

Out of scope

From: Simon Laube <Simon.Laube@ecc.org.nz>

Sent: Tuesday, July 9, 2024 3:05 PM

To: David Seymour <David.Seymour@parliament.govt.nz>

Cc: 9(2)(a); 9(2)(a)

Subject: Thank you for your support - testimonials provided to MoE from the community

Kia ora Minister

Thank you for everything you have done to support Country Kindy so it is treated fairly. The 12 week stay is very welcome news.

This email shares some information and insights that may assist. It includes ECC's representation to the Ministry which got ignored together with an impressive collection of parent testimonials.

I understand that today the parents have sent in their new letter signed by attendees at the 4 July community meeting (email from 9(2)(a) email address).

The Country Kindy case resonates across ECC's membership. For our members it is about unreasonable regulatory conduct and disproportionate sanctions by the MoE, ie after Country Kindy who will be next? Our members are understandably fearful. Unfortunately I am aware of other cases including the other case that is before the District Court in Auckland.

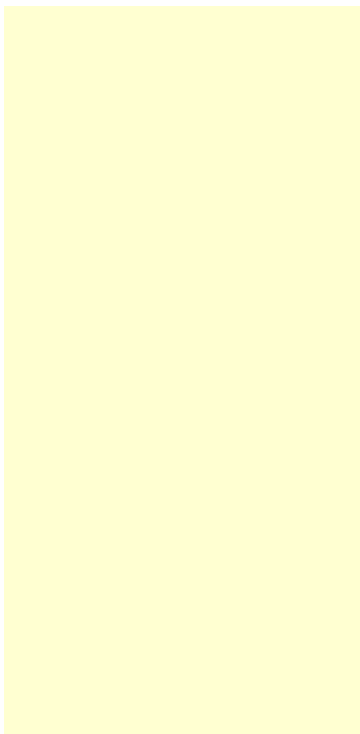
The Country Kindy case also highlights the importance of parents being able to maintain their ECEs of choice. This is one of the objectives/purposes set out in the Education & Training Act. Arguably it is already a statutory expectation that the Ministry should be giving regard to – but it is not: s14(c). There should already be a balancing of these objectives and considering the harm the MoE causes through cancelling a licence through a lens of diversity of provision and parent choice.

14 Purpose of Part 2

The purpose of this Part is to regulate an early childhood education system where all children are able to participate and receive a strong foundation for learning, positive well-being, and life outcomes by—

- (a) setting standards to support quality provision and learning; and
- (b) supporting the health, safety, and well-being of children; and
- (c) enabling parental choice by providing for licensing and funding of different types of provision.

When it comes to curriculum the MoE regulations merely provide the basic “wiring”, how practice and learning actually unfolds is meant to be constantly evolving and is best assessed by ERO during its reviews (snapshots). During a review they test the systems thoroughly. All systems require fine-tuning and maintenance. The last [Country Kindy ERO review](#) placed the service in the “establishing” grade (highlighted) – ie not the bottom grade. Considering the staffing challenges Country Kindy has been dealing with – this is an impressive result and yet they are focused on how they can improve further, as all services should be.



Akarangi

Whakatō
Emerging

Whāngai
Establishing

Whakaū
Embedding

Organisational conditions

<p>Ngā Aronga Whai Hua Evaluation for improvement</p>	<p>The service is at an early stage of developing the conditions (systems, processes, practices, tools and methods, voices, trust, resources and communication strategies), capabilities and collective capacity to do and use evaluation for improvement.</p>	<p>The service is establishing the conditions (systems, processes, practices, tools and methods, voices, trust, resources and some communication strategies) capabilities and collective capacity to do and use evaluation for improvement.</p>	<p>The service has established and working to embed the conditions (systems, processes, practices, tools and methods, voices, trust, resources and communication strategies) to increase the capability and collective capacity to do and use evaluation for improvement. Some evidence of improvement.</p>
<p>Kaihautū Leaders foster collaboration and improvement</p>	<p>Leaders are beginning to develop the conditions that enable collaboration for improvement.</p>	<p>Leaders are establishing the conditions that enable collaboration for improvement.</p>	<p>Leaders have established and are embedding the conditions that enable collaboration for improvement.</p>
<p>Te Whakaruruhau Stewardship through effective governance and management</p>	<p>The service is at an early stage in developing the systems, processes, and practices to promote equitable outcomes for children.</p>	<p>The service has developed systems, processes and practices that when fully implemented will support decision making and an increased focus on what is happening for children and their learning.</p>	<p>The service has established sound systems, processes and practices that support decision making and strengthen the focus on what is happening for children and their learning.</p>

ECC is aware that ERO is not providing ANY “Excelling” assessments in the ECE reviews **at all**. This is a major system weakness – a healthy system should both catch services who are poor performing but also reward those for success and excellence – positive feedback and recognition are very powerful motivators. We are lacking that incentive in the current review system.

