

Ms [REDACTED]
Person with Management and Control
Community Services #1 Incorporated
RE: Mawson Out of School Hours Care

Email: [REDACTED]

Dear Ms [REDACTED]

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 allegations relating to the operation of Mawson Out of School Hours Care SE-00009687 (the Service), operated by Community Services #1 Incorporated PR-00005865 (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 17 August 2020, the Provider notified the Authority of a series of incidents on 12 August 2020 involving a child, [REDACTED] (NOT-40464425). In that notification, the Provider included numerous strategies being pursued, such as training with [REDACTED], observations of triggers, and that parents/guardians had been notified of behaviour to date. Refer to Attachment A.1 for a copy of the notification and follow-up documents and emails with the Authority.
5. On 21 August 2020, the Provider notified the Authority of a further incident involving [REDACTED] during the afternoon of 19 August 2020 (NOT-40465528). In that notification, it was stated that [REDACTED] guardian was notified at the end of the day, and the strategies outlined in NOT-40464425 were referred to. Refer to Attachment A.2
6. On 2 September 2020, the Provider notified the Authority of a further incident involving [REDACTED] on 1 September 2020 (NOT-40468627). Refer to Attachment A.3
7. All notified incidents involved escalation of [REDACTED] following an incident, with restraint and/or shadowing used as a strategy.

8. On 8 September 2020, a direct complaint was received regarding the strategies used in the care of [REDACTED] (a child who had [REDACTED]), together with other issues regarding lack of communication regarding incidents.
9. Due to the risk of harm when inappropriate behaviour guidance strategies are implemented, the Authority investigated.
10. During the investigation, evidence was gathered which supported the following allegations:
 - a) Allegation One

It is alleged that, between 3 August 2020 and 3 September 2020, in contravention of section 167(1) of the *Law*, the Provider failed to take reasonable precautions to protect a child being educated and cared for by the Service [REDACTED] from harm or hazard likely to cause injury in that there was no support plan in place and methods used on a child with [REDACTED]
 - b) Allegation Two

It is alleged that, in contravention of section 174 of the *Law*, the Provider has failed to notify prescribed circumstances to the Regulatory Authority, being circumstances arising at the Service that pose a risk to the health, safety or wellbeing of a child or children attending the Service.
 - c) Allegation Three

It is alleged that, in contravention of section 175 of the *Law*, the Provider has failed to maintain a prescribed record, being a record of all incidents and trauma in which [REDACTED] was involved whilst being educated and cared for at the Service.
 - d) Allegation Four

It is alleged that, in contravention of Regulation 86, the Provider has failed to notify [REDACTED] or any member of [REDACTED] of all incidents [REDACTED] in which [REDACTED] was involved between 3 August 2020 and 3 September 2020.
11. On 27 November 2020, a Show Cause Notice (SCN) was issued to the Provider. Refer Attachment B. Due to size, attachments to the SCN have not been included but are available on request.
12. There were three grounds for issuing the SCN, being:
 - a) Reasonable precautions to protect a child from harm;
 - b) Failure to notify the Authority of prescribed circumstances;
 - c) Inadequate record-keeping and notification to parent/carer.

13. The SCN outlined the evidence obtained during the investigation and attached copies of relevant documentation, including incident and enrolment documentation, correspondence, a witness statement obtained under the *Children and Young People's Act 2008*, and extracts of witness statements 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.
14. On 28 January 2021, after an agreed extension of time, a response was received by email from the Provider (Response). Refer Attachment C for the Response.
15. Within the Response, the Provider advised that [REDACTED] had ceased her role as nominated supervisor on 9 June 2020, but the notification was not submitted to the Authority until 22 December 2020, which is an offence under section 173(2) of the *Law*.

Law and Regulations

Legislative Provisions Relevant to Allegation One

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.

Regulation 170 – Policies and procedures to be followed

The approved provider of a centre-based services must take reasonable steps to ensure that nominated supervisors and staff members of, and volunteers at, the service follow the policies and procedures required under regulation 168.

Penalty: \$1000

Legislative Provisions Relevant to Allegation Two

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-
 - (c) information in respect of any other prescribed matters.
- (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 175 – Prescribed information to be notified to Regulatory Authority

- (2) For the purposes of section 174(2)(c) of the *Law*, the following matters are prescribed-
 - (c) any circumstance arising at the service that poses a risk to the health, safety or wellbeing of a child or children attending the service;

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 –
- (c) in any other case, within 7 days of the relevant event or within 7 days of the approved provider becoming aware of the relevant information.

