MINISTRY OF EDUCATION
TE TĀHUHU O TE MĀTAURANGA

16 June 2020

[redacted]

Dear [redacted]

Thank you for your email of 25 April 2020 to the Ministry of Education requesting the following information:

1. *The full terms and conditions of the childcare for essential workers scheme that was provided to childcare organisers, in particular Porse Childcare.*
2. *The value and details of any payment, funding, reimbursement, reward, tax break or other benefit, monetary or otherwise that Porse Childcare is receiving in return for facilitating the childcare arrangements for essential workers.*
3. *The value and details of any payment, funding, reimbursement, reward, tax break or other benefit, monetary or otherwise that Porse Childcare has received from the government within the past year for any reason.*
4. *If Porse's decision to facilitate childcare for essential workers had any positive or negative influence on their current or future funding, payment, support or other benefit provided by the government, financial or otherwise. An example of non-financial could include, but is not limited to the offering of further contracts by the government to Porse, promotion of Porse by the government or other non-financial benefit.*
5. *Any current service agreement between Porse and the Government, Crown or any Ministry or other organisation subject to the OIA*

Your request has been considered under the Official Information Act 1982 (the OIA).

On 24 March 2020, on the eve of Alert Level 4 'lockdown', we contacted three licensed early learning home-based providers to determine their willingness and capacity to provide childcare for essential workers. At the same time, Out of School Care and Recreation (OSCAR) providers funded by the Ministry of Social Development were also approached by the Ministry of Social Development.

PORSE In-Home Childcare Limited (PORSE), along with two other home-based providers, were selected as they had the highest number of home-based education and care licences, offering the broadest national coverage. Selecting a small number of providers was consistent with the Government's desire that most people stay home; limit work to essential workers, and ensure essential workers had access to childcare.

National Office, Mātauranga House, 33 Bowen Street, Wellington 6011
PO Box 1666, Wellington 6140. Phone: +64 4 463 8000 Fax: +64 4 463 8001

In initial discussions with these providers we advised them that a criteria for funding was being developed. In the absence of a confirmed funding criteria, PORSE adopted a typical home based educator payment arrangement.

On 6 April 2020 PORSE, along with the other providers, were advised of the Government's funding criteria for childcare. The criteria consisted of:

1. Home-based providers be paid a flat rate per carer of $60 as a one-off administration fee
2. Each home-based carer will be funded at $25 per hour, excluding GST
3. Ministry of Education ECE subsidies (including 20 Hours' ECE) cannot be claimed for these hours. Note: ECE subsidies funding may have already been paid (on or about 1 March 2020).

The Childcare for Essential Workers initiative was ended on 8 May 2020.

Our answers to your individual questions have been outlined below:

Q 1. The full terms and conditions of the childcare for essential workers scheme that was provided to childcare organisers, in particular PORSE Childcare.

The terms and conditions were contained in an Agreement for Services and an accompanying information sheet. This information has been provided within the attached **documents A and B**.

The terms and conditions set out in the contract are the same as those included in PORSE's Agreement for Services, attached as **document C**.

Q 2 and Q 3. The value and details of any payment, funding, reimbursement, reward, tax break or other benefit, monetary or otherwise that PORSE Childcare is receiving in return for facilitating the childcare arrangements for essential workers and/or has received from the government within the past year for any reason.

14 payments have been made to PORSE in the last year. Types of payments include:

- ECE funding subsidy payments
- Teacher release payments
- Childcare for Essential Workers payments.

The amounts are listed below:

Description	Payment Date	Payment Amount (including GST)
ECE funding subsidy	1/07/2019	4,259,302.23
ECE funding subsidy	23/07/2019	1,591,014.10
Incredible Years Teacher Release	11/09/2019	1,150.00
Incredible Years Teacher Release	26/09/2019	1,150.00
Incredible Years Teacher Release	11/09/2019	1,150.00
ECE funding subsidy	1/11/2019	3,353,972.21
Te Ahu o Te Reo Māori Teacher Release	13/01/2020	2,208.00
ECE funding subsidy	2/12/2019	1,372,595.56
ECE funding subsidy	2/03/2020	4,681,046.95

ECE funding subsidy	2/03/2020	13.17
Childcare for Essential Workers	23/04/2020	122,284.10
Childcare for Essential Workers	23/04/2020	320,840.52
Childcare for Essential Workers	14/05/2020	90,914.69
Childcare for Essential Workers	14/05/2020	107,273.44
		15,904,914.97

Q 4. If PORSE's decision to facilitate childcare for essential workers had any positive or negative influence on their current or future funding, payment, support or other benefit provided by the government, financial or otherwise.

As outlined above, PORSE was selected as they were one of the three largest providers of home-base education and care. Our invitation was not related to any current or future funding, payment, support or other benefit, financial or otherwise, that PORSE may receive.

Q 5. Any current service agreement between PORSE and the Government, Crown or any Ministry or other organisation subject to the OIA.

Our essential Workers Childcare Support Services Agreement and two contract variations have been provided previously as **document C**. We do not have any other current service agreements with PORSE.

Unfortunately, we cannot answer on behalf of other government agencies. If you would like information relating to other government agencies, you will need to approach them directly.

Please note, the Ministry now proactively publishes OIA responses on our website. As such, we may publish this response on our website after five working days. Your name and contact details will be removed.

Thank you again for your email. You have the right to ask an Ombudsman to review this decision. You can do this by writing to info@ombudsman.parliament.nz or Office of the Ombudsman, PO Box 10152, Wellington 6143.

Yours sincerely

Katrina Casey
Deputy Secretary
Sector Enablement and Support

Document A

Government announcement about children aged 0 – 14 of Essential Workers

This is only available to Essential Workers, while performing essential services.

The Minister of Education has agreed to the childcare scheme, with conditions and criteria, which are outlined below.

Funding

The funding for this support scheme is as follows:

- Licensed home-based providers in the scheme will be paid a flat rate per carer of $60 plus GST as an administration fee
- Each home-based carer will be funded at $25 per hour excluding GST
- Ministry of Education ECE subsidies (including 20 Hours ECE) cannot be claimed for these hours. Note: ECE subsidies funding may have already been paid (on or about 1 March 2020)
- This funding will not impact any eligibility under the COVID-19 wage subsidy scheme

Criteria for funding

This funding is only available:

- for the duration of the four week alert level 4 lock-down period
- for the children of essential workers (you will need to have evidence they are an essential worker)
- for children aged 0-14
- where the carer had an existing relationship with your organisation as an educator prior to the lock-down period from midnight Wednesday 25 March 2020
- where your organisation confirms it has undertaken a complete and current safety check including police vet, in accordance with the Children's Act 2014, for the carer before they have access to children
- where carers are working solely for one family as part of the family's self-isolation unit
- all Covid19 Public Health rules must be complied with
- where the parent/caregiver (essential worker/s) has attested that that there are no other adults in the household able to undertake childcare
- in the case where the care is provided from the carer's home, your organisation can confirm it has previously assessed the carer's home as meeting health and safety licensing requirements and police vetted any adults in accordance with Sections 319FB-FD of the Education Act 1989

- Essential workers are not to be charged additional fees
- Funding is not available where the carer normally lives at the same address as the essential worker/s.
- Licensed home-based service providers must keep records of carer details and hours worked, and these may be subject to audit.
- The licensed home-based service providers taking part will be deemed an essential services and their home-based educators as essential workers.

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Document B

MINISTRY OF EDUCATION
TE TĀHUHU O TE MĀTAURANGA

ESSENTIAL WORKERS CHILDCARE SUPPORT SERVICES AGREEMENT

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Ministry of Education

[Provider]

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AGREEMENT dated 7 April 2020

PARTIES

The Sovereign In Right of the Government of New Zealand acting by and through the **Secretary for Education** at Wellington (the ***Ministry***)

[Provider] at **[**Location**]** company no.[insert] (the ***Provider***)

BACKGROUND

A As a result of the COVID-19 pandemic, on 23 March 2020 the government made the decision to move to Alert Level 4 from midnight 25 March which introduced a number of restrictions including people being instructed to stay at home, closing educational facilities, and closing all businesses other than those business considered to be essential services.

B Under Alert Level 4 schools and early childhood education services were not classified as essential services, and therefore all early childhood education and care centres were required to close, however the group of Ministers with Power to Act on COVID-19 subsequently noted essential workers require childcare during the lock-down, and agreed that individual home-based educators be classified as essential workers where they are working solely for one family as part of the family's self-isolation unit, and to fund providers accordingly.

C On [date] April 2020, pursuant to section 476C of the Education Act 1989, the Secretary for Education, directed that a number of licensed home-based education and care service providers, of which the Provider is one, may open to provide care for the children of essential workers aged up to 14 years for the period during which this direction applies.

D The Ministry has selected the Provider to provide the Services, which the Provider has agreed to supply, on the terms and conditions set out in this Agreement.

