

18 January 2025

The Hon Prue Car MP
NSW Deputy Premier & NSW Minister for Education and Early Learning
NSW Government
52 Martin Place
SYDNEY NSW 2000

Dear Deputy Premier Car,

Re: Request urgent change to Regulation 272 due to its disharmony with early childhood teachers' vocational expectations

It would be understandable to assert that virtually all NSW accredited teachers would broadly have a vocational expectation of their teaching children between 9 am and 3 pm. However, since December 2011, [Regulation 272\(2\)-\(5\)](#) has been a glaring, simplest and leading example of excessive regulatory burden for degree-qualified and NSW Education Standards Authority (NESA) accredited early childhood teachers and the up to 3,057 long daycare services they work at.

The [NSW Productivity Commissioner](#) in December 2022 quantified excessive regulatory burden as “... the cost of NSW maintaining requirements above the national standards equates to around \$3,000 a year for each child attending ECEC”.

As enunciated by the [NSW Department of Education](#) (in September 2022) and the [Federal Minister for Education](#) (in October 2022) of their concerns that 40% and 45% (respectively) of children were not developmentally on track upon starting school, such higher regulatory imposts by the NSW Government have also not demonstrated any corresponding superior and consistent results despite:

- Australia's [The Front Project](#) (2019) – “Overall, the study has identified approximately **\$2 of benefits for every \$1** spent on early childhood education”;
- Nobel Prize winner [Professor James J Heckman](#) (2015) – “... the existing research suggests expanding early learning initiatives would provide benefits to society of roughly **\$8.60 for every \$1** spent”; and
- [NSW Health's Brighter Beginnings: The First 2,000 Days of Life](#) (2021) – “investing in early childhood produces a return on investment of **\$13 for every \$1** you put it.”

As early as before the NSW State Election on 25 March 2023, you will recall our representations to you on a spectrum of concerns, including the unintended implementation of Regulation 272.

Now with the (2 year) mid-point of the NSW Labor Government's term occurring in 66 days, the speed at which even the most plausible solution to the simplest problem (ie Regulation 272) continues to elude creates significant apprehensions for the future of NSW's early childhood education and care.

The continuing severe labour shortages is already more than challenging. And trying to recruit degree-qualified early childhood teachers to comply with Regulation 272(2)-(5)'s “at all times” requirement is becoming less and less possible.

We have attached legal advice confirming that it is not possible to guarantee that NSW Department of Education's Authorised Officers will not insist on the literal interpretation of Regulation 272(2)-(5)'s

requirement to have degree-qualified early childhood teacher(s) present “at all times” for the duration of their employer’s operating hours.

Degree-qualified and NESA accredited early childhood teachers’ vocational expectations are implicitly not in harmony with Regulation 272(2)-(5) where NSW long daycare services operate between 7.30 am to 6 pm on weekdays.

It is worse for currently up to 70 NSW long daycare services that operate outside of those typical hours (including 24 hours), and for up to another 57 NSW long daycare services that operate on weekends. Most importantly, not being able to comply with Regulation 272(2)-(5) has a direct negative impact on the number of places offered to children and their families.

In addition to vocational dissatisfaction, recruitment challenges, retention challenges as well as being able to offer all the places for children as approved by the NSW Department of Education, compliance with Regulation 272(2)-(5) also have the inflationary impact on fees for parents or else such teachers will gravitate elsewhere.

Not being able to comply with Regulation 272(2)-(5) also contribute to NSW’s already lopsided and excessive numbers of regulatory breaches/non-compliances. As reported by the Commonwealth’s Productivity Commission’s last four annual [Report on Government Services \(RoGS\)](#), NSW early childhood education and care services generated between 53.6% to 65.26% of the national total of breaches. We also anticipate similar unbelievable results in the next RoGS to be released on 11 February 2025 at 10.30 pm AEDT.