Legislative Provisions Relevant to Allegation Three

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 –

- (b) an incident, injury, trauma and illness record as set out in regulation 87.

Regulation 87 – Incident, injury, trauma and illness record

- (1) The approved provider of an education and care service must ensure that an incident, injury, trauma and illness record is kept in accordance with this regulation.
- (3) The incident, injury, trauma and illness record must include –
 - (a) Details of any incident in relation to a child or injury received by a child or trauma to which a child has been subjected while being educated and cared for the education and care service or the family day care educator, including-
 - (i) The name and age of the child;
 - (ii) The circumstances leading to the incident, injury or trauma; and
 - (iii) The time and date the incident occurred, the injury was received or the child was subjected to the trauma;
 - (e) The name of any person –
 - (i) whom the education and care service notified or attempted to notify, of any incident, injury, trauma or illness which a child has suffered while being educated and cared for by the education and care service or family day care educator; and
 - (ii) the time and date of the notifications or attempted notifications.

Legislative Provisions Relevant to Allegation Four

Section 5 of the Law – Definition of Parent

Parent, in relation to a child includes –

- (a) A guardian of the child; and
- (b) A person who has parental responsibility for the child under a decision or an order of a court.

Regulation 86 – Notification to parents of incident, injury, trauma and illness

The approved provider of an education and care service must ensure that a parent of a child being educated and care for by the service is notified as soon as practicable, but not later than 24 hours after the occurrence, if the child is involved in any incident, injury, trauma or illness while the child is being educated and cared for by the education and care service.

Legislative Provisions Relevant to Allegation Five

Section 173 – Offence to fail to notify certain circumstances to Regulatory Authority

- (2) An approved provider must notify the Regulatory Authority of the following in relation to an approved education and care service operated by the approved provider –
 - (b) if a nominated supervisor of an approved education and care service –
 - (iii) withdraws consent to the nomination.
- (3) A notice under subsection (1) or (2) must –
 - (a) be in writing; and
 - (b) include any prescribed information.
- (5) A notice under subsection (2) must be provided within the relevant prescribed time to the Regulatory Authority that granted the service approval for the education and care service to which the notice related.

Regulation 174 – Time to notify certain circumstances to Regulatory Authority

- (2) For the purposes of section 173(5) of the *Law*, a notice must be provided –
 - (b) in any other case, within 7 days of the relevant event or within 7 days of the approved provider becoming aware of the relevant event.

Consideration of Provider’s Response to Allegations

Allegation One – section 167(1) substantiated

- 29. In relation to Allegation One, the SCN referred to evidence consisting of enrolment documentation (indicating that [REDACTED] was a child [REDACTED] two incident reports, notifications to the Authority, and extracts from witness statements regarding incidents and strategies involving [REDACTED] during the relevant time period.
- 30. In the Response, the Provider submitted that there was no information on the enrolment form to indicate [REDACTED], that a support plan was not received

until 8 December 2020, all parties were doing their best to support but failed to work as a team. The Provider also submitted that the Nominated Supervisor had assured that additional supports and communication was taking place. It was further submitted that supports in place were appropriate and that [REDACTED] had opportunities to calm down in the canteen upon arrival at the Service. The Authority notes that witness evidence indicates that opportunity was discouraged after return to face-to-face learning, with an unsuccessful attempt to use the stage.

31. The Provider submits that restraint was not occurring daily and that evidence was due to a miscommunication. It was submitted that shadowing was enacted for health and safety and that [REDACTED] was free to participate in group activities. That is not supported by the evidence, which indicates that [REDACTED] was restricted from participating in activities. The general strategy seemed to be to take a reactive approach, rather than a proactive one, which ended in [REDACTED] [REDACTED] escalated and restrained on occasion.
32. Corroborated evidence indicates that incidents involving [REDACTED] were generally provoked by actions of other children, such as [REDACTED] or other offensive remarks, and taking his belongings.
33. As the Provider noted, there was a lack of communication and trust between the parties. Numerous factors may have contributed to [REDACTED] escalation and increased support needs in Term 3, such as the increased number of children, inability to access quiet space, compulsory group time before outside play, absence of [REDACTED] without preparation, and lack of staff with knowledge of [REDACTED].
34. It is noted that, although the Nominated Supervisor was attempting to obtain a copy of [REDACTED]'s plan from the school, and to obtain assistance from members of [REDACTED] [REDACTED], it was ultimately the Provider's responsibility to ensure that appropriate strategies and supports were in place for [REDACTED].
35. In the Response, the Provider has recognised that, although no harm was intended (and the Authority does not suggest otherwise), during the period from 3 August 2020 to 3 September 2020, strategies were used with [REDACTED] that were not appropriate for a child with [REDACTED] [REDACTED].
36. The Authority notes that a positive behaviour support plan is now in place, having been prepared by [REDACTED], and that an action plan has now been implemented to upskill staff and ensure [REDACTED] is supported. The Authority also notes that a highly qualified new nominated supervisor is now engaged at the Service and that an action plan is being implemented to address failings identified as a result of the investigation and show cause process.
37. I find that the offence of failing to take reasonable precautions to protect a child from harm and hazards, in contravention of section 167(1), is substantiated on the balance of probabilities.