Ngā mihi
Simon

Chief Executive Officer | Early Childhood Council | (He/Him)



**Early Childhood
Council**

Fa'amanu Taeao

From: Simon Laube <Simon.Laube@ecc.org.nz>
Sent: Monday, 27 May 2024 8:32 am
To: 9(2)(a) @Education.govt.nz; Marlene Clarkson
Cc: 9(2)(a) ; Iona Holsted
Subject: ECC representations for Country Kindy
Attachments: ECC representation for Country Kindy - MoE licence cancellation proposal.pdf; CK responses to MOE intent to cancel license.pdf; Country Kindy Testimonials - Private and Confidential.pdf

Kia ora 9(2)(a)

Please see attached ECC's representations (and supporting documents) relating to the Ministry's proposed cancellation of Country Kindy's licence to operate a centre.

Iona – FYI

Ngā mihi
Simon

Chief Executive Officer | Early Childhood Council | (He/Him)
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Early Childhood Council

9(2)(a)

Manager Integrated Services Taranaki, Whanganui, Manawatū
Ministry of Education

By email: 9(2)(a) @Education.govt.nz

27 May 2024

Re: ECC's representations in relation to the Ministry of Education's intention to cancel the licence of Country Kindy Ltd (45768)

Tena koe 9(2)(a)

Overview of relevant issues

Your letter of intention to cancel consists of a series of narrow decisions, supported by limited and incomplete evidence collection - relating to conditions which you set without due regard to the regulatory concerns which you had.

Your application of the regulations has not been reasonable and ECC argues your intention to cancel the licence would not be legally justified.

The Ministry must remember its role in the ECE sector does not include the provision of services directly. You may want service providers to meet the regulations in particular ways but you do not have the means to require explicit undertakings except in the case of being able to issue a health & safety direction.

You must remain impartial and administer the regulations and funding in accordance with rules agreed by Parliament (the regulations) and the rules set by warranted Ministers of the Crown (the criteria guidance and funding conditions). Officials cannot impose their own subjective views about how a service should meet the regulations if the service provider asserts they are operating within the regulatory framework.

Your role should be **clearly focused on all children being able to participate in ECE and receive a strong foundation for learning, positive wellbeing and life outcomes by:**

1. Setting standards to **support** quality ECE provision and learning
2. **Supporting** the health and safety and wellbeing of children and
3. **Enabling** parental choice by providing for licensing and funding of different types of ECE provision.

The above objectives are taken directly from the Education & Training Act 2020 (section 14).

In Country Kindy's case, ECC submits that they have performed reasonable actions to satisfy your conditions. If you decide to cancel the licence, ECC would contend that would not be legally justified and amount to unjustified discrimination on the service provider as a similar new service provider with the same operational approaches would be eligible for a full licence.

ECC encourages you to reconsider your interventionist approach and reclassify the service provider with a full licence.

If you have lingering concerns you could make further requests in writing and schedule a future licensing review. If you have any health & safety matters of concern you had the option to issue a direction under regulation 54A. The option of cancellation is a last resort and should only be considered if there is a material risk to children – which you have not found.

If you can be specific and identify material concerns with the way the service operates in the confines of the regulations, ECC would encourage the service provider to address these. ECC would also support our member to comply. To-date, ECC cannot discern any material non-compliance practices or policies with Country Kindy's operation of its centre.

Ministry approach lacking consideration of the public interest

Non-compliance findings must be considered in context and they must be more than merely administrative and technical matters. In your letter you have equated the performance or non-performance of a condition as absolute, but performance should be able to be measured. Non-performance of a condition is not the same as non-compliance with the regulations.

You need to be able to show that non-compliance with the regulations presents a significant and/or material risk to the learning, wellbeing and health and safety of the children. If you do not train your mind to this dimension then you risk reducing parent choice through cancelling this licence without good reason. **We argue that there should be consideration of the public interest as this would have resulted in consideration of the negative impact on the centre from the Ministry's actions and the potential impact on parents and children should cancellation of the licence be the outcome.**

The Ministry's activities and undertakings relating to your investigation of Country Kindy was too limited on your conditions and has yielded inconclusive evidence due to material failures in your collection process. Your collection of evidence processes have demonstrated an over-reliance on written evidence and your staff have consistently failed to make or record observations from their visits to document actual practices at the centre. ECC agrees that policies are important but on closer inspection, what really matters is what the practices actually are in the centre. The Ministry should have access to this level of detailed information now but appears not to have used it. ECC is of the view that the Ministry decision making has failed to document and make sense of what these practices are. The result is we do not have confidence that you would be correct to cancel this licence as the service appears to us to be operating within the regulations.

