



**ACT**

Government

Education and Training

Mr [REDACTED]  
Person with Management or Control  
Alfoom Investments Pty Ltd  
RE: Gungahlin Kinder Haven

Email: [REDACTED]  
[REDACTED]

Dear Mr [REDACTED]

### **Decision to Issue Administrative Action**

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 notified complaint alleging that the *Education and Care Services National Law (ACT)* (the *Law*) was contravened at Gungahlin Kinder Haven SE-40001554 (the Service), operated by Alfoom Investments Pty Ltd PR-40000959 (the Provider).
2. Web addresses for the *Education and Care Services National Law (ACT)* (the *Law*) and the *Education and Care Services National Regulations 2011* (the *Regulations*) are provided for your convenience at the end of this decision.

### **Background**

3. On 27 April 2021, the Authority received a notification of complaint (NOT-40532950) by a parent regarding an injury to their child, [REDACTED] (1 year, 11 months) caused by falling and striking his head on concrete, which was not notified to the parents until collection. [REDACTED] was taken to hospital after repeated vomiting.
4. Between 27 April 2021 and 21 June 2021, the Authority engaged in follow-up monitoring with the Provider and obtained additional documentation, including the Provider's internal investigation. The additional documentation provided reasonable grounds for suspected offences under the *Law* relating to supervision and protection from harm.
5. Due to the risk to children when inadequately supervised, the Authority determined to investigate suspected offences of inadequate supervision and failure to take reasonable precautions to protect children from harm and from hazard likely to cause injury.
6. Throughout the course of the investigation, the Authority obtained evidence from numerous sources, including initial notifications, documentation, and witness statements obtained under section 215 of the *Law*. This evidence suggested three allegations that supported offences under the *Law*.

7. On 15 September 2021, the Authority issued the Provider with a Show Cause Notice (SCN). Refer Attachment A. Due to size, attachments to the SCN have not been included with this Decision but can be produced upon request.
8. On 22 September 2021, the Provider requested an extension of time to respond to the SCN to 13 October 2021, which was agreed by the Authority in consideration of the significant additional load on Providers and Services due to COVID-19 restrictions.
9. On 13 October 2021, the Provider produced a Response, with an attached document entitled "WDWC and Ratio-Accounting for Children Check Procedures". Refer Attachment B.

### **Consideration of Response**

#### **Allegation One – Inadequate Supervision**

10. It was alleged that, on Thursday 22 April 2021, the Provider failed to ensure adequate supervision of all children being educated and cared for in that [REDACTED] (DOB [REDACTED]) sustained a head injury and parents were not notified promptly, in circumstances where two educators were required to educate and care for 11-12 children under two years of age, in contravention of sections 165(1) and 167(1) of the *Law*.

#### **Allegation One– Relevant Legislation**

11. Provisions of the *Law* relevant to Allegation One are:

##### **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.

#### Allegation One– Evidence and Submissions

12. Evidence gathered relevant to Allegation One consisted of the Provider's notification, documents and witness statements obtained under section 215 of the *Law*.
13. Although there were inconsistencies in witness evidence regarding requests for support from the responsible person or nominated supervisor, and whose responsibility it was to notify ████████ parents, evidence was consistent that, after 3:00pm two educators were educating and caring for 11-12 children under two years of age.
14. In the Response, the Provider submitted that:
  - a. The educator who left Nursery 2 at 3:00pm did not ensure adequate supervision was maintained during the period she transitioned;
  - b. The incident was witnessed by two educators, one of whom attended immediately and provided first aid;
  - c. The educator advised the responsible person, ████████, and requested she notify ████████ parents and that Ms ██████ cannot recall being asked. The Authority notes Ms ██████ specifically refutes this conversation in her statement;
  - d. The educators responsible were experienced long term employees;
  - e. There is a range of factors to be considered regarding adequate supervision;
  - f. There was adequate staffing in place immediately prior to the incident. The Authority notes that the incident took place at approximately 3:30pm, 30 minutes after the third educator finished her shift;
  - g. ████████ early walking stage contributed to the fall.
15. Whilst noting the admission that supervision was not adequate after 3:00pm, the Authority is concerned at the Provider's position, evident in the internal investigation and the Response, of placing responsibility for ensuring adequate supervision on the educators, in circumstances where an educator's rostered shift had ended, and there appeared to be insufficient staff available to support the number of children in the combined Nursery rooms.
16. It is the Provider's (and Nominated Supervisor's) responsibility under the *Law* to ensure that staffing numbers and supervision are adequate. Adequate supervision cannot be ensured when staffing resources within a room are insufficient, as in this instance.

