

Mr [REDACTED]
Person with Management or Control
G8 Education Limited
RE: Lavender Lane Child Care Service

Email: [REDACTED]

Dear Mr [REDACTED]

Decision to Issue Compliance Notice and Impose Condition on Service Approval

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 a complaint alleging that the safety, health and wellbeing of children was compromised at Lavender Lane Child Care Service SE-0009802 (the Service), operated by G8 Education Limited PR-00000898 (the Provider).
2. I am satisfied that the Provider did not comply with the provisions of the *Education and Care Services National Law Act (ACT)* (the Law) and the *Education and Care Services National Regulations* (the Regulations).
3. Web addresses for the Law and the Regulations are provided for your convenience at the end of this notice.

Background Facts

4. On 7 November 2019, the Authority received a direct complaint in relation to the operation of the Service. Allegations raised via the complaint included inadequate staffing and supervision on multiple dates in October and November 2019.
5. The Authority determined to conduct an investigation into suspected offences of inadequate staffing and supervision, and failure to take reasonable precautions to protect children from harm and from hazard likely to cause injury.
6. During the investigation, the Authority received the following further complaints, which were amalgamated into the existing investigation:
 - a. 12 November 2019 – direct complaint alleging inadequate staffing and supervision, also in November 2019;
 - b. 21 November 2019 – direct complaint alleging inadequate staffing that morning;
 - c. 27 November 2019 – notified complaint regarding inadequate staffing on 12 November 2019;

- d. 19 December 2019 – direct complaint alleging inappropriate interactions in the Tiny Toddler Room;
 - e. 2 January 2020 – notified complaint regarding an educator in the Tiny Toddler room.
7. A risk audit was carried out at the Service on the morning of 21 November 2020, Authorised Officer's attended the Service at approximately 7:45am and observed that the Service was not meeting minimum regulated ratio levels. It is noted that evidence relevant to this audit was provided as an attachment to the Show Cause Notice issued 6 May 2020.
 8. Evidence gathered during the investigation included documentation from the Provider produced under section 215 of the *Law*, together with numerous witness statements.
 9. On its face, such evidence supported the following allegations, related to staffing, supervision, protecting children from harm or hazard, inappropriate interactions and failure to maintain prescribed records:
 - a. It was alleged that, during the period 1 October 2019 to 5 December 2019 (inclusive) the Provider failed to ensure adequate staffing at all times during which children were being educated and cared for, in contravention of section 169(1) of the *Law*, engaging contraventions of sections 165(1) and 167(1) of the *Law* (Allegation One);
 - b. It was alleged that the Provider failed to ensure minimum qualification requirements were met at all times during which the Service was educating and caring for children between 4 and 8 November 2019 (inclusive), in contravention of section 169(2) of the *Law* (Allegation Two);
 - c. It was alleged that the Provider, by not taking reasonable steps to ensure that the requirements of Regulation 155 were met at all times during the period 1 October 2019 and 31 December 2019, has failed to take reasonable precautions to protect children from harm and from hazards likely to cause injury, in contravention of section 167 of the *Law* (Allegation Three);
 - d. It was alleged that the Provider has failed to maintain a prescribed record, being working directly with children records, between 1 October 2019 and 1 November 2019 (Allegation Four).
 10. On 6 May 2020, a Show Cause Notice (the Notice) was sent to the Provider by email. Refer Attachment A. Due to size, attachments to the Notice have not been included with this Decision.
 11. The Notice outlined the evidence obtained during the investigation and included provisions of the *Law* and *Regulations*. Attachments included tables of witness evidence relevant to staffing (Attachment D to the Notice) and to interactions (Attachment F to the Notice).
 12. The Notice advised that the Authority was considering compliance action based on evidence that contraventions of the *Law* were identified during the Authority's investigation.
 13. The three grounds related to staffing arrangements, interactions with children and failure to maintain prescribed records.

14. The Provider's response to the Notice (Response) was received on 1 June 2020, within the permitted time. Refer Attachment B.

Law and Regulations

Legislative Provisions Relevant to Allegation One

Section 165(1) of the 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 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.

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

An approved provider of an education and care service must ensure that, whenever children are being educated and cared for by a 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 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.

Regulation 123(1) –Educator to child ratios – centre-based services

The minimum number of educators required to educate and care for children at a centre based service is to be calculated in accordance with the following ratios -

- a) For children from birth to 24 months of age – 1 educator to 4 children;
- b) For children over 24 months and less than 36 months of age – 1 educator to 5 children;
- c) For children aged 36 months of age or over (not including children over preschool age) – 1 educator to 11 children;
- d) For children over preschool age in a jurisdiction, the relevant ratio (if any) set out in Chapter 7 for that jurisdiction.