In addition you imposed evidence collection restrictions with no lawful basis. You imposed a physical evidence collection regime for no good reason. This deprived the service provider from a more effective way to collect and transmit evidence to the Ministry, and keep track of the numerous mistakes officials made in their collection and recording processes. The service provider wanted to use Dropbox to transmit evidence. They are allowed to use this method. That approach works for other Ministry offices – there appears no good reason why the Taranaki, Whanganui, Manawatū office needed such a restriction.

Regulatory investigations cascade over a two-year time horizon which is inconsistent with the statutory maximum limits in the regulations and the Ministry-contracted SELO provider has contributed to fresh concerns

The Ministry's intervention in the operations and associated compliance with the regulations have been ongoing since 6 May 2022. This means the service provider has been under constant Ministry scrutiny for a period of over two years. In the regulations a maximum time period of 12 months is envisaged for conditions. Clearly the compliance time horizon has covered a period of more than two years. It is grossly inappropriate that the Ministry has undertaken investigations like this.

Professional development provided by a third party **under contract by the Ministry** has contributed or caused further alleged non-compliance concerns to arise. In this regard, the Ministry needs to be mindful that you are considered, at least partially, responsible for contributing to more concerns through the SELO provider's actions. Complaints made by the service provider about the SELO provider appear not to have been processed through the Ministry's complaints process.

Overview of remaining conditions

The Ministry agrees that 10 out of 17 conditions have been satisfied by the service provider. The seven conditions alleged outstanding are mostly restatements of regulations. ECC notes the lack of any regulatory concerns relating to adult-child ratios, safety checking and person responsible. This is extremely positive.

The seven conditions do not appear to be drafted in the form of conditions so they do not form enforceable conditions in every case. The conditions imposed include:

1. "A philosophy statement guides the service's operation" – **this is not enforceable and is clearly compliant and has always been fully compliant**
2. "An ongoing process of self-review and internal evaluation helps the service maintain and improve the quality of its education and care" – **this is not enforceable and is clearly compliant and has always been fully compliant**
3. "The service curriculum is consistent with any prescribed curriculum framework that applies to the service" – **this is not enforceable and is clearly compliant and has always been fully compliant**
4. "The service curriculum is informed by assessment, planning, and evaluation (documented and undocumented) that demonstrates an understanding of children's learning, their interests, whānau, and life contexts" – **this is not enforceable and is clearly compliant and has always been fully compliant**
5. "Demonstrate that adults providing education and care engage in meaningful, positive interactions to enhance children's learning and nurture reciprocal relationships" – **this is not enforceable and is clearly compliant and has always been fully compliant**
6. "The practices of adults providing education and care demonstrate an understanding of children's learning and development, and knowledge of relevant theories and practice in early childhood education" – **this is not enforceable and is clearly compliant and has always been fully compliant**
7. "Demonstrate by way of written evidence that the service is effectively governed and is managed in accordance with good management practices and that appropriate documentation and records are developed, maintained, and regularly reviewed. In particular provide evidence that:
 - a. Demonstrate that the service has given regard to NELP.

- b. Demonstrate the service implements a regular robust review/evaluation process that ensures all aspects of the service including an appraisal process and curriculum are reviewed and maintained.
- c. Demonstrate that service has a process that ensures adequate professional support, professional development opportunities, and resources are provided to staff employed in the service”
 - **this is not enforceable and is clearly compliant and has always been fully compliant**

Difference between compliance concerns at one point in time historically compared to the risk of concerns arising/repeating in the future

Even if it was explained what caused the Ministry to effectively restate a selection of existing regulations in conditions so the service provider could understand your concerns and how to comply with them, ECC is not convinced that the Ministry understands that there is a difference between concerns arising from historical/observable facts (which *can't be* changed) and the ability of a service provider to change their approach to respond to those concerns or incidents so that in the future the same concern is no longer present (which *can be* changed).

The service provider cannot change what actually happened in the past but they can improve systems, policies and, most importantly, practices, so that non-compliance is less likely to happen in the future. ECC is of the view that the service provider has addressed all of the Ministry conditions by performing various actions they judged were sufficient. The final assessment of whether or not the service provider has indeed satisfied the conditions should involve consideration of whether future compliance has likely improved as a result and whether that improvement is a satisfactory improvement level of improvement or not.

ECC asserts that the Ministry does NOT have strong evidence to be able to assert that in all seven of the above conditions, the service provider has not performed reasonable actions to address the conditions. In each case ECC is satisfied that they now take a significantly different or improved approach to how they would meet the relevant regulations in the future (compared to concerns rooted in historical facts). Your assessments do not appear to consider their corrective actions.