AGREEMENT

1. DEFINITIONS AND INTERPRETATION

1.1 **Definitions**

In this Agreement, the following terms have the following meanings unless the context requires otherwise:

Agreement means this agreement, including the Schedule to this agreement.

Business Day means any day other than a Saturday, a Sunday or a public holiday (as defined in the Holidays Act 2003) in Wellington, New Zealand.

Charges means the amounts payable by the Ministry as specified in clause 8.

Confidential Information means all information in any form relating to or proprietary to a party (**Discloser**) that:

(a) is provided by (or on behalf of) the Discloser to the other party (**Recipient**) in connection with the Agreement; or

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(b) otherwise becomes known to the Recipient in connection with the Agreement; and

(c) is by its nature confidential, is designated (in writing or otherwise) by the Discloser as confidential or which the Recipient ought reasonably to know is confidential,

but excludes any information to the extent the Recipient can show the relevant information:

(d) at the time of receipt by the Recipient is in the public domain or subsequently comes in to the public domain otherwise than as a result of a breach of this Agreement or any other obligation of confidentiality;

(e) is already or lawfully comes in to the unrestricted possession of the Recipient without there having been any breach of any obligations of confidentiality owed by a third party;

(f) has been independently developed by the Recipient (as evidenced by records in its possession);

(g) is not intended to be confidential as evidenced by the written agreement of the Discloser;

(h) is disclosed by the Recipient with the prior written approval of the Discloser in accordance with the terms of such written approval; or

(i) is required to be disclosed, by law or by a governmental or other competent authority or pursuant to the listing rules of any applicable stock exchange, provided that before making the disclosure the Recipient has given the Discloser notice of the request for disclosure and where practical obtained a confidentiality order or similar protection limiting the persons to whom disclosure of the Confidential Information is made if the Discloser has no effective status on the matter.

Dispute has the meaning given to it in clause 15.

Dispute Notice has the meaning given to it in clause 15.

GST means goods and services tax payable under the Goods and Services Tax Act 1985 at the rate prevailing from time to time, including any tax levied in substitution for that tax.

Personnel means any employee, agent or representative of the Provider (including individual carers), or of any subcontractor of the Provider, who provides any Services.

Services means:

(a) the services described in this Agreement, including clause 3;

(a) all services incidental to, or required for the proper performance of, the services described in (a); and

(b) all other services agreed in writing by the parties from time to time.

Term means the term of this Agreement described in clause 2.1.

1.2 **Interpretation**

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In this Agreement, unless the context requires otherwise:

(a) headings are for convenience only and have no legal effect unless otherwise specified;

(b) references to the singular include the plural and vice versa;

(c) references to a party include that party's successors, executors, administrators and permitted assignees (as the case may be);

(d) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;

(e) references to a person include:

(i) an individual, firm, company, corporation or unincorporated body of persons;

(ii) any public, territorial or regional authority;

(iii) any government; and

(iv) any agency of any government or authority;

(f) an obligation not to do anything includes an obligation not to suffer, permit or cause that thing to be done;

(g) references to any statute include any amendment to, or replacement of, that statute and any subordinate legislation made under it;

(h) wherever the words "includes" or "including" (or similar words) are used, they are deemed to be followed by the words "without limitation";

2. OVERVIEW

2.1 Term

This Agreement will commence on 26 March 2020 and, unless terminated earlier in accordance with its terms, will end on the later of 22 April 2020, or the date on which the Ministry notifies the Provider in writing that the Provider has completed the provision of the Services in accordance with this Agreement to the satisfaction of the Ministry.

2.2 Appointment

The Ministry appoints the Provider, and the Provider agrees, to provide the Services on the terms and conditions of this Agreement.

3. SERVICES

3.1 Services

The Services the Provider will provide include:

(a) childcare for the children of essential workers aged up to 14 years during the hours the essential worker is providing essential services, and agreed between the essential worker and the Provider;

(b) the Services being provided at either:

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(i) the children's own home; or

(ii) the home of the individual carer providing the childcare;

(c) where the care is provided from the carer's home, ensuring that the carer's home has been previously assessed as meeting health and safety licensing requirements;

(d) each individual carer working solely for one family only as part of the family's self-isolation unit, provided that if the care is being provided from the carer's own home, they may also care for their own children;

(e) each individual carer will adhere to the key public health principles including:

(i) limiting contact to those within a household unit;

(ii) maintaining physical distancing of at least one metre, preferably two metres when interacting with others at all times;

(iii) maintaining good hygiene practices (for example cough and sneeze etiquette, hand hygiene);

(iv) maintaining good cleaning practices;

(v) not sharing food, drinks or eating utensils (for example, use of individual drink bottles) ; and

(vi) any other guidelines issued by the Ministry of Health relating to COVID 19.

3.2 **Location of Services**

The Services:

(a) may be provided anywhere in New Zealand where an Alert Level 4 exists (and the Provider acknowledges that alert levels may vary between any town, city, territorial local authority, region); and

(b) do not apply where the carer usually lives at the same address as the essential worker.

3.3 **Essential worker**

For the purposes of this clause 3, an essential worker is any worker (other individual carers providing Services pursuant to this Agreement) that:

(a) is providing services to essential businesses (pursuant to the order made by the Director-General of Health on 24 March 2020 in accordance with section 70(1)(m) of the Heath Act 1956) at Alert Level 4 as described at https://covid19.govt.nz/government-actions/covid-19-alert-level/essential-businesses/ and as updated from time to time; and

(b) has attested that during the hours they are providing essential services:

(i) no other adult in their household are able to provide care for their children; and

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(ii) they are unable to make any other arrangements for care of their children.

3.4 **Regulatory requirements do not apply**

In accordance with the Secretary of Education's direction described in paragraph B of the background section to this Agreement, the Services described in this clause 3 are not early childhood services as defined in section 309 of the Education Act 1989 and the Provider is not required to:

(a) meet any regulatory requirements that would otherwise apply to licensed early childhood services; or

(b) provide any education or instruction as part of the Services.

4. PROVIDER'S OBLIGATIONS

4.1 **Performance**

In providing the Services and complying with its other obligations under this Agreement, the Provider must:

(a) ensure that individual carers do not provide any Services on any day that either the individual carer, or the child being cared for, are feeling unwell or showing symptoms of Covid-19;

(b) comply with all reasonable directions given by the Ministry from time to time;

(c) comply with all the Ministry policies and procedures notified to the Provider from time to time;

(d) comply with all of its legal obligations (including under statute, regulation, and contract);

(e) promptly notify the Ministry in writing of:

(i) any breach of the Provider's obligations under this Agreement; and

(ii) any matter that may impact on the Provider's ability to perform its obligations in accordance with this Agreement.

4.2 **Child protection policy**

The Provider will maintain during the Term of this Agreement a child protection policy that accords with the requirements of section 19 of the Children's Act 2014.

4.3 **Maintain reputation**

The Provider must not engage in any activity or conduct that might, in the Ministry's opinion, damage the reputation or image of the Ministry or the Crown.

5. PERSONNEL

5.1 **Personnel**

The Provider:

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(a) must ensure the Services are provided by Personnel who have been police-vetted, and safety checked in accordance with the Children's Act 2014, and would otherwise be able to provide early childhood services for a licenced service provider under part 26 of the Education Act 1989;

(b) must ensure that if Services are being provided at the home of the individual carer, all members of the carer's family self-isolation unit aged 17 and older have also met the police vetting requirements of (a) above;

(c) is responsible for all acts and omissions of the Personnel as if they were the acts or omissions of the Provider; and

(d) must ensure that all Personnel, including individual carers:

(i) comply with the terms of this Agreement and with all of the Ministry's policies, procedures and directions;

(ii) do not charge any person any additional fees in connection with the provision of Services under this Agreement;

(e) must not subcontract any of its obligations under this Agreement without the Ministry's prior written consent;

(f) notwithstanding (e) above, may subcontract the delivery of Services but must ensure each subcontractor complies with the terms of this Agreement.

6. REPORTING

6.1 Reporting

The Provider will provide to the Ministry the following reports at the following times:

No.	Report	Report details	Due date
1	Daily	[Daily email summary containing a running total of the number of: • Confirmed carers placed; • Confirmed families placed; • Confirmed children placed; • Estimate of families not confirmed; • Estimate of children not confirmed ; • Geographical location(s) of any shortage(s).] *[Depending on provider's capacity, daily reporting may not be required.]*	5pm daily
2	Weekly	Report of prior calendar week containing the following information for each carer: • Name and confirmation they have provided the attestation required under clause 3.3(b) above; • Delivery address; • Number of children cared for; • Hours worked.	5pm each Wednesday
3	Ad hoc	Such additional information and reports as and when the Ministry may reasonably request.	As required

7. HEALTH AND SAFETY

7.1 Health and Safety at Work Act 2015

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The Provider shall:

(a) consult, cooperate and coordinate with the Ministry, to the extent required by the Ministry, and to ensure that the Ministry and the Provider will each comply with their respective obligations under the Health and Safety at Work Act 2015 as they relate to this Agreement;

(b) perform its, and ensure that its Personnel perform their, obligations under this Agreement in compliance with its and their obligations under the Health and Safety at Work Act 2015;

(c) comply with all reasonable directions of the Ministry relating to health, safety, and security;

(d) report any health and safety incident, injury or near miss, or any notice issued under the Health and Safety at Work Act 2015, to the Ministry to the extent that it relates to, or affects, this Agreement.

