

Ms [REDACTED]  
[REDACTED]  
[REDACTED]

Email: [REDACTED]@gmail.com

Dear Ms [REDACTED]

**Decision to Propose an Enforceable Undertaking**

1. As you are aware, Authorised Officers from ACT Regulatory Authority (the Authority) also known as Children’s Education and Care Assurance, recently conducted an investigation into allegations of inappropriate discipline, by you towards a child, on 13 and 14 October 2020 at Busy Bee’s at the Park, SE-00009849 (the Service), operated by FEL Childcare Centres 4 Pty Ltd, PR-40004076 (the Provider).
2. Web addresses to the *Education and Care Services National Law (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**

3. On 3 February 2021, you were issued with a Show Cause Notice (the Notice) by the Authority, which advised you that the Authority had been notified that, during the afternoon of 13 October 2020 and 14 October 2020, you allegedly inappropriately disciplined a child ([REDACTED] - 16 months), whilst employed as an educator at the Service.
4. The specific allegation was that about 3.30pm on 13 October 2020 in the Nursery room of the Service, you smacked the back of the child ([REDACTED] hand and spoke sternly saying “No [REDACTED]”
5. Furthermore, it was alleged that about 10.30am on the 14 October 2020, in the cot room of the Service, you placed a hand over the mouth of the child ([REDACTED] to quieten her and told her to “shut up” during a lockdown at the Service.
6. The Notice advised that potential compliance actions included an enforceable undertaking or prohibition notice. The Notice referred to, and included, copies of the evidence relied upon and provided you with an opportunity to respond before any decision was made regarding whether the allegations were substantiated or not. Refer Attachment A for a copy of the Notice.
7. On 6 February 2021, you emailed the Authority with your response to the Notice (Response). On 9 February 2021 you were invited by email to provide any further submission or evidence, noting that you had 14 days from 3 February 2021 within which to respond. Refer Attachment B for a copy of the Response with emails of 09 February 2021.

## Law

8. Relevant legislative provisions engaged by this Decision are as follows:

### **Section 166(3) of the Law – Offence to use inappropriate Discipline**

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 184 of the Law - Deciding whether to give prohibition notice**

- (1) If the Regulatory Authority gives a show cause notice under section 183 to a person, the Regulatory Authority must have regard to any written submission received from the person within the time stated in the show cause notice before deciding whether to give the person a prohibition notice.
- (2) If the Regulatory Authority decides not to issue a prohibition notice to the person, the Regulatory Authority must give the person notice of the decision.
- (3) The Regulatory Authority may accept an undertaking from a person under section 179A instead of giving a prohibition notice under this Division.

### **Section 179A of the Law - Enforceable undertakings**

- (1) This section applies—
  - (a) if a person has contravened, or if the Regulatory Authority alleges a person has contravened, a provision of this Law; or
  - (b) **in the circumstances set out in section 27(a), 72(a) or 184(3).**
- (2) If subsection (1)(a) applies, the Regulatory Authority may accept a written undertaking from the person, under which the person undertakes to take certain actions, or refrain from taking certain actions, to comply with this Law.
- (3) If subsection (1)(b) applies in relation to the approved provider of an education and care service, the Regulatory Authority may accept a written undertaking from the approved provider, under which the approved provider undertakes to take certain actions, or refrain from taking certain actions in relation to the education and care service.
- (4) If subsection (1)(b) applies in relation to a person other than the approved provider of an education and care service, the Regulatory Authority may accept a written undertaking from the person, under which the person undertakes to take certain actions, or refrain from taking certain actions in relation to an education and care service.
- (5) A person may, with the consent of the Regulatory Authority, withdraw or amend an undertaking.
- (6) The Regulatory Authority may withdraw its acceptance of the undertaking at any time and the undertaking ceases to be in force on that withdrawal.
- (7) The Regulatory Authority may publish on the Regulatory Authority's website an undertaking accepted under this section.

