

Our ref 540882 (Complaint ground: 540886)
Contact Juliet Le Couteur
9 May 2022



Ms Cynthia Hancox
Government Liaison
National Council Of Home Educators Of NZ

By email: cynthiahancox@actrix.co.nz

Dear Ms Hancox

Final opinion on your complaint Ministry of Education

I write further to Senior Investigator Juliet Le Couteur's advice on 13 April 2022 that I was still awaiting the Ministry's response to my enquiries concerning your complaint. I have since received it and I am now able to inform you of my opinion of your complaint.

My investigation concerned the Ministry's decision to issue a regulation that children enrolled in school or home education cannot attend an early learning centre in term time or holidays. You and another complainant similarly concerned about the regulation published on the Ministry's website and reinforced in correspondence from the Ministry, provided extensive submissions about the effects of the regulation particularly on families with younger siblings enrolled at Playcentre and without any alternative care available for school aged siblings when a parent attends Playcentre in support of the younger siblings, and to undertake normal parental responsibilities and duties as Playcentre parents.

You referred to the frustration and sense of unfairness that the regulation caused you and other families, and you identified various adverse consequences arising from the imposition of the regulation. Like you, the other complainant challenged the Ministry's claim that its position was based in law, describing the Ministry's reliance on section 10 of the Education and Training Act 2020 to exclude school-aged children from being on Playcentre premises as '*extra legal*.'

I have now formed a final opinion on the Ministry's decision to issue the regulation. In my view the Ministry acted unreasonably in seeking to issue and impose a rule for which there appears to be no lawful basis.

I **attach** details of my opinion so that you can see the basis for my conclusion that there was no lawful basis for the Ministry's position. You will note that the extract provided refers to a '*provisional opinion*'. This was provided to the Secretary of Education with the opportunity for the Ministry to respond before I formed my final opinion. In the event, the Ministry has accepted that the rule published on its website, is not reflected in the regulations.

You will see that my provisional opinion also foreshadows a recommendation if confirming it as my final opinion. The Ministry has responded to the first indicated recommendation, agreeing to change the information on its website once there has been engagement across the sector. The Ministry notes that this matter not only affects Playcentres but other centre-based settings with

whom it will need to communicate regarding any change to the messaging on the website because it will require them to ensure that attendances fit within certain requirements, on a case by case basis.

In terms of Playcentres, the Ministry draws attention to the following operational policy on school-aged children being present at Playcentre.

1. *A Playcentre cannot simultaneously provide care for children enrolled at a Playcentre session and older children (6 years or older) who are not eligible for enrolment but are visiting with a parent or other adult.*
2. *While older children can be present, they cannot participate in the ECE programme but they are counted as a child in relation to adult/child ratios and licence maximums as are younger children who are present but not enrolled in the session. This ensures minimum space requirements outlined in schedule 4 are complied with.*
3. *The Playcentre needs to ensure the health and safety of all children and adults present at each session. They must ensure there is sufficient supervision in place to meet licence standards for those enrolled and health and safety requirements for those who are visiting. This should include a degree of separation from the ECE provision, so that the standard of care provided to those children enrolled at the service is not affected.*

The Ministry advises that the law supports its operational policy, referring to regulatory obligations to the children that the service is there for, being paramount in the operation of the service. In that regard it cites various clauses of the Education (Early Childhood Services) Regulations 2008. These include clause 20A (requirements for premises of centre and hospital-based education and care centre to be for the exclusive use of the centre), clause 43 (curriculum and the gazetted curriculum framework), Schedule 2 (prescribing minimum adult-to-child ratios) and Schedule 3 (providing maximum service size). The Ministry notes that the only reference to a child over 6 is in the Schedule as an exception.

The Ministry also refers to the Licensing Criteria for Early Childhood Education and Care Centres 2008 and in particular, the criteria relating to premises and facilities, and health and safety. It draws attention to the primary focus of the service being to the enrolled children. It comments that the drivers for this approach are to ensure appropriate supervision of pre-school children attending the service, the health and safety of all children present on the site when older children are present, and to maintain the quality of education provided to the younger children enrolled in the service. The Ministry cites clause 46 of the Regulations which refers to *'health and safety practices standard'* to promote the good health and safety of children enrolled in the service, and the responsibilities of all parties under the Health and Safety at Work Act 2015. The Ministry refers to sections 36(2) and 46 of that Act.

With regard to its website, the Ministry contends that the information provided is correct as far as it goes in that the terms *attendance/attend* are used in a *'formal sense'*, and older children cannot be involved formally. However, it accepts that the website advice that refers to older children being present is not clear enough and it should reflect the operational policy rather than only to short periods of time or specific purposes. It should also refer to health and safety obligations relating to other persons being present. The Ministry intends to clarify this in revising the website

messaging and expects that this will address your concerns by making it possible if the necessary health and safety requirements are met, for children enrolled in school or home education to be present while their younger siblings attend Playcentre. It undertakes to correct the messaging on the website and *'to work with the sector so it understands and administers the policy fairly and without excluding children who can safely be present.'*

On the basis that the Ministry will act in accordance with this undertaking, I am now concluding my investigation. However I do not intend to lose sight of the Ministry's attention to this matter going forward. It seems to me that it warrants priority action given the likelihood that there are families currently deterred or prevented from attending Playcentres and other learning centres on account of the information currently on the Ministry's website. I have therefore asked the Secretary of Education to keep me informed of its progress towards revising the website information.

