

Mr [REDACTED]
[REDACTED]
Snedden Hall & Gallop
Lawyers

Email: [REDACTED]

Dear Mr [REDACTED]

DECISION TO ISSUE PROHIBITION NOTICE
YOUR REF: 25450 ESH

1. As a delegate of the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance, I am satisfied that there may be an unacceptable risk of harm to a child or children if you were allowed to be involved in the provision of education and care to children.
2. The Authority has made enquiries into an allegation of inappropriate conduct by yourself towards a two-year-old child, whilst you were employed as an educator at Gungahlin Kinder Haven SE-40001554 (the Service), operated by Alfoom Investments Pty Ltd PR-40000959 (the Provider).
3. Web addresses to the *Education and Care Services National Law Act (ACT) (the Law)* and the *Education and Care Services National Regulations (the Regulations)* are provided for your convenience at the end of this Decision.

Facts

4. On 31 May 2023, you entered an Enforceable Undertaking with the authority, in relation to a substantiated offence of inappropriate discipline of a child when you were employed at Lavender Lane Early Learning Conder on 13 January 2023. Refer to Attachment A for a copy of the Enforceable Undertaking.
5. By this Decision, the Authority gives notice of its withdrawal of consent to the Enforceable Undertaking at Attachment A.
6. On 9 June 2023, the Authority received a notification from the Provider alleging that you had inappropriately disciplined a two-year old child, known to be [REDACTED]. Due to the risk of harm occasioned to children if subjected to inappropriate discipline, the Authority carried out additional enquiries. The Provider advised that you had been suspended from employment pending investigation.

7. On 28 July 2023, the Authority sent you a Show Cause Notice for Prohibition (Show Cause Notice). The Show Cause Notice referred to and attached evidence relevant to the investigation including prescribed records, CCTV footage, and the Provider's investigation records, including the Provider's investigation interview with you on 21 June 2023.
8. The Authority advised in the Show Cause Notice that, if the allegation was substantiated, the Authority would consider whether you should be prohibited from:
 - a. Providing education and care to children for an education and care service;
 - b. Being engaged as an educator, family day care educator, employee, contractor or staff member of, or being a volunteer at, an education and care service; and/or
 - c. Carrying out any other activity relating to an education and care service.
9. Refer [Attachment B](#) for a copy of the Show Cause Notice, without attachments due to size. Additional copies of attachments can be provided on request.
10. On 31 August 2023, the Authority received a Response to the Show Cause Notice (Response) via your legal representative, Snedden Hall and Gallop Lawyers. Refer [Attachment C](#).

Allegation

11. It was alleged in the Show Cause Notice that:
 - a. On 7 June 2023, while engaged as an educator at the Service, you were witnessed using inappropriate discipline against a child, known to be [REDACTED] (aged 2 years), in a manner unreasonable in the circumstances (note that the Show Cause Notice erroneously referred to [REDACTED], in accordance with the Provider's notification);
 - b. The described conduct included physically lifting the child up by one arm to be face-to-face with you after the child allegedly attempted to bite you. In addition, you were also alleged to have then held on to the child in a restrictive manner when the child wanted to move away from you, in contravention of section 166(3) of the *Law*.

Response

12. In your Response, you advised that you ceased employment with G8 on 31 July 2023 and have not worked in the early education sector since your suspension on 8 June 2023. You advised that following the incidents leading to the Enforceable Undertaking and the incident of 7 June 2023, combined with aggressive bullying from G8 and centre parents, and a lack of support from G8, you decided not to continue to work in the sector.
13. The Authority notes your [REDACTED] and your submission that your [REDACTED] combined with prejudice/bullying means you are unlikely to succeed in the early education sector. However, you have submitted that you do not pose an unacceptable risk of harm to children.
14. In your Response, you have submitted that:

- a. the incident did not involve corporal punishment or discipline that was unreasonable in the circumstances;
- b. that another nearby child, [REDACTED] was known to bite other children;
- c. you picked up [REDACTED] with both arms under his armpits and brought him closer to check for bite marks;
- d. [REDACTED] was lifted approximately 5-10cm off the ground;
- e. that you were checking [REDACTED] for bite marks and comforting him, and not punishing him
- f. you did try to stop [REDACTED] walking away because you wanted to make sure he was not hurt.

Law

15. The evidence obtained during the Authority's enquiries into the matter, and as provided to you via the Notice, engages the following sections of the *Law*:

Section 166 of the Law – Offence to Use Inappropriate Discipline

- (3) A staff member of, or a volunteer at, an education and care service must not subject any child being educated and cared for by the service to-
 - (a) any form of corporal punishment; or
 - (b) any discipline that is unreasonable in the circumstances.

Section 182 of the Law – Grounds for issuing prohibition notice

- (1) The Regulatory Authority may give a prohibition notice to a person who is in any way involved in the provision of an education and care service if it considers that there may be an unacceptable risk of harm to a child or children if the person were allowed-
 - (a) To remain on the education the education and care service premises; or
 - (b) To provide education and care to children.

- (2) For the purpose of subsection (1), a person may be involved in the provision of an approved education and care service as any of the following-
 - (a) An approved provider;
 - (b) A nominated supervisor;
 - (c) An educator;
 - (d) A family day care educator;
 - (e) An employee;
 - (f) A contractor;
 - (g) a volunteer;
 - (h) a person who was formerly a person referred to in paragraphs (a) to (g) in relation to the approved education and care service -

or in any other capacity

Section 183 of the Law – Show cause notice to be given before prohibition notice

- (1) Before giving a person a prohibition notice, the Regulatory Authority must give the person a notice (a *show cause notice*) –
 - (a) stating that the Regulatory Authority proposes to give the person a prohibition notice; and
 - (b) stating the reasons for the proposed prohibition; and
 - (c) inviting the person to make a written submission to the Regulatory Authority, within a stated time of at least 14 days, about the proposed prohibition.
- (2) Subsection (1) does not apply if the Regulatory Authority is satisfied it is necessary, in the interests of the safety, health or wellbeing of a child or children, to immediately issue a prohibition notice to the person.

