

Ms [REDACTED]
Person with Management or Control
Communities@Work
RE: Communities@Work Palmerston Out of School Hours Care

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).
2. As you are aware, the Authority has recently conducted an internal review of reviewable decision under Section 191, of the Education and Care Services National Law (the Law), regarding a compliance notice issued to Communities@Work Palmerston Out of School Hours Care SE-00009682, operated by Communities@Work PR-00005824.
3. The notified incident advised that on 14 September 2023, an educator noticed a child, known as [REDACTED], outside the supervised area on the school oval for approximately 10 minutes.
4. The Regulatory Authority is satisfied that the Provider was not complying with the provisions of the Law in respect to this matter and in the best interests of the child the Authority advised the Approved Provider a new Decision Letter will be issued setting out the reasoning in regard to Regulation 155 and the correlation between Section 165 and 167 of the Law.
5. Web addresses to the *Law* and associated *Regulations* are provided for your convenience at the end of this Decision.

Facts

6. On 15 September 2023, the Authority received a notification of incident (NOT-40903034) from the Provider, advising that on 14 September 2023, an educator noticed a child known as [REDACTED] (6 years old) outside the supervised area on the school oval.
7. The Provider advised from last visual recall of the child, the child would have been unsupervised for a minimum of approximately 10 minutes, in which time the gate had been closed, separating the child from the rest of the group. Refer Attachment A.
8. Additional documents provided along with the notification included:
 - Inclusion Support Plan, refer to Attachment B
 - Incident, injury, trauma, and illness record, refer to Attachment C.

9. The notification advised that [REDACTED] has been diagnosed with autism spectrum disorder and is non-verbal. The inclusion support plan currently in place does note that [REDACTED] will try to walk off school grounds if she is wanting to go home. This raises additional concern that even with knowing the additional needs of the child, [REDACTED] was found unsupervised, separated from peers and educators for approximately 10 minutes.

Law

10. The description and context of the notified matter engages the following provisions of the *Law*:

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.

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.

Grounds – for Breaches of the Law

9. The facts substantiated the child was unsupervised (missing) for approximately 10 minutes in contravention of Section 165(1) engaging Section 167 of the *Law*.

Grounds – for Breaches of the Regulations

10. The evidence supports limited strategies documented to overcome [REDACTED] listed barriers within the Inclusion Support Plan. The plan lacked effective strategies to ensure such a situation does not occur again.
11. The Inclusion Support Plan noted that [REDACTED] would try to walk off the school grounds if she wanted to go home. The Inclusion Support Plan did not document any strategies how to manage the risk.

12. The Inclusion Support Plan did not set out strategies that build and nurture the relationships with educators and other children to lessen the chance of the child being unaccounted for and unsupervised.
13. The Inclusion Support Plan did not set out how segregation is overcome, nor any connections made at school such as teachers or friendship groups that ██████ may be drawn to lessening the possibility of wanting to leave.
14. The Inclusion Support Plan did not demonstrate an understanding of ██████ complex needs, there was no evidence supporting that the Approved Provider considered their community of practice to understand the complexity of ██████ diagnosis to minimise the risk of harms and hazards likely to cause injury.
15. The Community of Practice ensures that all stakeholders are working together to mitigate risks to ██████ ensuring positive interactions and that all educators are aware of the needs of ██████ and that there is a consistent and effective approach across all service types attended by ██████

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 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*
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;*
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.

Decision

17. The Authority has considered all information supplied by the Provider and is satisfied that there is sufficient evidence to ground an offence under sections 165(1) and 167(1) of the *Law* and Regulation 155.

18. In relation to the substantiated offences under sections 165(1) and 167(1) of the *Law*, the Authority is satisfied, on the balance of probabilities that the Provider failed to ensure adequate supervision at all times that the children were in the care of the Service, in that a child known as ██████████ was in an unsupervised area for approximately 10 minutes, separated from peers and educators by a closed gate on 14 September 2023.
19. Section 167(1) of the *Law* is satisfied to have been engaged because ██████████ was known by the Provider as diagnosed with autism spectrum disorder and is non-verbal requiring additional supports. It is noted that additional supervision was required as ██████████ would try and leave school grounds if wanting to go home. However, in knowing this, there did not appear to be any additional support or supervision in place to prevent the incident occurring on 14 September 2023.
20. In addition, it is considered a reasonable precaution to ensure that staffing and supervision levels always meet the emotional, developmental, and physiological needs of children and educators alike. These staffing and supervision levels may need to be adapted to be above minimum regulated ratio levels to protect children from harm and hazard likely to cause injury – both physically and psychologically.
21. A Provider's obligations under sections 165(1) and 167(1) of the *Law* is positively and strongly framed – the Provider must always ensure adequate supervision, and 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 or illness. Provision of adequate supervision is viewed as a reasonable precaution to be taken to protect children from harm and hazard likely to cause injury or illness.
22. Furthermore, the Inclusion Support Plan did not document what strategies will be employed to ensure inclusion practices are in place and the child is protected from hazards or harms likely to cause injury.
23. Considering the information submitted by the Provider, and the level of seriousness of the contravention, and the objectives and guiding principles of the *Law*, I have decided that issuing a Compliance Notice is appropriate and in the best interests of children.
24. The Authority has also taken into consideration that people and entities that choose to participate in regulated activities have a legal responsibility and an obligation to accept the consequences of that responsibility. In this case the Provider chose and consented to participating in the education and care of children and has a responsibility to comply with the standard of care under the *Law*.
25. 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

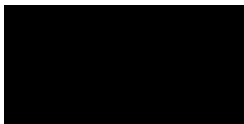
\$30 000, in any other case.

26. The Compliance Notice is provided as Attachment D to this decision letter. You are required to take steps directed in the Notice to comply with the relevant provisions. You must produce evidence of the steps required by the times indicated for each step within the Notice at Attachment C.
27. It is noted that the re-issuing of the Compliance Notice and Decision letter is in response to a review of a reviewable decisions that has now been completed.

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 myself via email at jo.williams@act.goc.au.

Yours Sincerely,



Jo Williams
Director Regulatory Operations
Education and Care Regulation and Support

4 December 2023