



Date of Decision: 19 January 2018
File number: STR0028

Applicant: 'Approved provider'
Regulatory Authority: NSW Department of Education

Decision

The Ratings Review Panel (the Panel) by consensus decided to amend element 7.3.3 from not met to met. As a result, the Panel amended the rating level for standard 7.3 to Meeting NQS. The Panel amended the rating level for Quality Area 7 to Meeting NQS, and the service's overall rating is amended to Meeting NQS.

Issues under review

1. The approved provider sought a review on the grounds that the regulatory authority, in making its determination, failed to take into account or give sufficient weight to facts existing at the time of the rating assessment (section 144(3)(b) *Education and Care Services National Law* (National Law)).
2. At Assessment and Rating, the service was rated as Working Towards NQS for Quality Areas 1, 2 and 7 and Meeting NQS for Quality Areas 3, 4, 5 and 6. The approved provider applied for first tier review to review three elements that were rated 'not met': elements 1.2.1, 2.3.1 and 7.3.3.
3. At first tier review, the regulatory authority amended elements 1.2.1 and 2.3.1 to 'met'; however it determined that there was insufficient evidence for element 7.3.3 to be amended to 'met'. In making its determination, the regulatory authority agreed with the authorised officer's assessment that the approved provider did not notify the regulatory authority of a circumstance (the replacement of a boundary fence) that posed a risk to children's health, safety or wellbeing in accordance with section 174(2)(c) of the National Law.
4. The regulatory authority also noted that the approved provider did not submit any evidence to support its claim at first tier review that the boundary fence had been installed on a weekend and therefore did not pose a risk to children's health, safety or wellbeing.
5. At second tier review, the approved provider submitted a letter from the landscaping and fencing contractor ('the contractor') that replaced the fence which stated that the fence replacement took place on a weekend. The approved provider asserted that it did not provide this letter at first tier review because it believed that it had provided sufficient information to the review.



Evidence before the panel

6. The ratings review panel established by ACECQA were provided with the following evidence submitted by the provider and the regulatory authority. This included:

Item	Document author	Document
1	Regulatory Authority	Assessment evidence summary
2	Regulatory Authority	Rating outcome summary – draft
3	Regulatory Authority	Rating outcome summary – final
4	Regulatory Authority	Rating certificate
5	Regulatory Authority	Response to approved provider feedback on assessment and rating report
6	Approved provider	Application for first tier review
7	Regulatory Authority	First tier review panel recommendation and decision notice – draft
8	Regulatory Authority	First tier review panel decision notice - final
9	Regulatory Authority	Notice of first tier review outcome to approved provider
10	Regulatory Authority	Feedback for region following first tier review
11	Approved provider	Application for second tier review
12	Contractor	Letter from landscaping and fencing contractor

7. The Panel was also provided with advice from ACECQA on the element under review.

The law

8. Section 151 of the National Law states that following a review, the Ratings Review Panel may:
- (a) confirm the rating levels determined by the Regulatory Authority; or
 - (b) amend the rating levels.

Background

9. The service is a long day care service with 59 approved places and is based in NSW.
10. The assessment and rating visit took place on 17 and 18 August 2017.



11. The regulatory authority sent the approved provider the draft report on 27 August 2017 and the regulatory authority received feedback to the draft report on 6 September 2017. The final report was sent to the approved provider on 12 September 2017.
12. The approved provider applied for first tier review on 19 September 2017. The regulatory authority made a decision on the review on 25 October 2017. The decision was sent to the provider on 20 November 2017. The approved provider applied for second tier review on 1 December 2017.

Review of rating levels

Element 7.3.3

13. Element 7.3.3 is that:

The Regulatory Authority is notified of any relevant changes to the operation of the service, of serious incidents and of any complaints which allege a breach of legislation.

Relevant provisions

14. Section 174(2)(c) requires an approved provider to notify the regulatory authority of information in respect of any prescribed matters in regulation 175(2). Among these prescribed matters are 'any circumstances arising at the service that poses a risk to the health, safety or wellbeing of a child or children attending the service' (regulation 175(2)(c)).
15. An approved provider must notify the regulatory authority of this information within 7 days of the relevant event or 7 days of the approved provider becoming aware of the relevant information (regulation 176(2)(c)).
16. Section 173(2)(c) requires an approved provider to notify the regulatory authority of 'any proposed change to the education and care service premises of an approved education and care service (other than a family day care residence).
17. Regulation 174(2)(b) requires the approved provider notifies the regulatory authority of the proposed change within 7 days of the relevant event or 7 days of the approved provider becoming aware of the relevant information.

Outcome summary

18. In the Outcome Summary, the regulatory authority states:

The service has processes in place to ensure the effective management of the service, however the service did not notify the Regulatory Authority about circumstances arising that may pose a risk to children's health, safety and wellbeing when they recently erected a fence in the children's playground during operating hours.



Evidence summary

19. In the Evidence Summary, the regulatory authority found through discussion with the nominated supervisor that:

The nominated supervisor is able to articulate the service's responsibilities regarding when to notify the Regulatory Authority. However the service recently erected a new fence at the service during operating hours and the Regulatory Authority was not notified.

20. The Quality Improvement Plan notes state:

To meet regulatory requirements the approved provider must ensure that the Regulatory Authority is notified of any circumstances which arise that may pose a risk to children's health, safety and wellbeing while being educated and cared for by the service.

First tier review

21. At first tier review, the approved provider stated:

We consider element 7.3.3 should be met as the service notifies the Regulatory Authority of any relevant changes to the operation of the service, of serious incidents and any complaints which allege a breach of legislation. There has been no change to the 'operation' of the service nor 'serious incidents' nor 'complaints' as stated in the element there was no need to notify the regulatory authority as there was no prescribed event to warrant notification.