#### Allegation One– Authority's Finding

17. For the reasons outlined above, the Authority is satisfied that the following contraventions of the *Law* have been substantiated on the balance of probabilities:

- a. Failing to ensure adequate supervision of all children being educated and cared for by the Service on 22 April 2021, in contravention of section 165(1) of the *Law*; and
- b. Failing to take reasonable precautions to protect children being educated and cared for by the Service from harm and from any hazard likely to cause injury on 22 April 2021, in contravention of section 167(1) of the *Law*.

#### Allegation Two – Staffing

18. It was alleged that, on 22 April 2021, the Provider failed to ensure that staffing levels met the prescribed minimum at all times when children were being educated and cared for by the Service, in contravention of section 169(1) of the *Law*.

#### Allegation Two – Relevant Legislation

19. The provisions of the *Law* and *Regulations* relevant to Allegation Two are:

##### **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 123 (1) and (2) –Educator to child ratio-centre – based service**

- (1) 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, 1 educator to 15 children.
- (2) If children being educated and cared for at a centre-based service are of mixed ages the minimum number of educators for the children must meet the requirements of subregulation (1) at all times.

**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.

Allegation Two – Evidence and Submissions

20. Evidence relevant to Allegation Two consisted of prescribed records obtained under section 215 of the *Law*, analysed by the Authority, which indicated potential inadequate staffing. Not all relevant prescribed records were able to be produced by the Provider, with some working directly with children records missing. These documents were supplemented by time sheets and rosters which did not include all relevant information. Children’s attendance records were also incomplete. Accordingly, multiple assumptions were required when analysing staffing, which were in favour of the Provider where possible.
21. In the Response, the Provider submitted that:
  - a. The number of educators working directly with children was inconclusive due to incomplete record-keeping;
  - b. Actual child attendance was inconclusive due to children not being signed out;
  - c. Ratio documentation indicated 12 children being supervised by two educators at the time of the incident; and
  - d. Prior to 3:00pm, ratio requirements were maintained in Nursery 2 and Educator [REDACTED] did not follow centre procedures for communicating staffing levels prior to shift completion.
22. The Authority notes that there is conflicting evidence as to whether the Responsible Person was advised that the Nursery 2 space would have insufficient staffing after 3:00pm but, ultimately, it is the Provider’s (and Nominated Supervisor’s) responsibility to ensure minimum prescribed staffing levels are met.
23. Witnesses were unable to provide evidence regarding staffing levels on an “under-the-roof” basis and the poor quality of the prescribed records renders it unreasonable to substantiate an offence on the basis of those documents.

### Allegation Two – Authority’s Finding

24. For the reasons outlined above, the Authority is not satisfied that there is sufficient evidence to substantiate any offence under section 169(1).

### Allegation Three – Prescribed Records.

25. It was alleged that the Provider failed to take reasonable steps to ensure accuracy of prescribed records for 22 April 2021 in that working directly with children records were incomplete and inaccurate, and children’s attendance records were incomplete, in contravention of Regulation 177(2).

### Legislation Relevant to Allegation Three

#### **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 158 – Children’s attendance record to be kept by approved provider**

- (1) The approved provider of an education and care service must ensure that a record of attendance is kept for the service that –
  - (a) records the full name of each child attending the service; and
  - (b) records the date and time each child arrives and departs; and
  - (c) is signed by one of the following persons at the time that the child arrives and departs-
    - (i) the person who delivers the child to the education and care service premises or collects the child from the education and care service premises;
    - (ii) a nominated supervisor or an educator.

#### **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

#### Allegation Three – Evidence and Submissions

26. Evidence relevant to Allegation Three consisted of prescribed records (working directly with children records and children’s attendance records) produced by the Provider under section 215. Some records were confirmed to be missing, and there were inaccuracies within prescribed records, which were apparent on their face. The incomplete and inaccurate information was noted on the ratio analysis provided with the SCN.
27. In the Provider’s Response, it was submitted that the Service was going through a transitional period at the time, with commencement of a new nominated supervisor on 19 April 2021, who was completing her induction program. It was noted by the Provider that, on the day of the incident, the records were not maintained as required.
28. The Authority notes that there was a person-in day-to-day charge at the Service (other than Ms [REDACTED] and completion of working directly with children records ought not be adversely affected by a new nominated supervisor if educators have been appropriately supported and trained to complete them, bearing in mind that record-keeping is the Provider’s responsibility under the *Law*.