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

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 purpose 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.

Legislative Provisions Relevant to Allegation Two

Section 169(2) – Offence relating to staffing arrangements

An approved provider of an education and care service must ensure that each educator educating and caring for children for the service meets the qualification requirements relevant to the educator's role as prescribed by the national regulations.

Penalty: \$10 000, in the case of an individual
 \$50 000, in any other case

Regulation 126 – Centre-based services – general educator qualifications

(1) The qualification requirements for educators at a centre-based service educating and caring for children preschool age or under are as follows-

- (a) at least 50% of the educators who are required to meet the relevant educator to child ratios for the service must have, or be actively working towards, at least an approved diploma level education and care qualification; and
- (b) all other educators who are required to meet the relevant educator to child ratios for the service must have, or be actively working towards, at least an approved certificate III level education and care qualification.

Legislative Provisions 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.

Regulation 155 – Interactions with children

An approved provider must take reasonable steps to ensure that the education and care service provides education and care to children in a way that—

- (a) encourages the children to express themselves and their opinions; and
- (b) allows the children to undertake experiences that develop self-reliance and self-esteem; and
- (c) maintains at all times the dignity and rights of each child; and

- (d) gives each child positive guidance and encouragement toward acceptable behaviour; and
- (e) has regard to the family and cultural values, age, and physical and intellectual development and abilities of each child being educated and cared for by the service.

Legislative Provisions to Allegation Four

Section 175 – Offence relating to requirement to keep enrolment and other documents

- (1) 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 – 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 relation 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.

Consideration of Provider’s response to the Notice

General

15. By way of general comment in the Response, the Provider:

- a. *Expressed an understanding that the concerns raised originated from several anonymous complaints made to the Regulatory Authority and subsequent observations.*

For the purposes of clarification, none of the complaints received were anonymous, and they were made separately by numerous different complainants;

- b. *Expressed an understanding that the Regulatory Authority has accepted and relied upon witness statements provided by ten (10) current or former employees who worked at the Service.*

For the purposes of clarification, at the time of issuing the Notice, no offences had been substantiated, and the purpose of the Notice was to present the evidence obtained (including Authorised Officer statements, witness statement extracts, and analysis of staffing levels and qualifications) in order to afford the Provider an opportunity to respond to the allegations and produce any evidence refuting the allegation;

- c. *Noted that extracts only were provided, and the Authority has not confirmed whether other inconsistent witness statements were obtained and has not confirmed the identities of the witnesses.*

By way of clarification, the Notice refers to “relevant” evidence, which is evidence which tends to prove or disprove a matter in issue. Attachments D and F to the Notice, being relevant extracts of evidence, do contain evidence that does not support the allegation. It would be improper for a regulator to “cherry pick” and present only evidence which supports an offence. Witness statements were obtained from educators, both former and current, from all rooms across the Service.

Regarding allegations of inadequate staffing, it is the Authority’s position that the identity of witnesses is not essential for the purposes of providing an adequate opportunity to respond to the allegation. Evidence to refute an allegation of inadequate staffing ought readily be available using prescribed records and other documents such as rosters, pay records and witness statements if required.

It is not the Authority’s usual practice to disclose the identity of witnesses unless essential. It is always open to the Provider to make application under Freedom of Information legislation.

Allegations One and Two – Inadequate Staffing Arrangements – Substantiated

16. In relation to Allegation One (inadequate staffing numbers), the Notice referred to evidence consisting of analysis of prescribed documents obtained from the Provider under section 215 of the *Law*, Authorised Officer statements evidencing observations at the Service, and witness statements, copies or extracts of which were provided.
17. In relation to Allegation Two (inadequate qualified educators), the Notice referred to evidence consisting of analysis of prescribed documents obtained from the Provider under section 215 of the *Law*, including staff records, working directly with children records and child attendance records.
18. In the Response, the Provider did not refute Allegations One or Two, but outlined various circumstances in mitigation, being:
 - a. *Unusual disruption and turnover during the final quarter of 2019, largely due to the former nominated supervisor, Ms [REDACTED] ceasing her employment with the Provider and encouraging other team members to cease employment;*
 - b. *An internal review and investigation indicated that prior to and following the end of her employment, Ms [REDACTED] made a number of direct complaints to the Regulatory Authority regarding ratios and supervision, and encouraged a number of families with children in care to also make direct complaints to the Authority, expressing an intention to harm the commercial interests of the Provider as a result of her interest in a new service at which she is currently employed;*

