



The Association of Independent Schools
of New South Wales Limited ACN 003 509 073 ABN 96 003 509 073

Level 4, 99 York Street
Sydney NSW 2000
Telephone: (02) 9299 2845
Facsimile: (02) 9290 2274
aisnsw@aisnsw.edu.au

11 October 2005

PRIVATE AND CONFIDENTIAL

Mr Martin Gooding
Dean of Staff
Knox Grammar School
PO Box 5008
WAHROONGA NSW 2076

Dear Mr Gooding

DUTY OF CARE SCENARIOS

I apologise for the delay in responding to the two scenarios you provided to me in late July, but I have had to give priority to a number of requests for assistance, including the review of boarding at Knox.

I now have some time to carefully consider the issues you raised.

1. **“Boarders wanting to go to parties. In the past we have advised parents [that either we think the party okay, or not okay] and required our boarders to go directly from the party to a host parent rather than return to the boarding house. The leave card indicated that the student is going to the party and thence to the host. We got ourselves into difficulties [as you know] recently, when the transfer to host parents took place outside the school at about 2am, and there was trouble. No boarding staff were present. Advice re the party could be seen as foreseeing trouble, but then we wash our hands of it so to speak.”**

I have thought long and hard about this situation and considered the following documents:

- My letter of 6 June 2005 to the Headmaster that reviewed the circumstances following the specific party you refer to above.
- The booklet provided at the Duty of Care, Liability and Indemnities briefing sessions conducted this year. (I'm aware you attended one of these sessions.) The advices on Duty of Care, Risk Warnings and Indemnities appear to be particularly relevant.

It is difficult to see how the school can completely distance itself from facilitating the attendance of students at parties (the position that may provide greatest protection for the school) and maintain good order and discipline by requiring that students do not return to the boarding houses after parties. The very nature of boarding seems to require some involvement in when and how boarders leave the school or return to it when attending a variety of activities. In the same vein, the school may feel moved to warn the boys and their parents of the possible risks involved in certain activities just as a responsible parent would at home.

It seems to me that the best protection may be afforded by a combination of a risk warning to the parent and child along with an indemnity from the parent to the school.

I note from Attachment 3, Risk Warnings in the Duty of Care, Liabilities and Indemnities Booklet:

Page 1

"6. A 'recreational activity' is defined as:

(b) any pursuit or activity that is engaged in for enjoyment, relaxation or leisure ..."

Page 3

"28. A warning might be appropriate where, for example, the school wishes to put parents and students on notice that it does not have control over the activities to be undertaken by the student, (for example, in relation to excursions where the activities are run by a third party)."

Should the risk warning / indemnity approach appeal to you, I would strongly recommend that legal advice is obtained to ensure that these steps will provide maximum protection for the school. The wording of the risk warning and indemnity would be very important.

2. **Our down syndrome boy, who is doing modified Lifeskills, comes to school 2 and ½ days per week; he is schooled at home the other days. When I visited as part of the supervision process for his learning programmes, I was a little surprised that it was not his home, but that of his teacher's aide, and that, from an OH&S / duty of care perspective, a number of things worried me – he is learning life skills, so a home is appropriate, but I know that if this home were part of the family day care network, for example, it would be closed immediately. Big plate glass doors / electrical equipment / knives etc. What is the status of such a place? Our duty of care is surely extended there, even though the aide is paid by the parents of the boy – is that correct? Should we have someone inspect? Should we insist that the boy be in the home of the parents?**

I'm aware that you are also obtaining advice from Robyn Yates' team about educational program issues in relation to this situation. I will not provide any advice in that regard.

There are major issues involved in working at home for both the employee and the employer. As a brief demonstration of some of the issues, I enclose a relevant press clipping.

I also note that the AIS has taken extensive legal advice concerning its employees working from home and has developed an OHS checklist that employees are required to complete before working at home is approved.

A critical question in your scenario is does the school have any responsibility in regard to the employment of the teacher's aide. If not, the school may not have OHS and Workers' Compensation obligations. You indicate that the parent is paying the teacher's aide – do you mean that the parent is directly paying the person or that they are reimbursing the school?

The Child Protection area is less clear because the employment context is not entirely clear to me. If the parent is the employer, they will not be a designated agency under the Ombudsman Act 1974 as

amended but the school is a designated agency. If the school is in a position to determine whether or not the teacher's aide continues to be employed they may have responsibilities under the Ombudsman's legislation.

Similarly, either the parent or the school may have obligations under the Commission for Children and Young People's legislation.

Because of the school's involvement in this program, it would be difficult to see how you wouldn't have some duty of care. I'm concerned that by inspecting the situation, or requiring that the program be run in the parents' home, you may extend your duty of care.

I'm very happy to discuss this further with you but in view of the issues raised again recommend that you consider taking specific legal advice.

Please contact me if I can be of further assistance, including arranging an appointment with Minter Ellison, Lawyers.

Yours faithfully,

Grahame Wilson
Assistant Director, Employment Relations