### Reasons

9. Having considered all information and documentation regarding the incident of 13-14 October 2020, inclusive of your response to the Notice, I am satisfied that the allegations are substantiated, and that your conduct on these days constitutes an offence of inappropriate discipline under section 166(3) the *Law*, being discipline that was unreasonable in the circumstances.
10. The Authority notes your Response, which raised points in regard to the allegations as follows:

#### Allegation 1

- a. Statement made by you to the Provider in relation to allegation 1 was made under duress;
- b. You deny the allegation of smacking the child's hand;
- c. Witness B near the bathroom could not have witnessed the incident;
- d. You also deny saying, "*I didn't tap you that hard*".

#### Allegation 2

- e. Statement made by you to the provider with regard to allegation 2 was made under duress;
  - f. You did not have training in lockdowns;
  - g. You were playing a game with the child, █████ to quieten her;
  - h. "*Shut up*" was not said toward the child or educators.
  - i. You deny saying, "*We are all going to die*" or "*hope you've had a good life*" █████
  - j. You believe the witness statement is not accurate due to the use of the term "*something along the lines of*" used within witness evidence.
11. I am satisfied that your response to the Notice did not mitigate the weight of evidence obtained from witnesses, or the credibility of the witnesses.
  12. Furthermore, I deliberated on the alleged conduct taking into regard the age of the children and the vulnerability of the age group, however noted that there was no evidence to support the behaviour as being systemic.
  13. Considering the entirety of the evidence and submissions, I have determined that the most appropriate course of action is to offer an enforceable undertaking pursuant to sections 179A and 184(3) of the *Law*. The proposed enforceable undertaking is attached and marked Attachment C.
  14. The proposed enforceable undertaking is carefully formulated to address what the Authority views as a substantial risk to children, whilst providing you with an opportunity to undergo appropriate training to improve your level of understanding and ability in guiding young children's behaviour. Please be aware that the only alternative available to the Authority is prohibition from the education and care of children at an education and care service.

15. If the enforceable undertaking is accepted, failure to comply with any of its terms allows the Authority to apply to the relevant tribunal or court for an order under section 181(2) of the *National Law* to enforce the undertaking. It is also open to the Authority to withdraw its consent to the enforceable undertaking and to issue a prohibition notice.
16. To accept the undertaking please sign for the “Person” on Attachment C and return to Authorised Officer Brian Cropper within 16 days of receiving this Decision. The undertaking may be returned via email at [Brian.Cropper@act.gov.au](mailto:Brian.Cropper@act.gov.au) or by post to:  
  
Children’s Education and Care Assurance  
Attn: Brian Cropper  
GPO Box 158  
CANBERRA ACT 2601
17. If you elect to return the signed undertaking by post, please advise by email as, due to COVID-19, the Authority has been experiencing some substantial delays in receipt of mail.
18. A countersigned copy will be returned for your records.
19. Please note that the offer to accept an enforceable undertaking in lieu of prohibition is made under section 184(3) of the *Law*. If you wish to enter the enforceable undertaking, it is essential that you sign and return the undertaking within the required time frame. If the signed undertaking is not received within the required 14 days, the Authority may review its decision.

#### **Legislation**

20. The *National Law* applies to you as an educator employed within the early education and care sector.
21. 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>.
22. The *National Law* and *National Regulations* can be viewed at:  
<http://www.acecqa.gov.au/national-law,and>  
<http://www.legislation.nsw.gov.au/#/view/regulation/2011/653>
23. If you have any questions in relation to this Decision or the proposed actions outlined in the undertaking, please contact Authorised Officer, Brian Cropper, on (02) 6207 1104 or by email at [Brian.Cropper@act.gov.au](mailto:Brian.Cropper@act.gov.au).

Yours Sincerely



Clare Brookes  
Senior Director  
Early Childhood Policy and Regulation  
ACT Education Directorate

31 March 2021