Year	CONFIRMED BREACHES AT NQF APPROVED ECEC SERVICES		
	NSW	NSW (% of Australia)	Rest of Australia
2016/2017	3,797	24.95%	11,424
2017/2018	7,865	39.71%	11,943
2018/2019	7,773	35.85%	13,909
2019/2020	13,673	54.39%	11,468
2020/2021	17,616	65.26%	9,376
2021/2022	15,943	57.87%	11,608
2022/2023	Not yet published	Not yet published	Not yet published

SOURCE: Table 3A.33 of the Commonwealth Productivity Commissioner’s Report on Government Services (RoGS)

ACA NSW continue to be available to offer solutions. But if our solutions are not plausible, we ask the NSW Government to urgently implement a plausible alternative, especially notwithstanding the NSW Department of Education’s process thus far.

Yours sincerely,



Chiang Lim
CEO

- encl 1. NSW Department of Education’s update about Regulation 272 (8 November 2024)
- 2. Copy of legal advice about the implementation of Regulation 272 (13 January 2025)

- cc Mr Mark Barraket, Deputy Secretary, NSW Department of Education
- Mr Paul Martin, CEO, NSW Education Standards Authority
- Mr Peter Achterstraat AM, NSW Productivity Commissioner
- Mr Bola Oyetunji, Auditor-General of New South Wales

272 Early childhood teachers—children preschool age or under

- (1) This regulation applies in place of regulations 132 to 135 in relation to a centre-based service that educates and cares for 25 or more children preschool age or under.
- (1A) If a centre-based service is educating and caring for 25 to 29 children preschool age or under on a given day, one early childhood teacher must be in attendance—
 - (a) for at least 6 hours on that day, if the service operates for 50 or more hours a week; or
 - (b) for 60 per cent of the operating hours of the service on that day, if the service operates for less than 50 hours a week.
- (2) One early childhood teacher must be in attendance **at all times** that a centre-based service is educating and caring for 30 to 39 children preschool age or under.
- (3) Two early childhood teachers must be in attendance **at all times** that a centre-based service is educating and caring for 40 to 59 children preschool age or under.
- (4) Three early childhood teachers must be in attendance **at all times** that a centre-based service is educating and caring for 60 to 79 children preschool age or under.
- (5) Four early childhood teachers must be in attendance **at all times** that a centre-based service is educating and caring for 80 or more children preschool age or under.
- (6) If an early childhood teacher is absent from a centre-based service because of short-term illness, leave or the early childhood teacher's resignation, the following persons may be taken for the purposes of this regulation to be an early childhood teacher during that absence—
 - (a) a person who holds an approved diploma level education and care qualification;
 - (b) a person who holds a qualification in primary teaching.
- (7) An early childhood teacher required to be in attendance under this regulation may be replaced in accordance with subregulation (6) for a maximum of 60 days in any 12 month period.
- (8) For the purposes of subregulation (7), in relation to a part-time early childhood teacher, 60 days is to be calculated on a pro rata basis.
- (9) The approved provider of a centre-based service must keep a record of an early childhood teacher who is replaced in accordance with subregulation (6) that includes the following information—
 - (a) the full name of the early childhood teacher;
 - (b) the qualification of the person who replaced the early childhood teacher;
 - (c) the dates on which the early childhood teacher was replaced;
 - (d) the reason for the early childhood teacher's absence.

Chiang Lim

From: Early Childhood Outcomes <earlychildhoodoutcomes@det.nsw.edu.au>
Sent: Friday, 8 November 2024 11:13 AM
To: Chiang Lim
Subject: Regulation 272 Update

Dear Chiang,

Thank you for your enquiry at the 1 November ECAG meeting regarding a review of NSW policy settings in relation to Regulation 272 (2) to (4) relating to the number of ECTs who must be in attendance at all times that a centre-based service is educating and caring for children.

The Department is grateful to ACA NSW and other sector peaks for feedback shared earlier this year regarding the operational impacts of Regulation 272.




I note that the ACECQA-led Review of NQF Staffing and Qualifications Regulations (Focus Area 5-1 under the National Workforce Strategy) was recently completed and provided to Education Ministers for consideration. As an immediate action, Education Ministers have agreed to [extend three expiring workforce transitional provisions](#) to provide flexibility for services and providers while governments fully consider recommendations arising from the Review.

I also note that the public consultation process for the Review included questions relating to sector professionals' experience with and the impact of jurisdiction-specific provisions such as Regulation 272. The Department looks forward to reviewing insights relating to Regulation 272 alongside feedback already received from NSW sector peaks.