The service replaced an old boundary fence, the service engaged an accredited installer to install child proof temporary fence whilst the old fence was being replaced. There was no risk to the children's health, safety and wellbeing at any time during the replacement. The service is aware of its obligations in relation to notifications and has no history of non-compliance, this time the service acted in good faith not knowing that this was a notifiable event.

22. The regulatory authority considered the approved provider's claim and noted that the approved provider did not submit any evidence to support the claim that the fence had been installed on Saturday 1 July 2017.
23. In addition, the regulatory authority noted that section 173(2)(c) requires an approved provider to notify the regulatory authority of any proposed change to the service premises.
24. As a result, the regulatory authority found that, while the service demonstrated practice that is Meeting the NQS, there was insufficient evidence for element 7.3.3 to be met.

Second tier review

25. At second tier review, the approved provider submitted a letter from the contractor that states the boundary fence was replaced on Saturday 1 July



2017 when no children were attending the service and therefore, there was no risk to the health, safety or wellbeing of children.

26. The approved provider made the following written submission:

The approved provider requests the Review Panel reconsider element 7.3.3 should be "met" and maintains there was no risk to the children's health, safety and wellbeing at any time during the boundary fence replacement. The replacement actually took place on Saturday while the service was closed and no children were present. As evidence to support this application I provided a letter confirming the replacement took place on Saturday 01/07/2017.

The reason this letter was not provided for the first tier review is that I believed the information provided was sufficient however the letter is now provided as evidence to support my application for second tier review.

The service is aware of its obligations to provide [a] safe environment for children [and] therefore installed child proof temporary pool fence as a precaution [if the] fence replacement [was] not completed in one day. The work was completed on the same day (Saturday), the temporary fence was not needed and removed shortly after.

The service has no history non-compliance and in this case did not notify the Regulatory Authority as it believes there was no risk to the children that warrant[ed] notification and requests element 7.3.3 changed to "met" and overall service rating to "Meeting".

27. The regulatory authority was provided with a copy of the approved provider's second tier review application and the letter from the contractor and provided no additional information.

Ratings review panel's considerations

28. The Panel discussed whether the replacement of the boundary fence posed a risk to the health and safety of children at the service and therefore required notification under section 174(2)(c).
29. In its discussion, the Panel considered the approved provider's submission that the fence replacement occurred on Saturday 1 July 2017 when no children were attending the service and the accompanying letter from the contractor which was supplied at second tier review to support this assertion.
30. The Panel discussed whether the installation of a temporary fence (mentioned in the provider's submission to the first tier review) indicated that the fence was installed while children were attending the service; however it dismissed this suggestion, noting the provider's submission at second tier review that the temporary fence was a contingency in case the replacement could not be completed on the weekend. In the Panel's view, this seemed reasonable.



31. The Panel noted that the regulatory authority relied on a brief reference in the authorised officer's report that the fence was replaced during operating hours and that it found there was insufficient evidence to the contrary from the approved provider.
32. On balance, the Panel concluded that the approved provider's submission and the letter from the contractor stating there were no children attending the service at the time of the fence replacement, and therefore no risk to children's health, safety or wellbeing, was more compelling.
33. The Panel also considered whether the replacement of the fence constituted a notifiable event under section 173(2)(c) which required the approved provider to notify the regulatory authority of 'any proposed change to the education and care service premises of an approved education and care service (other than a family day care residence)'. It considered this question in response to the first tier review panel's suggestion that the service had failed to comply with this requirement:
34. *The Guide to the NQF* (p. 457)^{1,2} includes a table which refers to section 173(2)(c):

'any proposed change to the education and care service premises, such as refurbishment'.
35. *The Guide to the NQS* (p. 186)³ includes information about element 7.3.3. It states under the heading 'what we aim to achieve with element 7.3.3' that:

'Responsibility for notifying the Regulatory Authority of any significant changes to the operation of the service rests with the approved provider'.
36. The Panel agreed that the replacement of an existing fence was not a notifiable event as intended by the National Law and Regulations as it did not change the premises, merely retain them in a form consistent with their approval.

Additional comments from the ratings review panel

37. The Panel questioned why more detailed information was not provided by both the regulatory authority or the approved provider about the date of the fence's installation at the point of the draft report and why the approved provider did not supply a letter at first tier review.

¹ ACECQA. (2017). Guide to the National Quality Framework, <http://files.acecqa.gov.au/files/NQF/Guide-to-the-NQF.pdf>

² The Guide to the National Quality Framework was published in September 2017 to reflect changes to the National Law and Regulations commencing 1 October 2017. The same guidance about section 173(2)(c) may also be found in the Guide to the National Law and Regulations (p. 116) (last updated February 2017): <http://files.acecqa.gov.au/files/National-Quality-Framework-Resources-Kit/NQF-Resource-02-Guide-to-ECS-Law-Regs.pdf>.

³ ACECQA (2017). Guide to the National Quality Standard, <http://files.acecqa.gov.au/files/National-Quality-Framework-Resources-Kit/NQF-Resource-03-Guide-to-NQS.pdf>



38. It noted the approved provider's assertion at second tier review that it had not done so because it believed the information it provided in its first tier review application was sufficient. The Panel agreed that this explanation was reasonable.
39. The Panel also noted that the regulatory authority was given an opportunity to respond to the approved provider's submission at second tier review that the fence replacement occurred on Saturday 1 July 2017, and the accompanying letter from the contractor.

Decision

The Ratings Review Panel (the Panel) by consensus decided to amend the rating level for element 7.3.3 from not met to met. As a result, the Panel amended the rating level for standard 7.3 to Meeting NQS. The Panel amended the rating level for Quality Area 7 to Meeting NQS, and the service's overall rating is amended to Meeting NQS.