- c. *The Provider experienced delay in recruitment of suitably qualified and experienced team members to fill vacancies. Agency team members and team members from other local approved services were utilised at the Service when available;*
 - d. *██████████ was appointed as nominated supervisor but, shortly after her appointment, experienced a serious medical emergency resulting in extended absence;*
 - e. *The former area manager, ██████████ abandoned her employment on 13 November 2019 without notice, which contributed negatively to the available supervision, mentoring and guidance provided. A new Area Manager was appointed in late December 2019;*
 - f. *A number of team members at Conder failed to follow policies and procedures relating to leave and absence and did not provide sufficient notice for the Provider to roster alternative team members;*
 - g. *A number of team members were negatively affected by the national bushfire crisis;*
 - h. *As a result of the above unnotified absences, other team members experienced more difficult and stressful working conditions than they otherwise would have;*
 - i. *The Provider provided additional emergency centre support on 25 November 2019, 26 November 2019, and 2 December 2019;*
 - j. *Action Plans were implemented.*
19. It is noted that the Provider has not produced evidence refuting Allegations One and Two, nor produced any evidence to support the contentions in mitigation (other than the Action Plan, and an internal audit document). In particular, the Provider refers to an investigation regarding Ms ██████████ but has not provided any of the statements mentioned, or any other documentation in support. I can confirm that Ms ██████████ made one direct complaint to the Authority, regarding inadequate staffing on multiple dates. One of those dates, being the morning of 7 November 2019, was corroborated by other witnesses and prescribed records. On other dates, prescribed records were not accurate enough to analyse, or were absent.
20. The origin of a complaint is not material; to substantiate any allegation, it must be supported by evidence gathered during the investigation (including any show cause process). As mentioned, evidence was gathered from a variety of sources to support Allegations One and Two, including records produced by the Provider.
21. An allegation of intent to cause harm is a serious one, and the Authority is unable to take it into account without corroborative evidence.
22. Regarding the cessation of employment by ██████████, the Authority notes the evidence of Witness D in Attachment D to the Notice, which referred to the giving of notice in mid October 2019 prior to leaving in early November 2019. The Response does not contain any evidence to support the submission that ██████████ abandoned her employment without notice.
23. Regarding the Continuous Quality Improvement Action Plan, it is noted that it is dated 2 January 2020. The most recent status update is 31 March 2020 (refer [Attachment C](#) for a copy). I note that, according to the update, the Workforce Management System was due to be rolled out in the second quarter of 2020 and that weekly reporting on staffing compliance was implemented by 29 February 2020.

24. Unexpected absences are a contingency that occur at every approved service and it is essential to have procedures in place to cover those unexpected absences when they do occur.
25. Having considered the evidence relevant to Allegations One and Two, and the absence of evidence in the Response to refute those allegations, I am satisfied that Allegations One and Two have been substantiated on the balance of probabilities.
26. I am satisfied that the Provider contravened sections 165(1), 167(1) and 169(1) of the *Law* by failing to ensure adequate staffing at all times that children were educated and cared for at the Service between 1 October 2019 and 5 December 2019.
27. I am satisfied that the Provider contravened section 169(2) of the *Law* on each day between 4 and 8 November 2019 (inclusive).

Allegation Three – Inappropriate Interactions – Substantiated

28. In relation to Allegation Three, the Notice referred to statements obtained from multiple witnesses regarding inappropriate interactions with children in the Tiny Toddlers room, relevant extracts of which were included at Attachment F to the Notice.
29. In its Response, the Provider stated:
 - a. *Despite regular attendances, the incidents described were not recorded by centre-based team managers, were concealed from the Provider by team members and the Provider was not aware of the incidents;*
 - b. *The Provider has implemented robust complaints and child protection policies and procedures and provides training to team members;*
 - c. *The Provider acknowledges that procedures were not followed at the Service during the relevant period and will provide additional training and coaching at the Service to ensure policies and procedures are followed.*
30. It is noted that the Provider has conceded that the incidents took place but has denied having knowledge of them.
31. As stated in the Notice, there was a lack of qualified staff in the Tiny Toddlers room throughout the relevant period. The room had up to 16 children (aged two years and under) in attendance, with up to three new trainee educators working directly with children in the room, often in the absence of a Diploma-qualified educator. The room was described as “chaotic” by three different witnesses. It is trite to say that such conditions increase educators’ stress levels, increasing the likelihood of inappropriate interactions, regardless of the training provided.
32. Provision of training in itself does not satisfy a provider’s obligation to take reasonable steps to ensure interactions are appropriate. Educators must be supported by the Provider (which

includes appropriately qualified staff in each room and at management level) and their conduct must be adequately monitored to ensure interactions are appropriate.

