

Mitigating Legal Risk for School Districts Offering or Supporting Extended Learning Opportunities

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Extended learning opportunities ("ELOs") are an innovative approach to education. ELO Programs may be structured differently from state to state but generally they allow high school students to experience a field of interest outside the traditional classroom setting while earning educational credits. ELOs afford the opportunity for students to learn in alternative settings; often in a manner that is more amenable to their learning style. For example, a student interested in computer hardware design may intern at a retail computer repair facility and not only gain pragmatic skills and information, but do such in a manner that makes the learning experience relevant to future employment. (This paper is educational in nature and is not intended as legal advice. This paper touches on certain aspects of New Hampshire law from an educational perspective and does not review the law of any other state or authority. You should seek the advice of your legal counsel with regard to the implementation of any ELO Program and the reduction of risk.)

ELOs provide numerous benefits. Students learn specialized skills in a hands-on manner. Students gain access to resources and learning experiences they may not be able to gain in the traditional classroom setting. ELOs provide the ability to create learning plans that are tailored to individual student's learning needs, styles and goals. They can cover a broad range of experiences including, but not limited to, internships, a Dean B. Eggert specializes in the representation of public School Districts throughout the state of New Hampshire. His biography can be found at <http://www.wadleighlaw.com/nh-lawyers/dean-b-eggert/>.

Performance groups, community service, and online courses. ELOs provide students with opportunities to make valuable connections in the community and meet people who can provide guidance on future career plans and serve as mentors. Real world experience allows students to understand what their working careers would be like in a field and better assess whether it is a career they wish to pursue. ELOs are a valuable supplement to classroom learning by expanding the possibilities for learning and putting knowledge learned in classrooms to practical use.

The New Hampshire Department of Education has led the way in adopting ELOs and making them available to students. See NH Department of Education regulation, Ed 306.02(i). Pursuant to these regulations, all New Hampshire School Districts are required to accommodate extended learning opportunities. See Ed 306.04(a)(14). The National Center for Competency Based Learning, ("NCCBL"), based in New Hampshire, is a not-for-profit organization formed to support the expansion of ELOs in public education.³ The Center works collaboratively with School Districts as they seek to adopt ELO Programs.

Public schools are recognizing the intrinsic benefits of ELOs and are beginning to create and embrace ELO Programs as part of the learning experience. As they do such, School Districts must also consider the legal risks posed by these programmatic changes in learning. This article will address some of the main areas of risk and review steps School Districts can take to reduce their liability and protect their students while also allowing them to experience all the benefits of ELO Programs.

³ For more information on NCCBL see: <http://nccbl.org/>.

The Duty Owed by School Districts

As a general rule, School Districts and their employees owe a duty of supervision to each student and can be held liable for negligence in their actions or omissions in carrying out this duty. As the New Hampshire Supreme Court ruled in Marquay v. Eno, schools share a special relationship with students entrusted to their care, which imposes upon them certain duties of reasonable supervision. This duty falls only upon those school employees who have supervisory responsibility over students and who thus have stepped into the role of parental proxy. See Marquay v. Eno, 662 A.2d 272, 279-280 (N.H. 1995). This duty however, is circumscribed and limited by the doctrine of foreseeability as well as certain legislative protections.⁴

ELOs are identified as a subset of the "alternative learning plan;" an educational opportunity codified in NH RSA 193:1.⁵ From this passing reference in the definition of the "alternative learning plan," we know that ELOs can include "independent study, private instruction, performing groups, internships, community service, apprenticeships, and on-line courses." *Id.* We also know that if ELOs are part of an "alternative learning plan," that they require, "consultation with the pupil, a school guidance counselor, the *School Principal and at least one parent or guardian of the pupil, and [submission] to the School District superintendent for approval.*" *Id.*

⁴For example, absent an extraordinary assumption of a duty, schools do not owe a duty to prevent a child's off campus suicide. See Mikell v. School Administrative Unit No. 33, 158 NH 133 (2009). See also Gauthier v Manchester School District, 2015 WL 5174775 NH_ (slip op., September 4, 2015) (Anti-Bullying statutes expressly preclude both a statutory and common law negligence action against district).

