however, also noted that there appeared to be inconsistency between the Provider and the Nominated Supervisor regarding how many children were in attendance on the day itself.
26. The decision to substantiate s169 of the *Law* has been made in consideration of the Attendance data submitted by the Provider in response to the Notice 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.
27. In relation to section 174 of the *Law*, the Authority is satisfied, on the balance of probabilities, that the Provider has failed to notify this matter within the prescribed regulated timeframe of 24 hours for. The Authority noted the admissions made by the Provider in relation to this offence.
28. 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.
29. Considering the evidence, the objectives and guiding principles of the *Law*, the compliance history of the Service, and the steps taken by the Provider to mitigate risk of a similar incident and subsequent non-compliances, the Authority has decided to issue this administrative action rather than statutory compliance actions.
30. This Decision is issued to remind the Provider, 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.
31. In addition, this Decision is issued to remind the Provider to ensure that all educators, especially the Nominated Supervisor, are aware of and understand all policies and procedures, 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.

32. The substantiated contraventions have been recorded on your Service file and may be considered by the Authority in any future applications for approvals, amendments, or waivers. They may also be considered in determining the action to be taken, should further similar breaches of the *Law* or *Regulations* be substantiated.

**Legislation**

33. 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>.

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. Should you have any questions about this Decision please contact me at  
[Janine.fairburn@act.gov.au](mailto: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