33. Having considered the evidence relevant to Allegation Three, including the Provider's Response, I am satisfied that Allegation Three has been substantiated on the balance of probabilities.
34. I am satisfied that Regulation 155 was contravened, engaging a contravention of section 167(1) of the *Law*, on numerous occasions between 1 October 2019 and 31 December 2019.

Allegation Four – Failure to Maintain Prescribed Records – Substantiated

35. In relation to Allegation Four, the Notice referred to prescribed documents (being working directly with children records) produced by the Provider under section 215. On their face, those documents had a level of inaccuracy and incompleteness so as to constitute a failure to maintain that prescribed document.
36. In its Response, the Provider:
 - a. *Acknowledged and accepted that a number of team members at the Service did not adequately complete required documentation during the relevant period.*
 - b. *Referred to the ACT Action Plan regarding enhanced training and support for the team members at the Service.*
37. It is noted that the problem was a systemic one, over an extended period of time, covering all rooms, and multiple educators. One or two educators failing to complete records indicates a problem at educator level, but a widespread failure indicates ineffective training at educator and centre-management level, and inadequate governance and monitoring at Provider level.
38. Having considered the evidence relevant to Allegation Four and the Provider's concession in the Response, I am satisfied that Allegation Four has been substantiated on the balance of probabilities.
39. I am satisfied that section 175 of the *Law* was contravened on numerous occasions between 1 October 2019 and 1 November 2019.

Obligations upon Regulatory Authority

40. 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”.
41. 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.

- 42. 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*.
- 43. 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.
- 44. 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.

Compliance History

- 45. In determining appropriate compliance action, I have considered the compliance history of the Provider's services in the ACT, and the services held by the Provider's associated entities. It is noted that the Service had no compliance history prior to a compliance notice in January 2020 resulting from a risk audit in December 2019. It is further noted that in 2014 it was rated as Meeting NQF and in late 2019 was rated as Working Towards NQF
- 46. The compliance history considered is Attachment D to this Decision.

Decision

- 47. Considering the evidence obtained in the investigation, the Response to the Notice, the Provider's compliance history in the ACT, and the objectives and guiding principles of the *Law*, I have determined that issuing a compliance notice and imposing a condition on the Service Approval would be appropriate and in the best interests of children.
- 48. 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.
- 49. The compliance notice is Attachment E to this Decision letter. You are required to take the steps directed in the Notice to comply with the relevant provisions.

50. You must produce evidence of the steps required by **the times indicated for each step within the Notice at Attachment E.**

51. The Authority is empowered to amend a service approval under section 55 of the *Law*

55 – Amendment of service approval by Regulatory Authority

- (1) The Regulatory Authority may amend a service approval at any time without an application from the approved provider.
- (2) Without limiting subsection (1), an amendment may vary a condition of the service approval or impose a new condition on the service approval.
- (3) The Regulatory Authority must give written notice of the amendment to the approved provider.
- (4) An amendment under this section has effect:
 - (a) 14 days after the Regulatory Authority gives notice of the amendment under subsection (3); or
 - (b) If another period is specified by the Regulatory Authority, at the end of that period.
- (5) The Regulatory Authority must amend a service approval to the extent that it relates to an associated children’s service in accordance with any direction by the children’s services regulator if that direction is given in accordance with the children’s services law of this jurisdiction.

52. The Service Approval is hereby amended by imposing the following condition:

“For each day on which the Service is educating and caring for children, the Provider must roster two additional educators, who are in excess of the educators required to meet the minimum number prescribed by Regulation 123 including provision of cover for all breaks or other times an educator is not working directly with children as defined by Regulation 13.”

53. This condition is to minimise the risk that unexpected absences do not continue to result in staffing levels being inadequate at the Service. The condition comes into effect fourteen (14) days from the date of receipt of this Decision.

54. An Amended Service Approval is Attachment F to this Decision.

55. The Authority will also be increasing its auditing of the Service to ensure compliance is appropriately monitored, so as to ensure the health, safety and wellbeing of children being educated and cared for.

Rights of Review

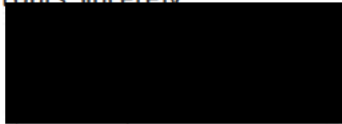
56. A decision to issue a compliance notice and a decision to impose a condition on a service approval are **reviewable decisions** as defined in Section 190 of the *Law*. Under section 191 of the *Law*, you may apply for an internal review of these decisions or either of them. Any application must be lodged within 14 days after you are notified of the decision (or, if not notified, within 14 days after becoming aware of the decision).

57. 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

58. 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>.
59. 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>
60. Should you have any questions about this Decision, the Condition, or the Compliance Notice please contact Senior Investigator, 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

7 July 2020