



Mr [REDACTED]
Person with Management and Control
Affinity Education Group Limited
RE: Papilio Early Learning Turner

Email: [REDACTED]

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. 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. As you are aware, the Authority, has recently assessed a Notification of Serious Incident (NOT-40659574) relating to Papilio Early Learning Turner SE-40007193 (the Service), operated by Affinity Education Group PR-40001112 (the Provider), which engaged suspected offences being contravened.
3. 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

4. On 25 March 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.
5. The Notice outlined the grounds for issue, relevant evidence supporting suspected contraventions of *Law*, and potential compliance actions being considered if allegations were substantiated. Refer copy of Notice (minus attachments due to size, noting on request can be produced again) issued at Attachment A.
6. On 8 April 2022, the Provider submitted to the Authority, via email, a response to the Notice. Refer correspondence relating to response at Attachment B.

7. Evidence submitted by the Provider as part of the response, demonstrating actions undertaken as a result of the incident occurring 2 March 2022, included:
- a) Provider response and response template to Notice ([Attachment C](#));
 - b) Photographs of Fire Safety Door alarm locations;
 - c) Closing and opening checklists between 7 March 2022 and 8 April 2022;
 - d) Educators sign in/out template;
 - e) Evidence of staff Induction Progress;
 - f) Copy of a quote from the KODIAK group ([Attachment D](#));
 - g) Copy of the Provider approval issued 23 July 2015;

Law

8. Provisions of the *Law* relevant to the assessment engaged the following:

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 the Law - Offence relating to protection of children from harm and hazards

The approved provider, and the 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.

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.

(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.

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.

Obligations upon Regulatory Authority, Providers and Services

9. 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".
10. 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.
11. 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.
12. 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*.
13. 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.
14. 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

15. The Authority has considered all the information supplied by the Provider and is satisfied that, on balance of probabilities, the Provider has not ensured adequate supervision of all children at all times and was not ensuring that every reasonable precaution was taken to protect the child from harm and hazard likely to cause injury or illness on 2 March 2022, in contravention of sections 165(1) and 167(1) of the *Law*.
16. Furthermore, the Authority is satisfied, on balance of probabilities, the Provider has not taken reasonable steps to ensure records of educators working directly with children are accurate, in breach of *Regulation* 177.
17. In relation to substantiated contraventions of sections 165 and 167 of the *Law*, and *Regulation* 177, the Authority is satisfied that:

- a) The very nature of the notification of serious incident submitted by the Provider on 3 March 2022 supports the incident occurring as detailed, therefore supporting the offences under *Law* being contravened.
 - b) CCTV footage shows █████ climbing onto a chair, being able to open an exterior door and move in and out of the room and outdoors on multiple occasions, without the educator in the room noticing what was occurring. CCTV footage also shows that █████ eventually stopped returning back to the room and was seen running up the road outside of the Service which was noticed by a member of the public who then engaged with █████ at the corner of the street.
 - c) CCTV footage shows the above occurring over a 5 minute and 18 second timeframe. During this time, an educator was sitting at a table close to the door that █████ exited, but with her back towards him, engaged in an activity with another child.
 - d) The Emergency Evacuation Diagram submitted by the Provider indicates that the door that █████ exited is an Emergency Exit door which leads out towards McKay Lane and McKay Street in Turner. Furthermore, the diagram indicates that █████ would have, without guidance or support, needed to descend two flights of stairs to reach ground level with no additional barriers (eg a gate) preventing further access to public roads.
 - e) Evidence submitted in response to the Notice of actions undertaken by the Provider as a result of the incident, are considered as reasonable precautions that should have been taken prior to the incident of 2 March 2022, which would have likely mitigated the incident occurring in the first instance.
 - f) Working Directly with Children records for all rooms across the service submitted by the Provider on 4 March 2022, as outlined in paragraph 20 of the Notice, were inaccurate, with no evidence of reasonable steps taken by the Provider to ensure accuracy being provided to refute the allegation.
18. Admissions noted in the Provider’s response to the Notice of acknowledged non-compliance with the *Law* and *Regulations* further supports the Authority’s substantiation of non-compliance.
19. Considering the evidence obtained via the Notification of Incident, additional information and Notice response, the seriousness of the incident and the objectives and guiding principles of the *Law*, the Authority have determined that issuing a Compliance Notice would be appropriate and in the best interests of children. The Authority has also taken into consideration the Services previous compliance history when determining this action.
20. 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.
21. The Compliance Notice is Attachment E to this decision letter. You are required to take steps directed in the Notice to comply with the relevant provisions.
22. You must produce evidence of the steps required by **the times indicated for each step within the Notice at Attachment C.**

Appeal Rights

23. 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).
24. 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

25. The Education and Care Services National 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>.
26. 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>
27. Should you have any questions about this Decision or Compliance Notice please contact Assistant Director Janine Fairburn via email janine.fairburn@act.gov.au.

Yours Sincerely



Jo Williams
Director
Children's Education and Care Assurance
Education and Care Regulation and Support
ACT Education Directorate

2 May 2022