



7. The Provider's response included evidence supporting the following stated mitigations:
- a) First instance of non-compliance involved a technology issue with the booking system, which only rostered one additional educator, instead of two when bookings exceeded 66. Bookings have now been capped at 66;
  - b) The second and third instances of non-compliance involved being unable to fill shifts despite all efforts;
  - c) There is a known shortage of educators within the ACT;
  - d) Despite breaching the condition on the service approval, the Service always met minimum prescribed ratio requirements.

### **Law**

8. Legislative Provisions engaged by the Notice and this Decision are as follows:

#### **Section 19 of the Law – Conditions on provider approval**

- (1) A provider approval may be granted subject to any conditions that are prescribed in the national regulations or that are determined by the Regulatory Authority.
- (2) Without limiting subsection (1), a provider approval is subject to the condition that the approved provider must comply with this Law.
- (3) A condition of a provider approval applies to the provider as the operator of any education and care service or associated children's service, unless the condition expressly provides otherwise.
- (4) An approved provider must comply with the conditions of the provider approval.

#### **Section 51 of the Law – Conditions on service approval**

- (1) A service approval is granted subject to the condition that the education and care service is operated in a way that –
  - a) Ensures the safety, health and wellbeing of children being educated and cared for by the service; and
  - b) Meets the educational and developmental needs of the children being educated and cared for by the service.
- (5) A service approval is granted subject to any other conditions prescribed in the national regulations or imposed by –
  - a) This Law; or
  - b) The Regulatory Authority
- (8) An approved provider must comply with the conditions of a service approval held by the approved provider.

#### **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 cared for by the service from harm and from any hazard likely to cause injury.

## **Reasons for Decision**

9. Having considered all information available, inclusive of the Provider's response to the Notice, the Authority is satisfied that the Provider has failed to comply with the *Law*. The information contained in the Notifications is an admission of a breach of section 51(8) of the *Law*.
10. Evidence, by way of Notifications received 8 March 2021, 24 March 2021 and 5 April 2021 supports failures to comply with the staffing condition on the Service Approval, therefore substantiating, on the balance of probabilities, that the Service has not been operating at all times in compliance with section 51 of the *Law*.
11. However, the Authority is not satisfied that the Provider has not taken reasonable precautions to ensure that not only conditions of the Service approval are always complied with, but that the *Law* is complied with, therefore not engaging contraventions of section 19(2) of the *Law*, and section 167(1) of the *Law*.
12. In deciding if contraventions of *Law* have been engaged, what likelihood and level of risk is engaged, and if compliance action should be taken the Authority has considered that Provider has taken appropriate steps to ensure that all staff responsible for staffing arrangements at the Service are aware of and understand the requirements of the service approval conditions.
13. Furthermore, the Authority has considered that the Provider has been proactive in monitoring internally compliance with the service approval condition, has advised the Authority voluntarily of the identified non-compliances as they have occurred, and have implemented strategies to take into consideration access to staff and obligations under the *Law*. Accordingly, the Authority will not be initiating statutory compliance action in this instance.
14. This Decision, however, is intended to bring to your attention the need to ensure that the Provider meets its obligations under the *Law*, in particular the obligations to ensure that the conditions of the service approval are adhered to at all times to ensure that all children are adequately supervised at all times and that every reasonable precaution is taken to protect children from harm and any hazard likely to cause injury.
15. This decision will be recorded on your service file and may be considered in any future applications for approvals, amendments or waivers. This decision may also be considered in determining any future regulatory action, should there be future breaches of the *Law* or *Regulations*.
16. Please be aware that any further contraventions of section 51(8) of the *Law* may be addressed via stronger statutory action.

## **Legislation**

17. 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>.
18. 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>

19. Should you have any queries regarding this Decision please contact Janine Fairburn at email [Janine.fairburn@act.gov.au](mailto:Janine.fairburn@act.gov.au).

Yours sincerely



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**15** June 2021

CC'd: 