8. CHARGES AND PAYMENT

8.1 Charges

The Ministry will pay the Provider a maximum sum of $[xxx] (excluding GST), consisting of:

(a) *Administration fee* - a one-off administration fee of $60 (excluding GST) for each individual carer placed with a family by the Provider to provide childcare; and

(b) *Pass-through costs* - an hourly rate of $25 (excluding GST) for each hour of childcare provided under this Agreement, to be passed through to the individual carer.

8.2 Total charge

The Ministry will pay the Charges to the Supplier in accordance with this clause 8.

8.3 No other amounts payable

Except as expressly provided by in this Agreement, or otherwise agreed by the parties, the Provider will not be entitled to any additional payment for the provision of the Services, the granting of any rights under this Agreement, and/or the performance of any other activities in connection with this Agreement.

8.4 Invoicing and payment

The Provider will invoice the Charges incurred in respect of each week no later than the Wednesday of the following week* and will ensure that each such invoice is a valid tax invoice under the Goods and Services Tax Act 1985. Subject to clause 8.6 the Ministry endeavour to pay each such invoice on the Thursday in the week after the valid invoice is received.

**This may be changed to fortnightly at the Provider's request*

8.5 Taxes

The Ministry shall pay GST in respect of all taxable supplies made by the Provider to the Ministry under this Agreement. All other government taxes, duties, imposts and levies assessed or levied on the Provider in relation to this

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Agreement (including penalties thereon) are hereby deemed to be included in the Charges.

8.6 **Disputed invoices**

If the Ministry has a genuine dispute in relation to all or any portion of an invoice submitted by the Provider, the Ministry may withhold payment of the amount subject to the dispute, provided that:

(a) the Ministry shall pay the undisputed amount when it becomes due and payable in accordance with the terms of this Agreement;

(b) the Ministry must provide reasonable details about the disputed amount and the reasons for withholding payment, and must advise the Provider of the dispute on or before the payment date for that invoice (provided that no failure by the Ministry to do any of the foregoing will prejudice the Ministry's right to dispute an invoice after it has been paid); and

(c) the Provider shall continue to perform its obligations under this Agreement notwithstanding the dispute.

9. RECORDS AND AUDIT

9.1 **Records**

Without limiting its other obligations under this Agreement or at law, the Provider must create and maintain, and must ensure that each subcontractor creates and maintains, full, accurate and accessible Records relating to:

(a) the provision of the Services (including the names and ages of the children being cared for, the names of the individual carers providing care and to which child, and the carer's written attestation described in clause 3.3(b) above);

(b) the Charges charged under this Agreement; and

(c) its health and safety reporting requirements,

to the standards required under the Public Records Act 2005.

9.2 **Notice of audit**

The Ministry may at any time notify the Provider that the Ministry wishes to audit any or all of the Provider's:

(a) provision of the Services;

(b) invoicing; and

(c) compliance with the terms of this Agreement.

9.3 **Audit**

The Ministry will notify the Provider of the date on which the audit will commence, which must be at least two Business Days after receipt of a notice under clause 9.2. The Provider will allow the Ministry or its nominee to inspect the Provider's premises, systems and records on and from the date notified by the Ministry during the Provider's normal business hours for the purpose of conducting the audit. The Ministry will comply with the Provider's reasonable security and confidentiality requirements in conducting any audit under this clause 9.3.

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9.4 **Assistance**

The Provider will assist the Ministry with any audit conducted under clause 9.3 and will ensure its Personnel and subcontractors also assist the Ministry, including by making their premises, systems and records available to the Ministry or its nominee if requested.

9.5 **Costs**

The Ministry will meet its costs of any audit unless the audit discloses that the Provider has overcharged the Ministry on any invoice by 5% or more. In that case, the Provider will meet the Ministry's audit costs.

9.6 **Non-compliance**

Without limiting any of the Ministry's other rights or remedies, if any audit conducted under clause 9.3 discloses any failure to comply with this Agreement by the Provider, the Provider will promptly remedy the non-compliance. The Provider will refund any amounts overcharged by the Provider within five Business Days of completion of an audit and delivery of an audit report.

9.7 **Official Information Act 1982**

The Provider acknowledges that the Ministry is subject to the Official Information Act 1982 (the ***OIA***) and agrees to cooperate fully in providing the Ministry with any documents or other information that the Ministry is required to provide pursuant to a request made under the OIA, or pursuant to questions raised in Parliament or in any Select Committee concerning this Agreement.

10. WARRANTIES

10.1 **Warranties**

The Provider warrants at all times that:

(a) all information supplied by it to the Ministry under this Agreement is true, complete and accurate;

(b) it has full corporate power and has obtained the required authority and authorisations to enter into and perform its obligations under this Agreement;

(c) the Services will at all times be provided by provided by Personnel who have met the requirements of clause 5.1(a) of this Agreement.

11. LIABILITY AND INSURANCE

11.1 **Liability**

Subject to clause 11.2, each party's liability to the other party for damages (under the law of contract, tort including negligence, equity or otherwise) arising out of or in connection with this Agreement will be limited in aggregate to:

(a) in the case of the Provider, the total Charges paid or payable under this Agreement;

(b) in the case of the Ministry, $100,000,

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provided that liability is not limited:

(c) in the case of wilful default or fraud; or

(d) in relation to any unauthorised use of the other party's Intellectual Property or Confidential Information.

11.2 **Exclusions of liability**

Despite any other provision of this Agreement, neither party will be liable to the other (under the law of contract, tort, equity or otherwise) for any damages of any kind arising out of or in connection with this Agreement that are indirect or consequential (meaning not arising in the ordinary course as a direct, natural or probable consequence of the act or omission complained of), regardless of the cause of such damages or whether the other party had been advised of the possibility of such damage.

11.3 **Insurance**

During the Term of this Agreement, the Provider will maintain insurance coverage in amounts and against risks that are normal for businesses similar to that of the Provider.

12. INTELLECTUAL PROPERTY

12.1 **No change**

All intellectual property which is owned by, or is proprietary to, the Ministry or Provider at the date of this Agreement will at all times remain owned by that party exclusively.

12.2 **New Intellectual Property**

Subject to clause 12.1, and except where the Ministry and the Provider agree otherwise, all intellectual property rights in the Services will vest absolutely and exclusively in the Provider on its creation in material form and without the need for any further act by the Provider except as required by law.

13. CONFIDENTIAL INFORMATION

13.1 **Confidentiality obligations**

Subject to clause 13.2, each party will keep the other party's Confidential Information in the utmost confidence, and will not use or disclose that Confidential Information except as permitted by this Agreement**.**

13.2 **Permitted use and disclosure**

Clause 13.1 will not prohibit:

(a) either party from using or disclosing any information with the express prior written consent of the other party;

(b) use or disclosure of information that has become generally known to the public other than through a breach of this Agreement;

(c) either party disclosing information to its Personnel with a need to know, to be used to enable that party to perform its obligations or take the intended benefit of its rights under this Agreement, so long as the disclosing party informs such Personnel of the confidential nature of that information and makes a written record of doing so;

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(d) disclosure compelled by any statute or regulations, or any court order;

(e) disclosure by the Ministry at the request of an officer of Parliament, a parliamentary select committee, a royal commission, or a Minister of the Crown (including for the purposes of a parliamentary question); and/or

13.3 **Privacy**

To the extent applicable to its activities in connection with this Agreement, the Provider will comply with all aspects of privacy and data protection legislation governing the collection, use, security and storage of personal information.

13.4 **Misuse or breach**

The Provider will notify the Ministry in writing immediately upon becoming aware of any:

(a) potential, threatened or actual misuse or unauthorised disclosure of Confidential Information by any person to whom the Provider makes any disclosure; or

(b) breach of the Provider's obligations under this clause 13,

and will co-operate with the Ministry in preventing or limiting such misuse, unauthorised disclosure or breach, at the cost of the Provider.

13.5 **Equitable relief**

Each party acknowledges that any breach of this clause 13 by the Recipient may cause the Owner irreparable harm for which damages would not be an adequate remedy. In addition to any other remedy available to it, the Owner may seek equitable relief (including injunctive relief or specific performance) against any breach or threatened breach of this clause 13 by the Recipient.

13.6 **Announcements**

The Provider must not make any announcement regarding this Agreement to any person, without the Ministry's prior written consent.

