ACT Government
Education

Ms [redacted]
Person with Management or Control
ACT Education Directorate
RE: Curtin Primary School - Curtin North Preschool Unit

Email: [redacted]

Dear Ms [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 (CECA). 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 investigated suspected offences relating to Curtin Primary School - Curtin North Preschool Unit SE-00011179 (the Service) operated by ACT Education Directorate PR-00006465 (the Provider).

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 7 August 2023, the Authority sent the Provider a Show Cause Notice (the Notice), advising the Provider that the Authority had determined there was sufficient evidence to support a case to answer for the Provider regarding a suspected offences under the *Law.*

5. The Notice outlined the grounds for issue, relevant evidence supporting the suspected contravention of the *Law*, and potential compliance actions being considered if the allegation was substantiated. Refer copy of Notice (minus attachments due to size, noting they can be produced on request) at Attachment A.

6. The Notice advised that evidence obtained during the investigation supported the allegation of offences under the *Law* as follows:

   Allegation One – Sections 165 and 167 of the *Law*
   It is alleged that on 8 May 2023, the Provider failed to ensure that all children being educated and care for by the service, were adequately supervised at all times, in that children, believed to be [redacted] (4:11) and [redacted] (4:4), exited the service by climbing bushes and exiting over a rear fence, unsupervised and unnoticed,

later located by a members of the public about a kilometer away and returned, contravening section 165(1) of the *Law*, and giving rise to a contravention of 167(1) of said *Law*.

Allegation Two – Section 167 of the *Law*.
It is alleged that by the 8 May 2023, the Provider failed to ensure that every reasonable precaution was taken to protect children from harm and any form of hazard, in that, risk assessment failed to highlight and enact maintenance of bushes in proximity to the rear fence, facilitating two children, believed to be [redacted] (4:11) and [redacted] (4:4), in scaling the fence and leaving the Service unnoticed by educators, in contravention of Section 167(1) of the *Law*.

Allegation Three – Section 217 of the *Law*.
It is alleged that by 1 June 2023, the Provider failed to comply with the requirements of a Notice issued under section 215 of the Law, in that child attendance records were not furnished to the Authority in their entirety, contravening section 217 of said *Law*.

Allegation Four – Regulation 177.
It is alleged that on 8 May 2023, the Provider failed to take reasonable steps to ensure prescribed records were accurate, in that, child attendance records were not kept in compliance with Government policy pursuant to regulation 158(2) and therefore regulation 158(1), contravention Regulation 177(2).

Allegation Five – Regulation 177
It is alleged that by 9 May 2023, the Provider failed to take reasonable steps to ensure prescribed records were accurate, in that, Incident, injury, trauma, illness record was not completed for each child in compliance with regulation 87, giving rise to a contravention of regulation 177(2).

7. On 4 September 2023, the Provider submitted a response with attachments via the ACT Government Solicitor. A copy of the Response (minus attachments) is provided at Attachment B.

Legislation Relevant to the Allegation

8. Provisions of the *Law* relevant to the investigation include the following:

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 215 of the Law – Power of regulatory Authority to obtain information, documents and evidence by notice.

(1) This section applies if the regulatory Authority reasonably suspects that an offence has or may have been committed against this Law.
(2) The regulatory Authority may, by written notice, require a specified person-
    (a) To provide to the Regulatory Authority, in writing signed by that person or, if the person is not an individual, by competent officer of that person, within the time and in the manner specified in the notice, any relevant information that is specified in the notice; or
    (b) To produce to the Regulatory Authority, or person specified in the notice acting on the regulatory Authority's behalf, in accordance with the notice, any relevant documents referred to in the notice; or..
(3) The notice must-
    (a) Warn the person that a failure or refusal to comply with the notice would constitute an offence; and
    (b) Warn the person about the effect of sections 217, 218 and 219.

Section 217 of the *Law* – Offence to fail to comply with notice or requirement.

A person must not refuse or fail to comply with a requirement under section 215 or 216 to the extent that the person is capable of complying with that requirement.

Penalty: $8000, in the case of an individual
$40 000, in any other case

Regulation 177 – Prescribed enrolment and other documents to be kept by 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 –
    (b) An incident, injury, trauma and illness record as set out in regulation 87;
    (k) A children's attendance records as set out in regulation 158;
(2) The approved provider of the education and care service must take all reasonable steps to ensure the documents referred to in sub regulation (1) are accurate.

Penalty: $2000

Regulation 158 – Children's attendance record to kept by 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.

(2) A preschool program provided by a school is not required to comply with sub-regulation (1) if it keeps attendance records in accordance with the education law, or Government education department policy, of the participating jurisdiction.

Regulation 87 - Incident, injury, trauma and illness record

(1) The approved provider of an education and care service must ensure that an incident, injury, trauma and illness record is kept in accordance with this regulation.