Allegation Two – section 174 substantiated

38. Regarding Allegation Two, the SCN referred to three incidents being reported to the Authority, with witness evidence indicating that further reportable incidents had taken place.

39. With regards to the incident on 2 September 2020, the Provider submitted that it may have taken place on 1 September 2020. The Authority notes that the 2 September 2020 incident involved different children and different circumstances, although it was another dispute regarding Ooshies.
40. The Authority notes the Provider's submission that there was no daily restrictive practice and that evidence was due to a miscommunication between the Nominated Supervisor and ██████ ██████ Regarding the Term 2 incident, although precise details were difficult to recall, multiple witnesses refer to that incident and one of them was not at the Service on 12 August 2020 so confusion is unlikely.
41. It seems likely that some incidents were not reported up to the Provider, given that the Provider has noted in the Response that some staff were unclear on identifying reportable incidents and were not reporting them to the Nominated Supervisor or Provider at the time.
42. I find the offence of failing to notify prescribed circumstances to the Authority, in contravention of section 174, to be substantiated on the balance of probabilities.

Allegation Three – section 175 substantiated

43. Regarding Allegation Three, the SCN referred to the two (unsigned) incident reports and witness evidence regarding incidents.
44. The Provider has advised that they could not locate any records for the incident of 12 August 2020 and submits that other incidents were not reportable or did not take place. It is noted, however, that the incident of 2 September 2020 was likely separate to the one on 1 September 2020, as it involved different children and circumstances. Witness E had a detailed recollection of both.
45. The Provider has conceded in its Response that the Nominated Supervisor failed to complete all necessary incident records.
46. I find the offence of failing to maintain a prescribed record, in contravention of section 175 of the *Law*, to be substantiated on the balance of probabilities.

Allegation Four – Regulation 86 - substantiated

47. Regarding Allegation Four, the SCN referred to witness evidence and documentation produced by the Provider under section 215 of the *Law*.
48. The Provider has submitted that a reasonable expectation was held that the Nominated Supervisor was communicating appropriately with ██████ ██████ and they were in regular contact regarding escalation and incidents involving ██████ However, the Provider has conceded that the Nominated Supervisor failed to communicate incidents to ██████ on all occasions.
49. As is evident from the events which played out, full and frank communication with parents is vital to providing appropriate support to all children, but particularly very vulnerable children such as ██████

50. I find the offence of failing to notify a parent of all incidents and [REDACTED] involving [REDACTED] in contravention of Regulation 86, to be substantiated on the balance of probabilities.

Additional Offence from Response – section 173(2) substantiated

51. Within the Opening Statement provided in the Response, the Provider advised of an error in that the cessation by [REDACTED] in the role of nominated supervisor of the Service was not notified to the Authority as required. It was stated that, from 9 June 2020 to 18 December 2020, [REDACTED] was the sole nominated supervisor of the Service, indicating that [REDACTED] [REDACTED] ceased on 8 June 2020.
52. The notification was required to be made within seven days, or by 15 June 2020, but was not made until 22 December 2020.
53. I find an offence of failing to notify prescribed circumstances to the Authority, in contravention of section 173(2) of the *Law*, is substantiated on the balance of probabilities.

Obligations Upon Regulatory Authority

54. 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”.*
55. 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.*
56. 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*.
57. 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.
58. 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

59. The Service has no relevant compliance history in this instance and it is noted that the Provider commenced operating the Service at the beginning of 2020 after a transfer from a previous provider.

Decision

60. Considering the evidence obtained in the investigation, the Response (including actions taken to address identified failings), 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.
61. 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.
62. The compliance notice is Attachment D to this Decision letter. You are required to take the steps directed in the Notice to comply with the relevant provisions.
 63. You must provide evidence of the steps required by the time indicated within the Notice at Attachment C.
 64. 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

65. 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).
66. 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

67. 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>.
68. 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>
69. 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

10 March 2021