14. TERMINATION

14.1 **Termination for convenience**

The Ministry may terminate this Agreement at any time by giving the Provider one days' written notice.

14.2 **Termination for Provider's breach**

Without prejudice to any other right or remedy it may have, the Ministry may immediately terminate this Agreement at any time by notice in writing to the Provider if the Provider:

(a) is in material breach of this Agreement and, in the case of a material breach capable of remedy, the material breach is not remedied promptly upon the Provider receiving written notice specifying the material breach and requiring its remedy;

(b) is in material breach of this Agreement and the material breach is not capable of remedy.

14.3 **Consequences of termination**

On termination or expiry of this Agreement for any reason:

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(a) the Provider will cease to provide the Services;

(b) the Provider will, upon receipt of a written request from the Ministry, return or destroy (at the Ministry's option), all Confidential Information in the possession or control of the Provider or any Personnel or subcontractor. Upon the return or destruction (as the case may be) of all such Confidential Information, the Provider will provide to the Ministry a certificate stating that the Confidential Information returned or destroyed comprises all Confidential Information in the possession or control of the Provider or any Personnel or subcontractor;

(c) the Provider will provide such information and assistance as the Ministry requires to allow the Ministry to make an orderly transition of all or any of the Services to the Ministry and/or any nominated alternative provider.

14.4 **Survival of provisions**

Upon termination or expiry of this Agreement for any reason, the provisions of clauses, 8.33, 9.1, **Error! Reference source not found.**, 9.4 to 9.7, 10, 11, 12, 13.1 to 13.6, 14.33 to 14.5, 15, 16 and the Schedule and any other clauses intended to survive termination or expiry, together with those other provisions of this Agreement that are required in order to give effect to those clauses, will remain in full force and effect.

14.5 **Accrued rights**

Termination or expiry of this Agreement will be without prejudice to the rights and remedies of the parties accrued prior to termination or expiry, including in respect of any prior breach of this Agreement.

15. DISPUTES

15.1 **Procedure**

If a dispute, disagreement, question, difference or claim arises between the parties in connection to this Agreement or its subject matter (***Dispute***), either party may give the other written notice (***Dispute Notice***) requiring that the Dispute be determined in accordance with the dispute resolution process set out in Schedule 4.

16. GENERAL

16.1 **Variations**

No amendment to this Agreement will be effective unless it is in writing and signed by the parties.

16.2 **Assignment**

The Provider may not assign, transfer, novate, subcontract, charge, pledge or otherwise encumber this Agreement, or any of its rights or obligations under this Agreement, without first obtaining the Ministry's written consent.

16.3 **No waiver**

(a) A delay, neglect or forbearance by a party in enforcing any provision of this Agreement against the other will not waive or limit any right of that party.

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(b) No provision of this Agreement will be considered waived by a party unless that party waives the provision in writing.

(c) The parties will not treat a waiver by a party of any breach as a waiver of any continuing or re-occurring breach, unless the parties have expressly agreed to do so in writing.

16.4 **Invalid clauses**

If any part of this Agreement is held to be invalid, unenforceable or illegal for any reason, this Agreement will be deemed to be amended by the addition or deletion of wording necessary to remove the invalid, unenforceable or illegal part, but otherwise to retain the provisions of this Agreement to the maximum extent permissible under applicable law.

16.5 **Costs**

Each party will bear its own legal costs and expenses incurred in connection with the preparation, negotiation and execution of this Agreement.

16.6 **Relationship**

(a) The parties will perform their obligations under this Agreement as independent contractors to each other.

(b) This Agreement will not create, constitute or evidence any partnership, joint venture, agency, trust or employer/employee relationship between the parties, unless it expressly states otherwise. Neither party may make or allow anyone to represent that any such relationship exists between the parties.

(c) Neither party will have the authority to act for, or incur any obligation on behalf of, the other party, except as expressly provided for in this Agreement.

16.7 **Entire agreement**

This Agreement contains the whole of the contract and understanding between the parties in respect of the matters covered by it and supersedes all prior representations, agreements, statements and understandings between the parties in respect of those matters, whether verbal or in writing.

16.8 **Remedies cumulative**

The rights of the parties under this Agreement are cumulative. The parties do not exclude any rights provided by law, unless otherwise expressly stated in this Agreement.

16.9 **Notices**

(a) Any notice, consent, approval, agreement, undertaking, report or other communication given by a party for the purposes of this Agreement will be of no effect unless given in writing and addressed to the recipient at the address last notified by the recipient to the other party. Until a change is so notified, the address of each party is

To the Provider: Address: Email:

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To the Ministry: Address: PO Box 1666, 33 Bowen Street, Wellington 6011 Email: colin.meehan@education.govt.nz CC: casey.dalton@education.govt.nz

(b) Delivery may be effected by hand, by post with postage prepaid, or by email. A notice or other communication will be deemed to have been received:

(i) in the case of hand delivery or pre-paid post sent from outside New Zealand, at the time of actual delivery to the recipient's address;

(ii) in the case of delivery by pre-paid post sent from within New Zealand, no later than the 2nd Business Day after posting; or

(iii) in the case of delivery by email, no later than when the recipient's email server acknowledges receipt.

However, if a notice or other communication is received or deemed to have been received after 5 pm on a Business Day in the place to which it is sent, or on a day which is not a Business Day in that place, it will be deemed not to have been received until the next Business Day in that place.

16.10 **Governing Law**

This Agreement is governed by New Zealand law. Subject to clause 15, the parties submit to the non-exclusive jurisdiction of the New Zealand courts in respect of all matters relating to this Agreement.

16.11 **Counterparts**

This Agreement may be signed in any number of counterparts (including email copies) all of which, when taken together, will constitute one and the same agreement. A party may enter into this Agreement by signing any counterpart.

16.12 **Further assurances**

Each party will do all things and execute all documents reasonably necessary to give effect to the terms of this Agreement.

16.13 **Non merger**

The warranties, undertakings and indemnities given under this Agreement will not merge on any completion or settlement under this Agreement or any other agreement between the parties, but will remain enforceable to the fullest extent permissible, despite any rule of law to the contrary.

SIGNATURES

For **The Sovereign in right of the Government of New Zealand** acting by and through the **Secretary for Education**:	For [**Provider**]:

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Signature:	Signature:
Name: Colin Meehan	Name:
Position: Manager, ECE Regulations and Planning	Position:
Date:	Date:

Witnessed by:	Witnessed by:
Name:	Name:
Date:	Date:

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SCHEDULE - DISPUTE RESOLUTION PROCESS

1 **Negotiation**

The parties will enter into negotiations to resolve the Dispute within 10 Business Days of the Dispute Notice being issued. Negotiations will be held between representatives of the parties (who must have authority to settle the Dispute). The Dispute will be escalated to senior management as necessary.

2 **Mediation**

If:

(a) the parties agree; and

(b) the Dispute is not resolved by negotiation within 10 Business Days of receipt of the Dispute Notice,

then the Dispute may be referred to mediation (*Mediation*) by one party giving written notice to the other (*Mediation Notice*). The mediation will be heard as soon as possible in Wellington, New Zealand and conducted in accordance with the protocols of the Arbitrators' and Mediators' Institute of New Zealand Inc (*AMINZ*). The Mediation will be conducted by a mediator, and at a fee, agreed by the parties. If the parties fail to agree such matters within 10 Business Days following the date of the delivery of the Mediation Notice, the President for the time being AMINZ will select the mediator and determine the mediator's fee. The parties will share equally the cost of the mediator's fee.

3 **Arbitration**

If the Dispute:

(a) has not been resolved within a period of 10 Business Days (or such longer period as the parties may agree) in accordance with paragraph 1 of this Schedule; or

(b) in accordance paragraph 2 of this Schedule,

then either party may issue a notice (*Arbitration Notice*) referring the Dispute to arbitration.

Each Arbitration Notice will be regarded as a reference of the Dispute to arbitration in accordance with the Arbitration Act 1996 (the *Act*). Each such arbitration will be conducted on the following terms:

(c) the place of arbitration will be Wellington, New Zealand.

(d) the tribunal will consist of a sole arbitrator, to be appointed by agreement of the parties, but if the parties fail to reach such agreement within 10 Business Days of the date of the Arbitration Notice, then the arbitrator will be appointed by the President for the time being, or his or her nominee, of the Arbitrators' and Mediators' Institute of New Zealand Inc.

(e) the arbitration will be conducted as quickly as possible and, as far as is practicable, the arbitrator will issue his or her award within four months of

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his or her appointment. When determining the procedure and scheduling of the arbitration, the arbitrator will take this time period into consideration

(f) each party will pay its own costs in relation to the arbitration

(g) Clauses 3 (Powers relating to conduct of arbitral proceedings) and 6 (Costs and expenses of an arbitration) of the Second Schedule of the Act will apply to any arbitral proceedings under this Agreement. No other clauses in the Second Schedule will apply.

