

## OEAP EG: Underpinning Legal Framework

### Legal Sources of Reference

In the context of outdoor learning and off-site activities, legal requirements are largely defined by the interface of Health and Safety with Employment Law. The main points of statutory reference are:

- Health and Safety at Work Act (1974)
- Management of Health and Safety at Work Regulations (1999)
- Children Act (2004).

The above have to be set within the well-established (but evolutionary context) of Common Law, set down in case law, but developed by judges to reflect the changing needs of society.

### The Standard of “so far as is reasonably practicable”

Those taking responsibility for outdoor learning should be reassured that the law takes due account of the principle of proportionality. In general terms, legal expectation is to do that which is “reasonable” or is “reasonably practicable” and does **not** require an attainment of “perfection”. In other words, it is recognised that the systems and procedures put in place to support activity will have take into account the resource implications. The provision of an endless chain of “back-stops” to “back-stops” to meet “what if?” scenarios is unrealistic and not required.

### Common Law Duty of Care, Effective Supervision and Ratios

When a Visit Leader or Assistant Leader (including a Volunteer Helper) takes on responsibility for the supervision of young people, they take on a legal *duty of care* to ensure that those being looked after are kept safe from harm. Those leading the group must avoid all acts or omissions that might reasonably be foreseen to cause injury or otherwise harm the young people they are supervising.

Where a non-specialist or non-professional adult (the person traditionally described in Common Law as “the man on the Clapham omnibus”) takes on responsibility for young people, the legal expectation of the standard of care is described as that of a “reasonably prudent parent”.

When the adult taking on the duty of care has a particular expertise or specialist knowledge and/or is working in a professional or employment context, then the law expects a higher standard of care than that of a reasonably prudent parent.

When there is a failure to discharge the duty of care and it causes reasonably foreseeable harm, this may result in a civil claim for negligence. However, where the employer and the employee can demonstrate that they have done all that is reasonably practicable to prevent reasonably foreseeable harm, then they will be deemed to have properly discharged their duty and the harm will not be actionable.

Where there is a master-servant (i.e. employer-employee) relationship, the employer may be vicariously liable for the acts of its employees and thus employers (such as LAs, VA schools and Academies) owe a duty of care to both their employees and the young people being supervised by their employees. However, there is no strict (automatic) liability attaching to such circumstances.

### Effective Supervision

To exercise their duty of care, Common Law expectation is that activity leaders ensure that young people are supervised in accordance with the principles of “Effective Supervision”, requiring them to take account of:

- The nature of the activity (including its duration).
- The location and environment in which the activity is to take place.
- The age and gender (including developmental age) of the young people to be supervised.

- The ability of the young people (including their behavioural, medical, emotional and educational needs).
- Staff competence and experience requirements.

This means that every group should be considered in relation to its individual, component parts and effective supervision of any given group should reflect the unique nature of the group. It is therefore of critical importance that when planning a repeat or on-going series of activities, the previous plan (no matter how well it worked) is reviewed to ensure it meets current group needs. In the eyes of the law, there is no such thing as a definitive ratio for a particular age group undertaking a specified activity.

### **Discharge of the duty of care**

The first question that should be asked is: “is there a duty of care?”

If the answer is “no”, then that is the end of the story. If the answer is “yes”, the question arises as to whether whoever has the duty has met the required standard.

**Employers** should ensure that they are able to demonstrate that they have done all that is reasonably practicable to:

- provide appropriate guidance to their employees (including the requirement for effective supervision)
- ensure that the guidance they provide is understood (i.e. provide guidance training)
- ensure that there is access to further advice to help employees understand and implement guidance
- sample monitor employee compliance with guidance.

**Employees** should ensure that they are able to demonstrate that they have done all that is reasonably practicable to:

- take advantage of any guidance training provided by their employer (this may be recommended or a requirement)
- supervise the young people engaged in the off-site activity in accordance with the guidance provided by their employers
- implement the requirements of effective supervision

### **Duty of Care and the Use of Providers**

#### **Requirements of the Employer**

Where a Provider is appointed/contracted to deliver a specialist activity that requires specialist competence (e.g. swimming, archery, climbing etc etc) then the employer will have discharged their duty of care only if they have done all that is reasonably practicable to ensure that their guidance provides advice on how to choose an appropriate provider, and sample monitor whether this advice is implemented.

#### **Requirements of the Employee/Visit Leader when the provider delivers specialist activities**

Where a Provider is appointed/contracted to deliver a specialist activity that requires specialist competence (e.g. swimming, archery, climbing etc) then the employee will have discharged their duty of care only if they have done all that is reasonably practicable to ensure that the guidance that has been provided by their employer on how to choose an appropriate provider has been followed.