It is anticipated that implementation of the FA5-1 Review will be an opportunity to undertake broader NSW sector consultation on Regulation 272 (including 'at all times' provisions) to inform regulatory impact assessment, policy analysis and options development that considers both the need to address current workforce challenges and the importance of maintaining high standards of quality ECEC and positive outcomes for children in NSW. This work is likely to commence in early 2025.

Amy Birungi, Director Cross Government & Partnerships, will be in touch once timing for the FA5-1 Review implementation is finalised.

Many thanks,


A/Executive Director | Sector Workforce Strategy
Early Childhood Outcomes Division
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Belinda Kenneally
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Principal

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The Professional Standards Legislation

13 January 2025

The President & Executive Committee
Australian Childcare Alliance New South Wales
PO Box 660
Parramatta
NSW 2124

By email

Dear Mrs Connolly & Members of the Executive Committee

RE: ADVICE ON REGULATION 272 OF THE EDUCATION AND CARE SERVICES NATIONAL REGULATIONS (“THE REGULATIONS”)

I refer to your email dated 2 December 2024 in respect of interpreting Section 272 of the Regulations.

Interpretation and background matters

Firstly, I noted that such Section is contained in Part 7.3 of the Regulations which deal with those applicable to New South Wales. This Section overrides Part 4.4 Division 5 contained in the main body of the Regulation.

In respect of the interpretation principles set out in the *National Law* and the Regulations please note:

1. The NSW enactment of the *National Law* in the definition section states:

3 Definitions

(1) In this Act—

Children (Education and Care Services) National Law (NSW) means the provisions applying in this jurisdiction because of section 4.

(2) Terms used in this Act and also in the Education and Care Services National Law set out in the Schedule to the *Education and Care Services National Law Act 2010* of Victoria have the same meanings in this Act as they have in that Law.

2. The VIC enactment of the *National Law* has a Schedule 1 setting out the interpretation provisions.

Section 7 of that Schedule state:

(1) In the interpretation of a provision of this Law, the interpretation that will best achieve the purpose or object of this Law is to be preferred to any other interpretation.

(2) Subclause (1) applies whether or not the purpose is expressly stated in this Law.

Whilst Part 4.4 Division 5 is overridden by Section 272 it is useful to set out and compare the requirements:

Section 132 Requirement for early childhood teacher—centre-based services—25 to 59 children

(1) If a centre-based service provides education and care to 25 or more but less than 60 children **preschool age or under** on a given day, an early childhood teacher must be in attendance at the service—

Please direct all correspondence to PO Box 3213 Umina Beach NSW 2257

- (a) for at least 6 hours on that day, if the service operates for 50 or more hours a week; or
 - (b) for 60 per cent of the operating hours of the service on that day, if the service operates for less than 50 hours a week.
- (2) A centre-based service is not required to comply with subregulation (1) if—
- (a) the approved number of places for children preschool age or under at the service is 25 or more but less than 60; and
 - (b) the service employs or engages a full-time or full-time equivalent early childhood teacher at the service.

Section 133 Requirement for early childhood teacher—centre-based services—60 to 80 children

- (1) If a centre-based service provides education and care to 60 or more but not more than 80 children **preschool age or under** on a given day—
- (a) an early childhood teacher must be in attendance at the service—
 - (i) for at least 6 hours on that day, if the service operates for 50 or more hours a week; or
 - (ii) for 60 per cent of the operating hours of the service on that day, if the service operates for less than 50 hours a week; and
 - (b) a second early childhood teacher or a suitably qualified person must be in attendance at the service—
 - (i) for at least 3 hours on that day, if the service operates for 50 or more hours a week; or
 - (ii) for 30 per cent of the operating hours of the service on that day, if the service operates for less than 50 hours a week.