(h) The award in the arbitration will be final and binding.

4 **Interlocutory relief**

Nothing in this Schedule will prevent either party, at any time, from seeking any urgent interlocutory relief from a court of competent jurisdiction in relation to any matter that arises under this Agreement.

5 **Continuity**

In the event of a dispute between the parties concerning this Agreement, the Provider will continue to provide the Services unless the Ministry requires otherwise in writing.

6 **Without prejudice**

Unless and until a Dispute is resolved by an express written agreement of the parties, any and all statements and undertakings made by the parties in connection with the associated Dispute resolution process (excluding any arbitration proceedings) will be deemed to have been made on a "without prejudice" basis.

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Document C

MINISTRY OF EDUCATION
TE TĀHUHU O TE MĀTAURANGA

ESSENTIAL WORKERS CHILDCARE SUPPORT SERVICES AGREEMENT

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Ministry of Education

PORSE In-Home Childcare (NZ) Ltd

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AGREEMENT dated 3 April 2020

PARTIES

The Sovereign In Right of the Government of New Zealand acting by and through the **Secretary for Education** at Wellington (the ***Ministry***)

PORSE In-Home Childcare (NZ) Ltd at 7-9 Mccoll Street, Newmarket, Auckland 1023, NZBN: 9429038321504 (the ***Provider***)

BACKGROUND

A As a result of the COVID-19 pandemic, on 23 March 2020 the government made the decision to move to Alert Level 4 from midnight 25 March which introduced a number of restrictions including people being instructed to stay at home, closing educational facilities, and closing all businesses other than those business considered to be essential services.

B Under Alert Level 4 schools and early childhood education services were not classified as essential services, and therefore all early childhood education and care centres were required to close, however the group of Ministers with Power to Act on COVID-19 subsequently noted essential workers require childcare during the lock-down, and agreed that individual home-based educators be classified as essential workers where they are working solely for one family as part of the family's self-isolation unit, and to fund providers accordingly.

C On 25 March 2020, pursuant to section 476C of the Education Act 1989, the Secretary for Education, directed that a number of licensed home-based education and care service providers, of which the Provider is one, may open to provide care for the children of essential workers aged up to 14 years for the period during which this direction applies.

D The Ministry has selected the Provider to provide the Services, which the Provider has agreed to supply, on the terms and conditions set out in this Agreement.

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AGREEMENT

1. DEFINITIONS AND INTERPRETATION

1.1 **Definitions**

In this Agreement, the following terms have the following meanings unless the context requires otherwise:

Agreement means this agreement, including the Schedule to this agreement.

Business Day means any day other than a Saturday, a Sunday or a public holiday (as defined in the Holidays Act 2003) in Wellington, New Zealand.

Charges means the amounts payable by the Ministry as specified in clause 8.

Confidential Information means all information in any form relating to or proprietary to a party (**Discloser**) that:

(a) is provided by (or on behalf of) the Discloser to the other party (**Recipient**) in connection with the Agreement; or

(b) otherwise becomes known to the Recipient in connection with the Agreement; and

(c) is by its nature confidential, is designated (in writing or otherwise) by the Discloser as confidential or which the Recipient ought reasonably to know is confidential,

but excludes any information to the extent the Recipient can show the relevant information:

(d) at the time of receipt by the Recipient is in the public domain or subsequently comes in to the public domain otherwise than as a result of a breach of this Agreement or any other obligation of confidentiality;

(e) is already or lawfully comes in to the unrestricted possession of the Recipient without there having been any breach of any obligations of confidentiality owed by a third party;

(f) has been independently developed by the Recipient (as evidenced by records in its possession);

(g) is not intended to be confidential as evidenced by the written agreement of the Discloser;

(h) is disclosed by the Recipient with the prior written approval of the Discloser in accordance with the terms of such written approval; or

(i) is required to be disclosed, by law or by a governmental or other competent authority or pursuant to the listing rules of any applicable stock exchange, provided that before making the disclosure the Recipient has given the Discloser notice of the request for disclosure and where practical obtained a confidentiality order or similar protection limiting the persons to whom disclosure of the Confidential Information is made if the Discloser has no effective status on the matter.

Dispute has the meaning given to it in clause 15.

Dispute Notice has the meaning given to it in clause 15.

GST means goods and services tax payable under the Goods and Services Tax Act 1985 at the rate prevailing from time to time, including any tax levied in substitution for that tax.

Personnel means any employee, agent or representative of the Provider (including individual carers), or of any subcontractor of the Provider, who provides any Services.

Services means:

(a) the services described in this Agreement, including clause 3;

(a) all services incidental to, or required for the proper performance of, the services described in (a); and

(b) all other services agreed in writing by the parties from time to time.

Term means the term of this Agreement described in clause 2.1.

1.2 **Interpretation**

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In this Agreement, unless the context requires otherwise:

(a) headings are for convenience only and have no legal effect unless otherwise specified;

(b) references to the singular include the plural and vice versa;

(c) references to a party include that party's successors, executors, administrators and permitted assignees (as the case may be);

(d) where a word or phrase is defined, its other grammatical forms have a corresponding meaning;

(e) references to a person include:

(i) an individual, firm, company, corporation or unincorporated body of persons;

(ii) any public, territorial or regional authority;

(iii) any government; and

(iv) any agency of any government or authority;

(f) an obligation not to do anything includes an obligation not to suffer, permit or cause that thing to be done;

(g) references to any statute include any amendment to, or replacement of, that statute and any subordinate legislation made under it;

(h) wherever the words "includes" or "including" (or similar words) are used, they are deemed to be followed by the words "without limitation";

2. OVERVIEW

2.1 Term

This Agreement will commence on 26 March 2020 and, unless terminated earlier in accordance with its terms, will end on the later of 22 April 2020, or the date on which the Ministry notifies the Provider in writing that the Provider has completed the provision of the Services in accordance with this Agreement to the satisfaction of the Ministry.

2.2 Appointment

The Ministry appoints the Provider, and the Provider agrees, to provide the Services on the terms and conditions of this Agreement.

3. SERVICES

3.1 Services

The Services the Provider will provide include:

(a) childcare for the children of essential workers aged up to 14 years during the hours the essential worker is providing essential services, and agreed between the essential worker and the Provider;

(b) the Services being provided at either:

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(i) the children's own home; or

(ii) the home of the individual carer providing the childcare;

(c) where the care is provided from the carer's home, ensuring that the carer's home has been previously assessed as meeting health and safety licensing requirements;

(d) each individual carer working solely for one family only as part of the family's self-isolation unit, provided that if the care is being provided from the carer's own home, they may also care for their own children;

(e) each individual carer will adhere to the key public health principles including:

(i) limiting contact to those within a household unit;

(ii) maintaining physical distancing of at least one metre, preferably two metres when interacting with others at all times;

(iii) maintaining good hygiene practices (for example cough and sneeze etiquette, hand hygiene);

(iv) maintaining good cleaning practices;

(v) not sharing food, drinks or eating utensils (for example, use of individual drink bottles) ; and

(vi) any other guidelines issued by the Ministry of Health relating to COVID 19.

3.2 **Location of Services**

The Services:

(a) may be provided anywhere in New Zealand where an Alert Level 4 exists (and the Provider acknowledges that alert levels may vary between any town, city, territorial local authority, region); and

(b) do not apply where the carer usually lives at the same address as the essential worker.

3.3 **Essential worker**

For the purposes of this clause 3, an essential worker is any worker (other individual carers providing Services pursuant to this Agreement) that:

(a) is providing services to essential businesses (pursuant to the order made by the Director-General of Health on 24 March 2020 in accordance with section 70(1)(m) of the Heath Act 1956) at Alert Level 4 as described at https://covid19.govt.nz/government-actions/covid-19-alert-level/essential-businesses/ and as updated from time to time; and

(b) has attested that during the hours they are providing essential services:

(i) no other adult in their household are able to provide care for their children; and

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(ii) they are unable to make any other arrangements for care of their children.

3.4 **Regulatory requirements do not apply**

In accordance with the Secretary of Education's direction described in paragraph B of the background section to this Agreement, the Services described in this clause 3 are not early childhood services as defined in section 309 of the Education Act 1989 and the Provider is not required to:

(a) meet any regulatory requirements that would otherwise apply to licensed early childhood services; or

(b) provide any education or instruction as part of the Services.

4. PROVIDER'S OBLIGATIONS

4.1 **Performance**

In providing the Services and complying with its other obligations under this Agreement, the Provider must:

(a) ensure that individual carers do not provide any Services on any day that either the individual carer, or the child being cared for, are feeling unwell or showing symptoms of Covid-19;

(b) comply with all reasonable directions given by the Ministry from time to time;

(c) comply with all the Ministry policies and procedures notified to the Provider from time to time;

(d) comply with all of its legal obligations (including under statute, regulation, and contract);

(e) promptly notify the Ministry in writing of:

(i) any breach of the Provider's obligations under this Agreement; and

(ii) any matter that may impact on the Provider's ability to perform its obligations in accordance with this Agreement.