I think we can all agree that the service provider *has tried* to satisfy all the conditions, so the final test is whether or not those efforts to satisfy your conditions have been effective and whether they are satisfactory or not. If the Ministry thinks not, then why not? And what evidence has the Ministry relied on to form its judgments.

ECC requests this information under the Official Information Act to enable our member to consider its right to appeal should you choose to cancel the licence. ECC submits that the Ministry should be guided by the principles of natural justice which include giving the affected party access to the relevant information about your decisions – proactively, it should not be necessary for ECC to request this information.

ECC is of the view, however, that there are no remaining issues of non-compliance of any substance or material nature, so **a full licence should be reissued.**

Considering that our member has fully cooperated with all of your conditions, we also must comment on **the impact your intervention has had on the people working for Country Kindy Ltd, the parent community and the children.** The personal toll it has taken is completely unrecognised by you and effectively dismissed. You do not appear alert to the

risk that you as regulator could harm children by removing access to ECE without good cause. You have certainly failed to document their efforts.

Ministry has caused harm and should apologise

ECC considers that the burden the Ministry has placed on Fiona Zwart through prolonged intervention has been harmful to her personal mental health. This burden has affected others too and it has the potential to harm the children they care for indirectly. Harm has been caused by the Ministry providing unclear conditions that are ostensibly impossible to comply with and by running intervention processes over such long periods of time (two years). It was unfair and you should apologise to her for it. Most people would have given up a long time ago. While the ECE regulations require a focus on children, a service provider is also an employer and they need to ensure the work remains safe including to their personal mental health (refer Health & Safety At Work Act). It has not been safe for Fiona's mental health for a very long time.

Ministry conditions distracted the service provider from more effective solutions

ECC considers that the Ministry's interventions have been a major distraction for the service provider. They would have been better served (in our opinion) investing all the effort they put into complying with your conditions into trying to address their teacher staffing situation through a stronger focus on recruitment.

That single solution would have lifted compliance capabilities across the centre more effectively than the blunt conditions imposed by the Ministry. More teacher-staffing would have helped address the Ministry curriculum concerns as well, and reduced the unfair burden placed on the service provider's workers. None of the concerns with policies are material and the lack of any regulatory concerns relating to adult-child ratios, safety checking and person responsible is **extremely positive**.

Ministry places an overly heavy emphasis on written policies and procedures while ignoring actual practices which, had they been considered, would have demonstrated performance of the condition

You have relied **overly heavily** on written evidence which ECC believes has been collected selectively (showing bias). You have then interpreted the information (which is inherently incomplete) out of context, introduced assumptions, and shown deliberate ignorance of the actual practices being followed by Country Kindy workers.

It is not the case under the law that a centre's policies and procedures have to be documented in precise detail – the regulations give service providers a high degree of autonomy.

Failures in policies are not material as service providers can change written policies at any time

It is allowable for a service provider to update a policy to improve it or to respond to changes in the centre environment at any time. There are no time constraints that inhibit a service provider from undertaking a policy review as required. It is a form of entrapment for the Ministry to believe written policies are non-compliant and to allow the service provider to remain unaware for a period of up to two years. This does not put children first.

If this autonomy was not present then the administrative burden of constantly needing to update written policies and procedures would cripple ECE operations. Staff would be

constantly in the office making edits to the vast array of policies they are expected to administer.

No Ministry acknowledgement that the teacher staffing shortage makes compliance more difficult

The teacher staffing shortage that affects most ECC members is also affecting Country Kindy. This broader crisis contributes to placing additional pressure on the service provider. ECC notes that the Ministry does not officially recognise the teacher shortage whereas Immigration NZ recognises the shortage by including ECE teachers on the Green List. This omission is a failure and it implies to the service provider that they are responsible for the staffing shortage they are faced with.

ECC asked to represent Country Kindy and testimonials from the wider Country Kindy community including parents and teachers

ECC encloses the letter seeking representation we received from Country Kindy. It makes for disturbing reading and you can see why ECC is seeking an apology for the harm you have caused. We include the community testimonials of support received. This evidence speaks volumes and should remind you of your broader role to ensure access and enable parent choice. Clearly this community does not want you to cancel the licence.

Conclusion

ECC considers that the long-running investigation of Country Kindy for no good reason and with no clear focus should come to an end. The appropriate outcome is reinstatement of the full licence, an apology for the harm caused, and flexible funding to assist the service provider to meet advertising costs to help them to attract teachers to employ.

ECC intends to fight your decision if you decide to proceed with cancellation.

Nga mihi

9(2)(a)

A large rectangular area of the document is redacted with a solid grey fill, obscuring the text underneath.

Simon Laube
Chief Executive Officer