Section 134 Requirement for early childhood teacher—centre-based services—more than 80 children

- (1) If a centre-based service provides education and care to more than 80 children **preschool age or under** on a given day—
- (a) an early childhood teacher must be in attendance at the service—
 - (i) for at least 6 hours on that day, if the service operates for 50 or more hours a week; or
 - (ii) for 60 per cent of the operating hours of the service on that day, if the service operates for less than 50 hours a week; and
 - (b) a second early childhood teacher or a suitably qualified person must be in attendance at the service—
 - (i) for at least 6 hours on that day, if the service operates for 50 or more hours a week; or
 - (ii) for 60 per cent of the operating hours of the service on that day, if the service operates for less than 50 hours a week.

[Underlining and bold print added]

Please note the reference to “*provides educations and care*”. There is no further definition of this term.

An education and care service is defined by Section 5 of the *National Law* to be any service providing or intended to provide education and care on a regular basis to children under the age of 13, subject to certain exemptions which are not relevant for the present purposes.

However, in respect of this clause and Section 272, child preschool age or under in defined as a single term to be read together as:

“child preschool age or under means a child under the age of 7 years who is not a child over preschool age;”

Whilst Section 272 instead states:

272 Early childhood teachers—children preschool age or under

- (1) This regulation applies in place of regulations 132 to 135 in relation to a centre-based service that educates and cares for 25 or more children preschool age or under.

(1A) If a centre-based service is educating and caring for 25 to 29 children preschool age or under on a given day, one early childhood teacher must be in attendance—

(a) for at least 6 hours on that day, if the service operates for 50 or more hours a week; or
(b) for 60 per cent of the operating hours of the service on that day, if the service operates for less than 50 hours a week.

(2) One early childhood teacher must be in attendance at all times that a centre-based service is educating and caring for 30 to 39 **children preschool age or under**.

(3) Two early childhood teachers must be in attendance at all times that a centre-based service is educating and caring for 40 to 59 **children preschool age or under**.

(4) Three early childhood teachers must be in attendance at all times that a centre-based service is educating and caring for 60 to 79 **children preschool age or under**.

(5) Four early childhood teachers must be in attendance at all times that a centre-based service is educating and caring for 80 or more **children preschool age or under**.

[Underlining and bold print added]

Please note the reference to “*educating and caring*”. There is no further definition of this term.

Similarly, I agree that there is no definition of “*enrolled*” or “*in attendance*” in any of the above legislation.

Your Question:

- Can any NSW Authorised Officer of the NSW Department of Education legally interpret Regulation 272(2)-(5) to mean that while there are 30 or more children enrolled, that the corresponding number of early childhood teachers (ECTs) must be present at all times, including at their start time for the day (i.e. 6.30 am only for example) as well as at their end time for the day (i.e. 7.00 pm only for example)?

Based upon the above-mentioned interpretation provisions I think it would be a draconian interpretation of Sections 272(2) to Section 272(5) to require that the relevant ratio number of ECT’s must be present during all operation hours if the Service Approval educates and cares for 30 to more places. The provision is “triggered” upon the number of enrolled children at any point of the day being in attendance at the centre. That is, I interpret “being in attendance” as synonymous with the centre “educating and caring” for these children.

Accordingly, if the service provider miscalculates the time at the requisite number of children are actually at the centre for example because, a child is left at the centre earlier than the time that they were schedule to attend or they leave later than the time that they were intended to leave and they do not have sufficient ECT as per the relevant ratio, then they will be in breach of the regulations.

However, I cannot guarantee that a Department Officer may not interpret the Sections on this basis and may instead interpret the Sections as applying to the “whole day” as set out in your query, as it gets down as to whether “educating and caring” means when the children are actually in attendance at the centre or that it applicable to the number of children enrolled to attend on any one day.

Nor do I believe that the words “*or under*” can be independently used and interpreted to mean that it would for example apply to a centre falling within Section 272(2), and having only 29 children at the centre at any point without an ECT being in attendance, because as I indicated above those words fall with the broader use of “*preschool age or under*”.

In any event, I think it would be prudent to put this issue to the Deputy Premier and Minister Car in writing and to seek clarification in order to avoid a centre having to defend its interpretation of Section 272 if an

individual offer were to form the more limited view. As you know most, if not all centre owners do not want to end up being a “test case”.

Yours faithfully

A handwritten signature in blue ink, appearing to read "Kenneally", written in a cursive style.

Kenneally & Co Lawyers