4.2 **Child protection policy**

The Provider will maintain during the Term of this Agreement a child protection policy that accords with the requirements of section 19 of the Children's Act 2014.

4.3 **Maintain reputation**

The Provider must not engage in any activity or conduct that might, in the Ministry's opinion, damage the reputation or image of the Ministry or the Crown.

5. PERSONNEL

5.1 **Personnel**

The Provider:

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(a) must ensure the Services are provided by Personnel who have been police-vetted, and safety checked in accordance with the Children's Act 2014, and would otherwise be able to provide early childhood services for a licenced service provider under part 26 of the Education Act 1989;

(b) must ensure that if Services are being provided at the home of the individual carer, all members of the carer's family self-isolation unit aged 17 and older have also met the police vetting requirements of (a) above;

(c) is responsible for all acts and omissions of the Personnel as if they were the acts or omissions of the Provider; and

(d) must ensure that all Personnel, including individual carers:

(i) comply with the terms of this Agreement and with all of the Ministry's policies, procedures and directions;

(ii) do not charge any person any additional fees in connection with the provision of Services under this Agreement;

(e) must not subcontract any of its obligations under this Agreement without the Ministry's prior written consent;

(f) notwithstanding (e) above, may subcontract the delivery of Services but must ensure each subcontractor complies with the terms of this Agreement.

6. REPORTING

6.1 Reporting

The Provider will provide to the Ministry the following reports at the following times:

No.	Report	Report details	Due date
1	Daily	Daily email summary containing a running total of the number of: • Confirmed carers placed; • Confirmed families placed; • Confirmed children placed; • Estimate of families not confirmed; • Estimate of children not confirmed ; • Geographical location(s) of any shortage(s).	4pm daily
2	Weekly	Report of prior calendar week containing the following information for each carer: • Name and confirmation they have provided the attestation required under clause 3.3(b) above; • Delivery address; • Number of children cared for; • Hours worked.	5pm each Wednesday
3	Ad hoc	Such additional information and reports as and when the Ministry may reasonably request	As required

7. HEALTH AND SAFETY

7.1 Health and Safety at Work Act 2015

The Provider shall:

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(a) consult, cooperate and coordinate with the Ministry, to the extent required by the Ministry, and to ensure that the Ministry and the Provider will each comply with their respective obligations under the Health and Safety at Work Act 2015 as they relate to this Agreement;

(b) perform its, and ensure that its Personnel perform their, obligations under this Agreement in compliance with its and their obligations under the Health and Safety at Work Act 2015;

(c) comply with all reasonable directions of the Ministry relating to health, safety, and security;

(d) report any health and safety incident, injury or near miss, or any notice issued under the Health and Safety at Work Act 2015, to the Ministry to the extent that it relates to, or affects, this Agreement.

8. CHARGES AND PAYMENT

8.1 Charges

The Ministry will pay the Provider a maximum sum of $1,000,000 (excluding GST), consisting of:

(a) *Administration fee* - a one-off administration fee of $60 (excluding GST) for each individual carer placed with a family by the Provider to provide childcare; and

(b) *Pass-through costs* - an hourly rate of $25 (excluding GST) for each hour of childcare provided under this Agreement, to be passed through to the individual carer.

8.2 Total charge

The Ministry will pay the Charges to the Supplier in accordance with this clause 8.

8.3 No other amounts payable

Except as expressly provided by in this Agreement, or otherwise agreed by the parties, the Provider will not be entitled to any additional payment for the provision of the Services, the granting of any rights under this Agreement, and/or the performance of any other activities in connection with this Agreement.

8.4 Invoicing and payment

The Provider will invoice the Charges incurred in respect of each week no later than the Wednesday of the following week and will ensure that each such invoice is a valid tax invoice under the Goods and Services Tax Act 1985. Subject to clause 8.6 the Ministry endeavour to pay each such invoice on the Thursday in the week after the valid invoice is received.

8.5 Taxes

The Ministry shall pay GST in respect of all taxable supplies made by the Provider to the Ministry under this Agreement. All other government taxes, duties, imposts and levies assessed or levied on the Provider in relation to this Agreement (including penalties thereon) are hereby deemed to be included in the Charges.

8.6 Disputed invoices

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If the Ministry has a genuine dispute in relation to all or any portion of an invoice submitted by the Provider, the Ministry may withhold payment of the amount subject to the dispute, provided that:

(a) the Ministry shall pay the undisputed amount when it becomes due and payable in accordance with the terms of this Agreement;

(b) the Ministry must provide reasonable details about the disputed amount and the reasons for withholding payment, and must advise the Provider of the dispute on or before the payment date for that invoice (provided that no failure by the Ministry to do any of the foregoing will prejudice the Ministry's right to dispute an invoice after it has been paid); and

(c) the Provider shall continue to perform its obligations under this Agreement notwithstanding the dispute.

9. RECORDS AND AUDIT

9.1 Records

Without limiting its other obligations under this Agreement or at law, the Provider must create and maintain, and must ensure that each subcontractor creates and maintains, full, accurate and accessible Records relating to:

(a) the provision of the Services (including the names and ages of the children being cared for, the names of the individual carers providing care and to which child, and the carer's written attestation described in clause 3.3(b) above);

(b) the Charges charged under this Agreement; and

(c) its health and safety reporting requirements,

to the standards required under the Public Records Act 2005.

9.2 Notice of audit

The Ministry may at any time notify the Provider that the Ministry wishes to audit any or all of the Provider's:

(a) provision of the Services;

(b) invoicing; and

(c) compliance with the terms of this Agreement.

9.3 Audit

The Ministry will notify the Provider of the date on which the audit will commence, which must be at least two Business Days after receipt of a notice under clause 9.2. The Provider will allow the Ministry or its nominee to inspect the Provider's premises, systems and records on and from the date notified by the Ministry during the Provider's normal business hours for the purpose of conducting the audit. The Ministry will comply with the Provider's reasonable security and confidentiality requirements in conducting any audit under this clause 9.3.

9.4 Assistance

The Provider will assist the Ministry with any audit conducted under clause 9.4 and will ensure its Personnel and subcontractors also assist the Ministry,

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including by making their premises, systems and records available to the Ministry or its nominee if requested.

9.5 **Costs**

The Ministry will meet its costs of any audit unless the audit discloses that the Provider has overcharged the Ministry on any invoice by 5% or more. In that case, the Provider will meet the Ministry's audit costs.

9.6 **Non-compliance**

Without limiting any of the Ministry's other rights or remedies, if any audit conducted under clause 9.4 discloses any failure to comply with this Agreement by the Provider, the Provider will promptly remedy the non-compliance. The Provider will refund any amounts overcharged by the Provider within five Business Days of completion of an audit and delivery of an audit report.

9.7 **Official Information Act 1982**

The Provider acknowledges that the Ministry is subject to the Official Information Act 1982 (the ***OIA***) and agrees to cooperate fully in providing the Ministry with any documents or other information that the Ministry is required to provide pursuant to a request made under the OIA, or pursuant to questions raised in Parliament or in any Select Committee concerning this Agreement.

10. WARRANTIES

10.1 **Warranties**

The Provider warrants at all times that:

(a) all information supplied by it to the Ministry under this Agreement is true, complete and accurate;

(b) it has full corporate power and has obtained the required authority and authorisations to enter into and perform its obligations under this Agreement;

(c) the Services will at all times be provided by provided by Personnel who have met the requirements of clause 5.1(a) of this Agreement.

11. LIABILITY AND INSURANCE

11.1 **Liability**

Subject to clause 11.2, each party's liability to the other party for damages (under the law of contract, tort including negligence, equity or otherwise) arising out of or in connection with this Agreement will be limited in aggregate to:

(a) in the case of the Provider, the total Charges paid or payable under this Agreement;

(b) in the case of the Ministry, $100,000,

provided that liability is not limited:

(c) in the case of wilful default or fraud; or

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(d) in relation to any unauthorised use of the other party's Intellectual Property or Confidential Information.

11.2 **Exclusions of liability**

Despite any other provision of this Agreement, neither party will be liable to the other (under the law of contract, tort, equity or otherwise) for any damages of any kind arising out of or in connection with this Agreement that are indirect or consequential (meaning not arising in the ordinary course as a direct, natural or probable consequence of the act or omission complained of), regardless of the cause of such damages or whether the other party had been advised of the possibility of such damage.

11.3 **Insurance**

During the Term of this Agreement, the Provider will maintain insurance coverage in amounts and against risks that are normal for businesses similar to that of the Provider.

12. INTELLECTUAL PROPERTY

12.1 **No change**

All intellectual property which is owned by, or is proprietary to, the Ministry or Provider at the date of this Agreement will at all times remain owned by that party exclusively.