### **Requirements of the Employee/Visit Leader when there is joint provision**

Where the character of a given activity is such that the Visit Leader and their Assistant Leaders are themselves involved in a supervisory role along side the staff of the Provider (e.g. where a key aspect of appropriate supervision is most likely to depend on knowledge of the likely behaviour of the young people, as at a theatre, in a library etc) then the duty of care will remain with the Visit Leader and Assistant Leaders and should only be passed on to the Providers staff by a formally stated agreement.

### **Visit and Assistant Leader participation and/or observation of provider-led activities**

Where an appropriate Provider has been appointed, it is good practice for employees, as far as is reasonably practicable, to involve themselves in activities (or observe the activities) they have organised to monitor the provision and ensure the provision meets their requirements and learning outcomes they have tasked the Provider to deliver. Failure to do this when it is a reasonably practicable proposition should be regarded as a failure to meet the expectations of good practice. This statement is without prejudice to the reality that the nature of some activities will make involvement or observation an unreasonable expectation and will depend on the exact circumstances.

### **Legal Status of Guidance Documents**

Guidance documents are published by a variety of organisations, including government departments. While these often form the basis of guidance produced by employers (e.g. local authorities) and professional associations (e.g. NAHT) and professional bodies (e.g. AfPE), government department guidance has to be drafted in terms that takes into account that most of the legal responsibilities sit with employers - who are therefore charged with making the definitive call. This means that employer guidance and its supporting training requirements must prevail over other sources of guidance.

It is a critical aspect of outdoor learning activity and visit planning at all levels to ensure that there is proper understanding of the status of various visit and off-site activities guidance documents - which ones are useful and which ones must be followed because they will become the key point of reference in any legal proceedings. This understanding will set the expectations of good practice demanded by Employment and Health and Safety law.

The Health and Safety at Work Act 1974 places overall responsibility for health and safety with the employer. Who this is, varies with the type of establishment or setting.

- For community schools, community special schools, voluntary controlled schools, maintained nursery schools and pupil referral units the employer is the local authority.
- For Academies and trust schools, city technology colleges, foundation schools, foundation special schools and voluntary aided schools, the employer is usually the governing body or trust.
- For independent schools, the employer is usually the governing body or proprietor.
- The local authority is the employer for the statutory Youth Support settings. (Note: those in charge of non-statutory youth groups may also find this guidance useful.)
- The local authority is the employer of a range of staff working in other Children's Services settings such as Looked After Children, some Early Years settings etc.
- The increasing use by local authorities of partnership working and commissioned services should be on the basis that those commissioned will be tied by legal agreements to work to safeguarding standards not less than those required by the local authority, or as if the local authority were the employer.

### **Duties and Responsibilities of an Employer**

The employer has a duty to ensure, so far as is reasonably practicable:

- The health, safety and welfare of all employees.
- The health and safety for all young people (or vulnerable adults) in their care.

- The health and safety of volunteers involved in employer-led activities, including off-site activity and visits.

The employer must ensure that their employees are safe at work, including facilitating, organising or supervising off-site activities and activities that run outside of normal working hours. This duty extends to adults working with as volunteers to help provide employee-led activities. It also extends to any young people participating in activities where employees have a duty of care.

While this legal duty rests with the employer, most of the underpinning functions can (and will) be delegated to employees. Such delegation must be set out in procedures and processes that provide a clear audit trail. Therefore the employer must provide employees with guidance and ensure that there are appropriate training regimes in place to ensure that employees understand the guidance issued – i.e. employers **must** ensure that employees are trained.

Regardless of the delegation process, under the Common Law principle of Vicarious Liability, the employer will remain legally responsible for the actions of its employees, ensuring that in the event of a legal claim, it will be the employer that is sued and not the employee.

### **Detailed Content of Employer Guidance**

The exact content of an employer's guidance document is determined by the employer, but should reflect the core requirements and recommendations of good practice guidance recognised across the sector to which it applies. It is critical that those drafting employer guidance make it clear when a course of action is a requirement or a recommendation so that those using the guidance are aware of whether they have a choice.

*Recommendations* demonstrate good practice e.g. preliminary visits are strongly recommended.

*Requirements* are instructions and must be obeyed e.g. all off-site activities must be formally approved.

It will be up to the employer to either recommend or prescribe (as a requirement) any training regimes that are available to support their guidance.

### **Risks must be managed**

An employer has a legal duty to ensure that suitable and sufficient risk management systems are in place, requiring them to provide such support, training and resources to employees as is necessary to implement policy, including access to competent advice. See MOL guidance "Risk Management and Risk–Benefit Analysis"