⁵According to NH RSA 193:1(I)(h)(1) Alternative learning plans shall include age-appropriate academic rigor and the flexibility to incorporate the pupil's interests and manner of learning. These plans may include, but are not limited to, such components or combination of components of extended learning opportunities as independent study, private instruction, performing groups, internships, community service, apprenticeships, and on-line courses.

Alternative learning plans shall be developed, and amended if necessary, in consultation with the pupil, a school guidance counselor, the school Principal and at least one parent or guardian of the pupil, and submitted to the School District superintendent for approval. See NH RSA 193:1.

The New Hampshire Department of Education has issued rules regarding ELOs. They are intentionally broad in order to allow for creativity with regard to ELOs. See Ed. 306:21; Ed. 306:26(g); Ed. 306:27(b). These regulations provide little or no guidance to School Districts as to what is expected of them in implementing these programs.

While there is no New Hampshire case law specifically addressing school liability in ELO Programs, Districts generally have a duty to take reasonable steps to supervise and protect their students when the students are under their care. See, Marouay, 662 A.2d at 279. While Districts will not be held liable for injuries they could not foresee, Districts are responsible for taking reasonable steps to prevent harm to a student from a foreseeable risk when the student is in the district's care. *Id.* The following sections will address some of the risks districts may face when offering ELO Programs and some of the reasonable steps that should be taken to avoid liability.

Discerning the functional role of a School District in relationship to an ELO is the beginning point to defining a district's risk. While there is virtually no limit to the creative shape and form that an ELO can assume, the relationship between the district and the ELO should be used as the starting point to define and identify risk. On one end of the spectrum there is the "district ELO" and on the other end, the "independent ELO." Our working definition of the "district ELO" is any extended learning opportunity that is designed, operated, managed or supervised by a public School District, and which occurs within the "four walls" of the School District. In contrast, when we use the term, "independent ELO" we mean any extended learning opportunity that is designed, by a parent, student, or third party operated, managed, or supervised by a parent, or third party and not pre-approved by the district.⁶ In between these two poles, there are innumerable potential permutations, with the clear mid-point being the "district pre-approved ELO." By "district pre-approved ELO," we mean any independent extended learning opportunity that has been reviewed and approved by the School District before the student has participated in the ELO. As to any form of ELO, the district will retain responsibility for such matters such as reviewing the ELO for credit eligibility, setting eligible credit levels, measuring competencies, and determining whether or not competency has been met for credit. Districts are well-advised to set and publish general standards regarding credit eligibility, competency requirements and acceptable ELOs.

If "duty" and "foreseeability" define risk, then it follows that "district ELOs" present far greater risk due to the "duty" assumed in designing the ELO, and the ensuing likelihood that a district is far more able to foresee risk as to programs that it operates. Similarly, "district approved ELOs" may still have an element of duty owed if the district has not clarified and defined its role in reviewing the proposal and extending its blessing to the exercise. In comparison, it may be almost inconceivable that a district will owe a duty as to an independent ELO that has not been pre-approved, by the district and which has been designed by a third party, overseen by a parent, and implemented by that third party.⁶ The third party could be a private instructor, individual, business, other public entity, or charitable nonprofit corporation.

The Risk Calculus

Were districts to use risk analysis as their sole basis for making educational decisions, sports, athletic competitions, field trips, educational

travel, wilderness programs, laboratory experiments, and the like, would all be eliminated due to potential risk. Instead, districts, citizens and legislature have determined that the educational value of these activities are worth the risks, and thus they elect instead to take steps to mitigate the risks. For example, consider field trips, (mini-ELOs); districts reduce their risk by implementing policies as to field trips, providing adult supervision, and requiring permission slips from parents. Schools recognize that by taking proper steps to mitigate risks they can offer beneficial programs to students while also protecting themselves from liability and ensuring student safety. Similarly, in codifying the **ELO** as part of New Hampshire's public educational opportunity, our legislature, the State Department of Education, and public schools have determined that the rewards associated with ELOs outweigh the risks. See NH RSA 189:1; see also Ed 306.04(a)(14).