12.2 **New Intellectual Property**

Subject to clause 12.1, and except where the Ministry and the Provider agree otherwise, all intellectual property rights in the Services will vest absolutely and exclusively in the Provider on its creation in material form and without the need for any further act by the Provider except as required by law.

13. CONFIDENTIAL INFORMATION

13.1 **Confidentiality obligations**

Subject to clause 13.2, each party will keep the other party's Confidential Information in the utmost confidence, and will not use or disclose that Confidential Information except as permitted by this Agreement**.**

13.2 **Permitted use and disclosure**

Clause 13.1 will not prohibit:

(a) either party from using or disclosing any information with the express prior written consent of the other party;

(b) use or disclosure of information that has become generally known to the public other than through a breach of this Agreement;

(c) either party disclosing information to its Personnel with a need to know, to be used to enable that party to perform its obligations or take the intended benefit of its rights under this Agreement, so long as the disclosing party informs such Personnel of the confidential nature of that information and makes a written record of doing so;

(d) disclosure compelled by any statute or regulations, or any court order;

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(e) disclosure by the Ministry at the request of an officer of Parliament, a parliamentary select committee, a royal commission, or a Minister of the Crown (including for the purposes of a parliamentary question); and/or

13.3 **Privacy**

To the extent applicable to its activities in connection with this Agreement, the Provider will comply with all aspects of privacy and data protection legislation governing the collection, use, security and storage of personal information.

13.4 **Misuse or breach**

The Provider will notify the Ministry in writing immediately upon becoming aware of any:

(a) potential, threatened or actual misuse or unauthorised disclosure of Confidential Information by any person to whom the Provider makes any disclosure; or

(b) breach of the Provider's obligations under this clause 13,

and will co-operate with the Ministry in preventing or limiting such misuse, unauthorised disclosure or breach, at the cost of the Provider.

13.5 **Equitable relief**

Each party acknowledges that any breach of this clause 13 by the Recipient may cause the Owner irreparable harm for which damages would not be an adequate remedy. In addition to any other remedy available to it, the Owner may seek equitable relief (including injunctive relief or specific performance) against any breach or threatened breach of this clause 13 by the Recipient.

13.6 **Announcements**

The Provider must not make any announcement regarding this Agreement to any person, without the Ministry's prior written consent.

14. TERMINATION

14.1 **Termination for convenience**

The Ministry may terminate this Agreement at any time by giving the Provider one days' written notice.

14.2 **Termination for Provider's breach**

Without prejudice to any other right or remedy it may have, the Ministry may immediately terminate this Agreement at any time by notice in writing to the Provider if the Provider:

(a) is in material breach of this Agreement and, in the case of a material breach capable of remedy, the material breach is not remedied promptly upon the Provider receiving written notice specifying the material breach and requiring its remedy;

(b) is in material breach of this Agreement and the material breach is not capable of remedy.

14.3 **Consequences of termination**

On termination or expiry of this Agreement for any reason:

(a) the Provider will cease to provide the Services;

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(b) the Provider will, upon receipt of a written request from the Ministry, return or destroy (at the Ministry's option), all Confidential Information in the possession or control of the Provider or any Personnel or subcontractor. Upon the return or destruction (as the case may be) of all such Confidential Information, the Provider will provide to the Ministry a certificate stating that the Confidential Information returned or destroyed comprises all Confidential Information in the possession or control of the Provider or any Personnel or subcontractor;

(c) the Provider will provide such information and assistance as the Ministry requires to allow the Ministry to make an orderly transition of all or any of the Services to the Ministry and/or any nominated alternative provider.

14.4 **Survival of provisions**

Upon termination or expiry of this Agreement for any reason, the provisions of clauses, 8.3, 9.1, 9.2, 9.5 to 9.8, 10, 11, 12, 13.1 to 13.7, 14.3 to 14.5, 15, 16 and the Schedule and any other clauses intended to survive termination or expiry, together with those other provisions of this Agreement that are required in order to give effect to those clauses, will remain in full force and effect.

14.5 **Accrued rights**

Termination or expiry of this Agreement will be without prejudice to the rights and remedies of the parties accrued prior to termination or expiry, including in respect of any prior breach of this Agreement.

15. DISPUTES

15.1 **Procedure**

If a dispute, disagreement, question, difference or claim arises between the parties in connection to this Agreement or its subject matter (***Dispute***), either party may give the other written notice (***Dispute Notice***) requiring that the Dispute be determined in accordance with the dispute resolution process set out in Schedule 4.

16. GENERAL

16.1 **Variations**

No amendment to this Agreement will be effective unless it is in writing and signed by the parties.

16.2 **Assignment**

The Provider may not assign, transfer, novate, subcontract, charge, pledge or otherwise encumber this Agreement, or any of its rights or obligations under this Agreement, without first obtaining the Ministry's written consent.

16.3 **No waiver**

(a) A delay, neglect or forbearance by a party in enforcing any provision of this Agreement against the other will not waive or limit any right of that party.

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(b) No provision of this Agreement will be considered waived by a party unless that party waives the provision in writing.

(c) The parties will not treat a waiver by a party of any breach as a waiver of any continuing or re-occurring breach, unless the parties have expressly agreed to do so in writing.

16.4 **Invalid clauses**

If any part of this Agreement is held to be invalid, unenforceable or illegal for any reason, this Agreement will be deemed to be amended by the addition or deletion of wording necessary to remove the invalid, unenforceable or illegal part, but otherwise to retain the provisions of this Agreement to the maximum extent permissible under applicable law.

16.5 **Costs**

Each party will bear its own legal costs and expenses incurred in connection with the preparation, negotiation and execution of this Agreement.

16.6 **Relationship**

(a) The parties will perform their obligations under this Agreement as independent contractors to each other.

(b) This Agreement will not create, constitute or evidence any partnership, joint venture, agency, trust or employer/employee relationship between the parties, unless it expressly states otherwise. Neither party may make or allow anyone to represent that any such relationship exists between the parties.

(c) Neither party will have the authority to act for, or incur any obligation on behalf of, the other party, except as expressly provided for in this Agreement.

16.7 **Entire agreement**

This Agreement contains the whole of the contract and understanding between the parties in respect of the matters covered by it and supersedes all prior representations, agreements, statements and understandings between the parties in respect of those matters, whether verbal or in writing.

16.8 **Remedies cumulative**

The rights of the parties under this Agreement are cumulative. The parties do not exclude any rights provided by law, unless otherwise expressly stated in this Agreement.

16.9 **Notices**

(a) Any notice, consent, approval, agreement, undertaking, report or other communication given by a party for the purposes of this Agreement will be of no effect unless given in writing and addressed to the recipient at the address last notified by the recipient to the other party. Until a change is so notified, the address of each party is

To the Provider:
Address: 7-9 Mccoll Street, Newmarket, Auckland 1023
Email: rrahul.dosshi@porse.co.nz

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To the Ministry: Address: PO Box 1666, 33 Bowen Street, Wellington 6011 Email: colin.meehan@education.govt.nz CC: casey.dalton@education.govt.nz

(b) Delivery may be effected by hand, by post with postage prepaid, or by email. A notice or other communication will be deemed to have been received:

(i) in the case of hand delivery or pre-paid post sent from outside New Zealand, at the time of actual delivery to the recipient's address;

(ii) in the case of delivery by pre-paid post sent from within New Zealand, no later than the 2nd Business Day after posting; or

(iii) in the case of delivery by email, no later than when the recipient's email server acknowledges receipt.

However, if a notice or other communication is received or deemed to have been received after 5 pm on a Business Day in the place to which it is sent, or on a day which is not a Business Day in that place, it will be deemed not to have been received until the next Business Day in that place.

16.10 **Governing Law**

This Agreement is governed by New Zealand law. Subject to clause 15, the parties submit to the non-exclusive jurisdiction of the New Zealand courts in respect of all matters relating to this Agreement.

16.11 **Counterparts**

This Agreement may be signed in any number of counterparts (including email copies) all of which, when taken together, will constitute one and the same agreement. A party may enter into this Agreement by signing any counterpart.

16.12 **Further assurances**

Each party will do all things and execute all documents reasonably necessary to give effect to the terms of this Agreement.

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16.13 **Non merger**

The warranties, undertakings and indemnities given under this Agreement will not merge on any completion or settlement under this Agreement or any other agreement between the parties, but will remain enforceable to the fullest extent permissible, despite any rule of law to the contrary.

SIGNATURES

For **The Sovereign in right of the Government of New Zealand** acting by and through the **Secretary for Education**:	For **PORSE In-Home Childcare (NZ) Ltd**
Signature: Colin Meehan signed electronically	Signature: Rrahul Dosshi
Name: Colin Meehan	Name: Rrahul Dosshi
Position: Manager, ECE Regulations and Planning	Position: Managing Director
Date: 15 April 2020	Date: 15/04/20

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SCHEDULE - DISPUTE RESOLUTION PROCESS

1 **Negotiation**

The parties will enter into negotiations to resolve the Dispute within 10 Business Days of the Dispute Notice being issued. Negotiations will be held between representatives of the parties (who must have authority to settle the Dispute). The Dispute will be escalated to senior management as necessary.