I trust that you will consider that your persistence in this matter has achieved a worthwhile outcome.

My investigation is now complete.

Yours sincerely



Peter Boshier
Chief Ombudsman

Appendix 1. Details of my opinion

Analysis

It is evident from the complainants' dealings with the Ministry, that there has been an opportunity for the Ministry to reassess its position when responding to their various concerns about the implication of the regulation for families with home school older siblings and the complainants' challenges to the Ministry's interpretation of the law. It seems that the Ministry was sufficiently confident of its position, not to accede to Ms Hancox's request that a check be made with the Ministry's legal team. Accordingly, for the purposes of the investigation and the following analysis, it is assumed that the Ministry's position on the substantive issue is as stated in its correspondence with the complainants, namely that those children who can attend an early learning centre is prescribed by s 10 of the Education and Training Act 2020 and that does not allow for school aged children including those participating in home schooling, to attend early learning centres. However on my examination of this matter, it is not evident that the definition of 'early child education and care centre' as provided in s 10, provides a basis for the rule the Ministry has sought to promulgate.

The definition in s 10 simply describes what a centre is for the purposes of the Act. Contrary to the Ministry's view, I do not agree that it provides a clear basis to prohibit other children being present. As one of the complainants has noted, they are not arguing that the older children are receiving 'education or care' from the centre when they attend. They are present as another child of the parent who can attend.

It is reasonably clear that the intention and scheme of the Act was that rules of the nature that the Ministry has sought to impose, be promulgated in either the Act or regulations, and not by the Ministry itself.

Part 2 of the Act clearly seeks to 'regulate' the early child education system, s 14 refers. Section 15 provides that centres must be licensed in accordance with regulations. The power to make regulations is very broad as reflected in the range of matters referred to in s 636 for which regulations relating to early childhood services, may be promulgated. It seems reasonably clear that the intent was for matters like the 'rule' that the Ministry has sought to promulgate, to in fact be made through regulations. For example, s 636 envisages that regulations may:

- *Regulate the 'management, operation, and control of licensed early childhood services of any kind, and imposing duties on service providers'.*
- *Specify 'conditions for approval that must be met'.*
- *Prescribe 'for the purposes of ensuring the health, comfort, care, education, and safety of children attending licensed early childhood services, minimum standards...'*
- *'limit or regulate the number of children who may attend licensed early childhood education and care centres or any premises used to provide a licensed home-based education and care service or a licensed hospital-based education and care service'.*

Each of these could be broad enough to encompass a rule that only certain children attend early childhood centres. In the event, neither the Act nor the Education (Early Childhood Services) Regulations 2008 contain the rule that the Ministry has sought to impose and promulgate by way of its website. Accordingly, it appears that the Ministry has acted unreasonably in seeking to impose a rule for which there appears to be no lawful basis. This has resulted in some parents being forced to choose between the needs of one child over another, the withdrawal of their child from the early learning education centre of their choice and at worse, the younger child missing out on early childhood education altogether. These would seem to be unfair and unreasonable consequences for the families concerned, directly attributable to the Ministry's rule.

If consequences of this nature were intended in the interests of making sure that the early learning environment of children under age 6 is kept safe, with space to explore and learning opportunities not impacted by older children, then it seems to me that the Ministry could have been expected to consult with Playcentre prior to publishing the alleged regulations. There is no doubt that the certainties and conditions expected for early childhood education, are legitimate ones. However there is no indication in the correspondence with the complainants that any such consultation occurred or furthermore, any assessment made of the extent of any problem arising from the attendance of home school children at Playcentre with their parents and younger siblings, and whether this should or could be addressed by Playcentres on their own account, or warranted the Ministry's intervention by way of the so-called regulation.

It seems to me the following points in Ms Hancox's letter dated 25 September 2020 to the Ministry are highly pertinent to any consideration of this matter.

No one is arguing about the fact that the ECE centres are intended to be for the use of enrolled pre-schoolers, and that they should be the focus of the program, resources etc, and their learning and engagement should not be interfered with by older children who may be present. However, this does not mean that legally other children may not be present, when they are being supervised by their own parents or caregivers, whose responsibility it would be to also ensure those older children did not adversely [a]ffect the experience of learning of the enrolled children. Bear in mind that most older children will not be able to be present because they are required to be attending school at that time; we're talking about a very small number of children scattered across the country – Playcentres would not be overrun with older children! For those families, though, this is hugely important.

Provisional opinion

On the information before me, my provisional opinion is that the Ministry acted unreasonably in seeking to impose a rule for which there appears to be no lawful basis. My opinion is subject to any comments you may have. However if I were to confirm this as my opinion, then I may recommend that the Ministry either retract the rule that it has sought to impose or in the alternative, legalise it by way of a regulation pursuant to s 636 of the Act with reasonable accommodation by exception for home school children to be present when parents need to attend with younger siblings.