Recognizing Inherent Risks

Regardless of whether or not a district owes a legal duty, there are certain risks that are inherent with the experiential education offered by ELOs. The major categories include, but are not limited to:

1. Unsafe conditions that may result in a student injury.
2. Inappropriate action by an employee or employer at the **ELO**, for example, sexual harassment or sexual assault of a minor.
3. Misuse of student interns as labor, i.e. contrary to Department of Labor standards.
4. A substandard educational experience.
5. Inappropriate conduct by a student.
6. Overlooked Section 504/IDEA accommodation duties.

Districts should clearly establish certain ELO pre-approval standards as baseline protective measures. As a starting point, districts should indicate that they will not pre-approve ELOs that involve the following:

- Unlawful activities;
- Activities that are contrary to district policies;
- Activities that are prohibited by state or federal law;
- Activities that not creditworthy; or
- Activities that involve an unreasonable safety risk.

If a district is pre-approving an independent ELO Program, its initial risk reduction lies in the designing and securing of the permission and release forms, discussed in section "1." below. Students and parents will then properly bear the primary responsibility for ensuring that the pre-approved independent ELO is safe and appropriate. For school-run ELO Programs, it will be important to move beyond the garnering of permission forms and releases and to engage in all of the forms of risk mitigation outlined in this article.

Risk Reduction Through Parental Permission and Release Forms (a) Permission Slips and Application Forms

Permission forms and application forms will perform an important gatekeeping function with regard to both district ELOs and district approved ELOs. Obviously, the truly independent and autonomous ELO will not require district permission, and any application process will be after the fact, and limited to seeking credit.

Districts are well-advised to develop separate application forms for District ELOs and district pre-approved ELOs. The application forms should require the parents/adult student to provide all of the baseline information that the district will require in order to properly determine the student's eligibility for a district **ELO**, or the appropriateness of the independent ELO for pre-approval.

In the case of an application for pre-approval of an independent ELO, the application should seek the following information:

The name, address and contact information of the primary provider of the ELO;

- a) A detailed description of the nature of the ELO;
- b) The competencies that will be learned;
- c) The manner in which the competencies will be demonstrated;
- d) Whether the ELO is paid, or unpaid
- e) Nondiscrimination laws (RSA 354-A), and safety regulations;
- f) Whether the ELO provider has general liability and workers compensation coverage;
- g) Whether the ELO provider has general liability and workers compensation coverage
- h) Whether the ELO provider is in compliance with all applicable labor laws,
- i) Whether the ELO provider will furnish progress reports to the District;
- j) Whether the Parent/adult student waives FERPA for purposes of communication between the ELO provider and the district;
- k) The hours, days and date span of time that will be committed to the ELO;
- l) The credit that is sought for the ELO; and
- m) Whether the student has health insurance;

There are many other components to a thorough application and districts are well-advised to have their application reviewed by their general legal counsel for completeness.

Just as with school field trips and extra-curricular activities, it is crucial to have parental consent before allowing a minor student to participate in an ELO, particularly when it requires that the student leave the school campus and work or learn with non-school staff. Regardless of whether an ELO is a district approved, but independent ELO, or a school-run ELO, a parental permission form should always be required, signed, and returned before implementation and approval. As to the District approved, but independent ELO, the permission form should verify that the parent and student understands the nature of the ELO: that it is an ongoing program where the student will spend several hours per week, the school does not directly monitor the student while they are at the ELO (or ELO workplace), the employees at the ELO are not employees of the school but rather independently provide these extended learning opportunities to students, and any other relevant information regarding the particular ELO. The permission form should delineate those aspects of the ELO for which the School District has no responsibility, such as transportation, student safety, safety equipment, training (which is to be provided by the ELO workplace), the provision of accommodations and other special education or

related services, and any necessary expenses. Most importantly, the permission form should acknowledge that the district does not assume any responsibility for the safety of the student while participating in the independent ELO. The parent/adult student should be informed that the sole role assumed by the district is assess the creditworthiness of the ELO and if the student satisfactorily meets the competency standards, to grant credit.

In addition, as to the district approved ELOs, the permission/application form should include a statement that the district's approval pertains to creditworthiness only, and that the student and parents take full responsibility for ensuring the adequacy of student's ongoing safety in the program. In short, there must be recognition that the district will not in any way monitor or supervise the student's ELO, except in terms of setting educational expectations, measuring competencies, and granting educational credit for the experience.