2 **Mediation**

If:

(a) the parties agree; and

(b) the Dispute is not resolved by negotiation within 10 Business Days of receipt of the Dispute Notice,

then the Dispute may be referred to mediation (*Mediation*) by one party giving written notice to the other (*Mediation Notice*). The mediation will be heard as soon as possible in Wellington, New Zealand and conducted in accordance with the protocols of the Arbitrators' and Mediators' Institute of New Zealand Inc (*AMINZ*). The Mediation will be conducted by a mediator, and at a fee, agreed by the parties. If the parties fail to agree such matters within 10 Business Days following the date of the delivery of the Mediation Notice, the President for the time being AMINZ will select the mediator and determine the mediator's fee. The parties will share equally the cost of the mediator's fee.

3 **Arbitration**

If the Dispute:

(a) has not been resolved within a period of 10 Business Days (or such longer period as the parties may agree) in accordance with paragraph 1 of this Schedule; or

(b) in accordance paragraph 2 of this Schedule,

then either party may issue a notice (*Arbitration Notice*) referring the Dispute to arbitration.

Each Arbitration Notice will be regarded as a reference of the Dispute to arbitration in accordance with the Arbitration Act 1996 (the *Act*). Each such arbitration will be conducted on the following terms:

(c) the place of arbitration will be Wellington, New Zealand.

(d) the tribunal will consist of a sole arbitrator, to be appointed by agreement of the parties, but if the parties fail to reach such agreement within 10 Business Days of the date of the Arbitration Notice, then the arbitrator will be appointed by the President for the time being, or his or her nominee, of the Arbitrators' and Mediators' Institute of New Zealand Inc.

(e) the arbitration will be conducted as quickly as possible and, as far as is practicable, the arbitrator will issue his or her award within four months of

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his or her appointment. When determining the procedure and scheduling of the arbitration, the arbitrator will take this time period into consideration

(f) each party will pay its own costs in relation to the arbitration

(g) Clauses 3 (Powers relating to conduct of arbitral proceedings) and 6 (Costs and expenses of an arbitration) of the Second Schedule of the Act will apply to any arbitral proceedings under this Agreement. No other clauses in the Second Schedule will apply.

(h) The award in the arbitration will be final and binding.

4 **Interlocutory relief**

Nothing in this Schedule will prevent either party, at any time, from seeking any urgent interlocutory relief from a court of competent jurisdiction in relation to any matter that arises under this Agreement.

5 **Continuity**

In the event of a dispute between the parties concerning this Agreement, the Provider will continue to provide the Services unless the Ministry requires otherwise in writing.

6 **Without prejudice**

Unless and until a Dispute is resolved by an express written agreement of the parties, any and all statements and undertakings made by the parties in connection with the associated Dispute resolution process (excluding any arbitration proceedings) will be deemed to have been made on a "without prejudice" basis.

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MINISTRY OF EDUCATION
TE TĀHUHU O TE MĀTAURANGA

Variation 1 to Essential Workers Childcare Support Services Agreement

Ministry of Education

PORSE In-Home Childcare (NZ) Ltd

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PARTIES

The Ministry of Education acting by and through the **Secretary for Education**, at Wellington (the *Ministry*)

PORSE In-Home Childcare (NZ) Ltd having its registered office at 7-9 Mccoll Street, Newmarket, Auckland 1023, NZBN: 9429038321504 (the *Supplier*)

BACKGROUND

A The Ministry and Supplier are parties to an agreement for childcare services dated 03 April 2020 (the *Agreement*).

B The agreement term of 26 March 2020 to 22 April 2020 was set to reflect the planned minimum four week period at alert level 4. On 20 April 2020, the Prime Minister announced that alert level 4 would be extended to 11:59pm on 27 April 2020.

C In accordance with this extension, the parties wish to vary the Agreement upon the terms and conditions as detailed in this variation.

THE PARTIES AGREE as follows:

1 **INTERPRETATION**

1.1 **Defined terms**

In this variation, unless the context requires otherwise, words and expressions defined, and references construed, in the Agreement and not otherwise defined or construed in this variation will, where used in this variation, have the same meanings and constructions as those given to them in the Agreement.

Construction

Clauses: a reference to a clause is to a clause of this variation;

Documents: a reference to any document, including this variation, includes a reference to that document as amended or replaced from time to time;

Headings: headings appear as a matter of convenience and do not affect the construction of this variation;

Parties: a reference to a party to this variation or any other document includes that party's personal representatives/successors and permitted assigns;

Singular, Plural and Gender: the singular includes the plural and vice versa, and words importing one gender *include* the other genders.

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2 **CONFIRMATION**

Except as expressly varied by this variation, all terms of the Agreement continue in full force and effect and are acknowledged and confirmed by each of the parties.

3 **VARIATION**

With effect from 21 April 2020 the Agreement is varied as follows:

3.1 By the extension of the term (clause 2.1 TERM) to 11:59pm, 27 April 2020.

4 **GENERAL**

4.1 **Counterparts**

This variation may be signed in two or more counterparts all of which, when taken together, will constitute one and the same instrument. A party to this variation may enter into it by executing any such counterpart.

4.1 **Further assurances**

Each party will do all things and execute all documents reasonably necessary to give effect to the terms of this variation.

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EXECUTED AS A VARIATION

Signed for and on behalf of **Ministry of Education** by:	Signed for and on behalf of **PORSE In-Home Childcare (NZ) Ltd** by:
_____	Rrahul Dosshi _____
Signature	Director/Trustee
Colin Meehan, Manager ECE Regulations and Planning	
_____	Rrahul Dosshi _____
Name	Name

MINISTRY OF EDUCATION
TE TĀHUHU O TE MĀTAURANGA

Variation 2 to Essential Workers Childcare Support Services Agreement

Ministry of Education

PORSE In-Home Childcare (NZ) Ltd

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PARTIES

The Ministry of Education acting by and through the **Secretary for Education**, at Wellington (the *Ministry*)

PORSE In-Home Childcare (NZ) Ltd having its registered office at 7-9 Mccoll Street, Newmarket, Auckland 1023, NZBN: 9429038321504 (the *Supplier*)

BACKGROUND

A The Ministry and Supplier are parties to an agreement for childcare services dated 03 April 2020 (the *Agreement*).

B The agreement term of 26 March 2020 to 22 April 2020 was set to reflect the planned minimum four week period at alert level 4. On 20 April 2020, the Prime Minister announced that alert level 4 would be extended to 11:59pm on 27 April 2020.

C On 23 April 2020, the government agreed to a further extension to 8 May 2020 to 'enable families and providers to transition back to their usual arrangements or to make new arrangements where necessary'.

D In accordance with this extension, the parties wish to vary the Agreement upon the terms and conditions as detailed in this variation.

THE PARTIES AGREE as follows:

1 **INTERPRETATION**

1.1 **Defined terms**

In this variation, unless the context requires otherwise, words and expressions defined, and references construed, in the Agreement and not otherwise defined or construed in this variation will, where used in this variation, have the same meanings and constructions as those given to them in the Agreement.

Construction

Clauses: a reference to a clause is to a clause of this variation;

Documents: a reference to any document, including this variation, includes a reference to that document as amended or replaced from time to time;

Headings: headings appear as a matter of convenience and do not affect the construction of this variation;

Parties: a reference to a party to this variation or any other document includes that party's personal representatives/successors and permitted assigns;

Singular, Plural and Gender: the singular includes the plural and vice versa, and words importing one gender *include* the other genders.

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2 **CONFIRMATION**

Except as expressly varied by this variation, all terms of the Agreement continue in full force and effect and are acknowledged and confirmed by each of the parties.

3 **VARIATION**

With effect from 24 April 2020 the Agreement is varied as follows:

3.1 By the extension of the term (clause 2.1 TERM) to 11:59pm, 8 May 2020.

3.2 By the replacement of 'Alert level 4' within Clause 3.2 (a) and 3.3 (a) with 'Alert Level 4 and Alert Level 3'.

4 **GENERAL**

4.1 **Counterparts**

This variation may be signed in two or more counterparts all of which, when taken together, will constitute one and the same instrument. A party to this variation may enter into it by executing any such counterpart.

4.1 **Further assurances**

Each party will do all things and execute all documents reasonably necessary to give effect to the terms of this variation.

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EXECUTED AS A VARIATION

Signed for and on behalf of **Ministry of Education** by:	Signed for and on behalf of **PORSE In-Home Childcare (NZ) Ltd** by:
_____	_____
Signature	Director/Trustee
Colin Meehan, Manager ECE Regulations and Planning	
_____	_____
Name	Name