(2) -

(3) The incident, injury, trauma and illness record must include—

(a) details of any incident in relation to a child or injury received by a child or trauma to which a child has been subjected while being educated and cared for by the education and care service or the family day care educator, including—

(i) the name and age of the child; and
(ii) the circumstances leading to the incident, injury or trauma; and
(iii) the time and date the incident occurred, the injury was received or the child was subjected to the trauma;

(b) details of any illness which becomes apparent while the child is being educated and cared for by the education and care service or the family day care educator including—

(i) the name and age of the child; and
(ii) the relevant circumstances surrounding the child becoming ill and any apparent symptoms; and
(iii) the time and date of the apparent onset of the illness;

(c) details of the action taken by the education and care service or family day care educator in relation to any incident, injury, trauma or illness which a child has suffered while being educated and cared for by the education and care service or family day care educator, including—

(i) any medication administered or first aid provided; and
(ii) any medical personnel contacted;

(d) details of any person who witnessed the incident, injury or trauma;

(e) the name of any person—

(i) whom the education and care service notified or attempted to notify, of any incident, injury, trauma or illness which a child has suffered while being educated and cared for by the education and care service or family day care educator; and
(ii) the time and date of the notifications or attempted notifications;

(f) the name and signature of the person making an entry in the record, and the time and date that the entry was made.

(4) The information referred to in sub regulation (3) must be included in the incident, injury, trauma and illness record as soon as practicable, but not later than 24 hours after the incident, injury or trauma, or the onset of the illness.

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 specific 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 evidence gathered via the investigation process, inclusive of the response to the Notice, and is satisfied on the balance of probabilities, of the following:

    a) That on 8 May 2023, the Provider failed to ensure all children were adequately supervised at all times, in that two children, (aged 4:11 and aged 4:4), were unaccounted for during a period of 10 to 30 minutes, after scaling the rear fence and leaving the Service, unnoticed by educators. and were later located and returned by members of the public.

    b) That by 8 May 2023, the Provider failed to ensure that every reasonable precaution was taken to protect children from harm and any form of hazard, in that, risk assessment failed to highlight and enact maintenance of bushes in proximity to the rear fence, facilitating two children, (4:11) and (4:4), in scaling the fence and leaving the Service unnoticed by educators.

c) That by 1 June 2023, the Provider failed to comply with the requirements of a Notice issued under section 215 of the Law, in that child attendance records were not furnished to the Authority in their entirety.

d) That on 8 May 2023, the Provider failed to take reasonable steps to ensure prescribed records were accurate, in that, child attendance records were not kept in compliance with Government policy pursuant to regulation 158(2) and 158(1).

e) That by 9 May 2023, the Provider failed to take reasonable steps to ensure prescribed records were accurate, in that, Incident, injury, trauma, illness record was not completed for each child in compliance with regulation 87.

16. Within the Notice response, the Provider acknowledges the incident took place and submits the following main points:

    a) The Person with Management or Control had returned to their substantive role between 24 April 2023 and 29 May 2023.

    b) Has engaged a dedicated Preschool, unit Compliance Specialist.

    c) Undertaken to provide training for Nominated Supervisors.

    d) Regularly updates information hub for public preschool compliance.

    e) There was no intention to withhold information requested pursuant to a Notice issued under 215 of the *Law*.

    f) Agrees current roll marking and attendance practices are inconsistent with the *Law* and Government policy of the participating jurisdiction.

    g) Asserts that apart from the time of the notification, regulation 87 requirements were met.

17. The Authority notes the Providers response commences with an admission to failing to advise the Regulator (possible further offence) that the Person with Management or Control (PMC) had returned to their substantive role and was not a PMC at the time of the incident. The Authority has not received a notification of the PMC being removed during that time, or currently, and is listed as a PMC.

18. A Provider's obligation under section 165 and 167 of the *Law* is positively and strongly framed– the provider must ensure that all children being educated and cared for by the Service are adequately supervised at all times and take every reasonable precaution to protect children from harm and any form of hazard likely to cause injury.

19. The Provider also has clear obligations to comply with Regulations pertaining to accurately maintaining prescribed records, completed within associated timeframes, that also support the protection of children, inclusive of daily child attendance records and incident reports.

20. Furthermore, the Providers obligation extends to furnishing any relevant information, document or record, in accordance with a Notice issued by the Authority using powers under section 215 the *Law.*

21. In these instances, the Authority has determined that offences under section 165(1), 167(1), 217 of the *Law,* and noncompliance's with 177 of the *Regulations* are substantiated.

22. Considering the evidence obtained, including material submitted by the Provider, and the level of seriousness of the contraventions, I have decided that issuing a Compliance Notice is appropriate and in the best interests of children. In making this decision, I have also taken into consideration the Service's previous compliance history.

23. 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.

24. The Compliance Notice is provided as Attachment C to this decision letter. You are required to take steps directed in the Notice to comply with the relevant provisions.

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

Review Rights

26. 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).

27. 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

28. 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.

29. The *National Law* is made up of an Act and Regulations which can be viewed at:
    - http://www.acecqa.gov.au/national-law, and
    - http://www.legislation.nsw.gov.au/#/view/regulation/2011/653

30. Should you have any questions about this Decision or Compliance Notice please contact Authorised Officer Brian Cropper via email at brian.cropper@act.gov.au.

Yours Sincerely,

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

6 October 2023