

Ms [REDACTED]

Email: [REDACTED]

Dear Ms [REDACTED]

### **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. As you are aware, the Authority, has recently investigating suspected inadequate supervision at Papilio Early Learning Turner SE-40007193 (the Service) operated by Affinity Education Group Limited PR- 40001112 (the Provider) on 23 November 2022.
3. The Regulatory Authority is satisfied that you, as the Nominated Supervisor at the relevant time, 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 15 February 2023, the Authority sent you a Show Cause Notice (the Notice) advising that the Authority had determined that there was sufficient evidence to support a case to answer for you, as the nominated supervisor, regarding suspected offences under the *Law*.
5. However, the Authority's final determinations would not be made until you 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 *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](#).
7. On 6 March 2023, you submitted to the Authority, via email, a response to the Notice. Refer Response (minus attachments due to size, noting on request can be produced again) at [Attachment B](#).

8. In response to this allegation, you are acknowledged as raising that you had undertaken relevant supervision training and development with educators when in the role of Nominated Supervisor, and that on 23 November 2023 the Service was rostered in compliance with the National Law.

Allegation – Sections 165 and 167.

9. It is alleged that, on 23 November 2022, you as Nominated Supervisor failed to ensure that three children were being adequately supervised for a duration of six minutes, placing them at risk of harms and/or hazards, in contravention of sections 165(2) and 167(2) of the *Law*.

Law

10. The following provisions of the *Law* were engaged by the investigation and decision:

**Section 165(2) of the *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 the *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.

**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.

### **Reasons**

17. The Authority is satisfied on the balance of probabilities, that on 23 November 2022, that you, as the Nominated Supervisor, failed to ensure that all children were adequately supervised at all times, contravening section 165(2), engaging a contravention of section 167(2) of the *Law*.
18. Evidence gathered in the Authority's investigation, including witness statements, prescribed documents, and CCTV footage, support the incident occurring as detailed, and subsequent engagement of offences being substantiated.
19. Regarding the allegation, a nominated supervisor's obligations under sections 165 and 167 of the *Law* is positively and strongly framed – the nominated supervisor must ensure that adequate supervision is provided at all times to ensure compliance. Adequate supervision is viewed as a reasonable precaution to be taken to protect children from harm and hazard likely to cause injury or illness.
20. Regarding the concerns raised relating to your fitness and propriety as a nominated supervisor, the Authority is satisfied that evidence submitted mitigates these concerns.
21. The Authority acknowledges your reflection on your role, and the ability to also undertake the role of Nominated Supervisor of a service whilst also undertaking an Area Manager role.

### **Decision**

22. Considering the evidence obtained, the level of seriousness of the contraventions, and the mitigating circumstances raised in your response surrounding the environment at the time of the allegations, I have decided that that issuing you a Caution is appropriate and in the best interests of children in making this decision.

23. This Decision serves a reminder to you as a nominated supervisor of your obligations under the *Law* to ensure that always, staffing and supervision levels need to meet the emotional, developmental, and physiological needs of children at all times.
24. In addition, this is a reminder that as a Nominated Supervisor, it is imperative to ensure that educators, at all times, are aware of and understand the policies, procedures and expectations of yourself and the Provider in relation to the operation of the Service, and in their roles of educating and caring for children. This awareness and understanding needs to be monitored and reinforced regularly with all educators to ensure it is imbedded in practice.
25. The substantiated breach of Section 165(2), 167(2) will be recorded and may be taken into account by the Authority when considering any further events of similar nature.

### **Legislation**

26. 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>.
27. 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>
28. If you have any questions in relation to this letter, please contact Authorised Officer Brian Cropper on (02) 6207 1104 or by email at [Brian.Cropper@act.gov.au](mailto:Brian.Cropper@act.gov.au).

Yours sincerely



Janine Fairburn  
Assistant Director  
Children's Education and Care Assurance  
Education and Care Regulation and Support  
6 April 2023