#### Allegation Three – Authority’s Finding

29. For the reasons outlined above, the Authority finds an offence under Regulation 177(2) to be substantiated on the balance of probabilities.

#### Reasons

30. For the reasons outlined above, the Authority finds contraventions of sections 165 and 167 of the *Law*, and Regulation 177(2) have been substantiated. It is therefore necessary that the Authority consider what, if any, compliance action is required to ensure the health, safety and wellbeing of children is protected.

#### Obligations upon Regulatory Authority, Providers and Services

31. 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; ...’*

32. There are two relevant guiding principles at sections 3(3)(a) and (f), namely:
  - (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.
33. 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.
34. 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 and services to participate in a regulated environment and requires those participants to comply with the *Law*.
35. 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.
36. The *Law* outlines a range of statutory actions which may be taken by the Authority in response to non-compliance, for example fines or compliance notices through to suspension of your service approval and/or prosecution. Many of these options allow the Authority to publish details of your non-compliance.
37. Within the Response, the Provider outlined remedial steps undertaken since the incident, as follows:
  - a. Shortly after Ms ██████ commencement she became aware of issues with rostering, with numerous part time staff finishing at 3:00pm. Ms ██████ reviewed employment contracts and advertised for positions as required;
  - b. A range of issues resulting in contraventions of the *Law* and *Regulations* have been addressed by Ms ██████ following the investigation into the incident of 22 April 2021;
  - c. An Action Plan was developed and implemented by ██████ (this was not attached to the Response);
  - d. A mentoring project is being undertaken by ██████, including review of working directly with children records and procedures to ensure adequate staffing, which has been in place since late June 2021. A compliance audit was scheduled for early September to identify additional support (it is not clear if this took place);
  - e. The Procedure for working directly with children records and staffing is outlined in the Response.

38. The Provider submitted that compliance action was unnecessary given steps taken to strengthen supervision, staffing arrangements and record-keeping, and that an undertaking would be more appropriate. The Authority notes that an undertaking is, in fact, a form of compliance action under Part 7 of the *Law*.
39. In arriving at its Decision, the Authority has considered the fact that Ms [REDACTED] had only recently commenced her role, necessitating a transitional period with staff changes and time to implement strategies to improve compliance at the Service. The Authority has also considered the engagement of Ms [REDACTED] as compliance and mentoring support. With regards to the request for an enforceable undertaking, the Authority does not consider this to be an appropriate form of action in this instance.

### **Decision**

40. Considering the evidence and other factors outlined, and the objectives and guiding principles of the *Law*, the Authority has determined to issue this Administrative Action, rather than take statutory compliance action.
41. The Authority requires the Provider to produce evidence to support the submissions made in the Response, including:
- a. Action Plan referred to in the Response and evidence to demonstrate implementation of the strategies referred to in the Action Plan;
  - b. Evidence demonstrating how the steps taken under the Action Plan are to be monitored;
  - c. Evidence demonstrating support provided to the Service by [REDACTED], including relevant documentation such as compliance and other reports, records of meetings (including the centre managers' meeting referred to), and records of training undertaken;
  - d. Evidence that educators are aware of and understand strategies being implemented referred to in the Action Plan;
  - e. Evidence demonstrating that working directly with children records are to be monitored and that educators understand the need for accuracy of working directly with children records, specifically copies of working directly with children records for dates between 13 and 27 October 2021 (inclusive).
42. Please submit the required evidence within 21 days of the date of this Decision to Senior Investigator Tanya Masterman on [Tanya.Masterman@act.gov.au](mailto:Tanya.Masterman@act.gov.au) or by post to:

Children's Education and Care Assurance  
Attention Tanya Masterman

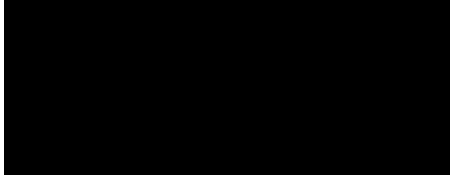
GPO Box 158  
Canberra ACT 2601.

43. Please note, the substantiated breaches of sections 165 and 167 of the *Law and Regulation 177* have been recorded on the Service file and may be considered by the Authority when considering any further applications for service approvals in the ACT.

**Legislation**

44. 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>.
45. 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>
46. If you have any questions in relation to this letter, please contact Authorised Officer Tanya Masterman by email at [tanya.masterman@act.gov.au](mailto:tanya.masterman@act.gov.au).

Yours sincerely



Janine Fairburn  
Assistant Director  
Children's Education and Care Assurance  
Education and Care Regulation and Support  
ACT Education Directorate

28 October 2021