Reasons

Obligations upon Regulatory Authority

16. The starting point for the Authority is the *Law*. Section 3 of the *Law* sets out objectives and guiding principles of the *Law*. 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; ...’
17. The relevant guiding principle at sections 3(3)(a) namely:
 - a.) that the rights and best interests of the child are paramount.
18. Section 260 of the *Law* sets out the functions of the Regulatory Authority, which include:
 - c.) to monitor and enforce compliance with this law;
19. The *Law* works to protect a particularly vulnerable part of our society — children — when they are in the care of people other than their parents or guardians. The *Law* authorises providers, services, and educators to participate in a regulated environment and requires those participants to comply with the *Law*.
20. A key object 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.
21. The *Law* is predominantly a protective law and the exercise of powers in this type of regulatory context is recognised by Courts as not being punitive. In the case of *New South Wales Bar Association v Evatt* [1968] HCA 20 the High Court set out in clear terms that action to enforce professional standards is protective.
22. ‘Discipline’ is any strategy employed by an educator with the intention of changing a child’s behaviour. Discipline that is inappropriate within the meaning of section 166 of the *Law* includes any form of physical punishment or any behaviour management strategy likely to cause emotional or physical harm to a child. Examples include yelling, physically dragging a

child, unreasonable restraint of a child, using threatening or humiliating language, isolating, or shaming children.

23. The Authority has deliberated on all available evidence and is satisfied that your conduct was, on balance of probabilities, in response to [REDACTED] biting you. CCTV footage identifies that the interaction was rejected by [REDACTED] who was visibly struggling to get away. Information submitted by the Provider does not support that you were assessing [REDACTED] for bites, but that [REDACTED] bit you on the chest and you were responding to that incident.
24. The Authority finds the allegation of inappropriate discipline to be substantiated on the balance of probabilities.
25. Whilst the Authority appreciates the challenges posed by your [REDACTED] and the alleged online bullying by parents, the Authority's objective is to ensure the safety, health, and wellbeing of children.
26. In deciding if action should be taken, the Authority has considered all available evidence, including your Response, your regulatory history, and the likelihood of risk to children.

Regulatory History

27. In coming to a Decision, the Authority has considered your regulatory history within the ACT. Attached to the Show Notice was a copy of the Enforceable Undertaking entered into on 31 May 2023, arising from a substantiated offence of inappropriate discipline on 13 January 2023.

Decision

28. The required threshold for prohibition is that a person may pose an unacceptable risk of harm to children. The Authority finds that risk is constituted by your demonstrated inability to appropriately respond to children's behaviour on two occasions.
29. Considering the evidence and information available, and the objectives and guiding principles of the *Law*, the Authority has decided to issue you a Prohibition Notice, pursuant to sections 182 and 183(2) of the *Law*, to come into effect on the date of this Decision.
30. This notice prohibits you from providing education and care to children for an education and care service; being engaged as an educator, family day care educator, employee, contractor or staff member of, or being a volunteer at, an education and care service; or carrying out any activity relating to an education and care service. A copy of the Prohibition Notice is at Attachment D.
31. The Authority may consider a cancellation of the Prohibition Notice in the future based on an application that provides information as set out in Section 186 of the *Law and Regulation* 189.
32. Section 186 of the *Law* permits a person for whom the prohibition notice is in force to apply to the Regulatory Authority to cancel the notice.

Section 186 of the Law - Cancellation of prohibition notice

- (1) If the Regulatory Authority is satisfied there is not a sufficient reason for a prohibition notice to remain in force for a person, the regulatory Authority must cancel the prohibition notice and give the person notice of the cancellation.
- (2) A person may for whom a prohibition notice is in force may apply to the Regulatory Authority to cancel the notice.
- (3) The applicant must-
 - (a) be in writing; and
 - (b) include the prescribed information; and
 - (c) be signed by the person.
- (4) The person may state in the application anything the person considers relevant to the Regulatory Authority's decision about whether there would be an unacceptable risk of harm to children if the person were-
 - (a) To remain at the education and care service premises; or
 - (b) To provide education and care to the children.
- (5) The application may include a statement setting out any changes in the person's circumstances since the prohibition notice was given or since any previous application under this section that would warrant the cancellation of the notice.

Regulation 189 Application to cancel prohibition notice

For the purpose of section 186(3) (b) of the *Law*, the following information is prescribed-

- (a) the applicant's name;
- (b) contact details for the applicant, including an address for service of the decision;
- (c) a statement setting out the grounds for the application to cancel the prohibition notice.

Review rights

33. In accordance with section 192 of the *Law* a decision to give prohibition notice is a reviewable decision for external review. A person who is the subject of a reviewable decision for an external review may apply to the relevant tribunal or court for a review of the decision. For the ACT this is the ACT Civil and Administrative Tribunal. Such application must be made within 30 days after the day on which you receive the prohibition notice.
34. The *Law* applies to you as a former educator. 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>
35. The *Law* and *Regulations* may be viewed at: <http://www.acecqa.gov.au/national-law>, and <http://www.legislation.nsw.gov.au/#/view/regulation/2011/653>
36. Should you have any questions about this Prohibition Notice please contact Jo Williams via email at Jo.Williams@act.gov.au.

Yours Sincerely



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

26 September 2023