

Distribution of FSA Union Materials to Parents Through Students

BCPSEA *@issue* No. 2008-13, dated September 30, 2008, sets out the criteria and suggested processes and procedures for determining which union materials can be distributed by teachers to parents, either directly or through students in sealed envelopes. This document is available on our public website at <http://www.bcpsea.bc.ca/access/publications/aissue/2008/ai2008-13.pdf>.

BC Teachers' Federation Policy Grievance and Position

The BC Teachers' Federation (BCTF) has filed a provincial policy grievance with respect to the content of the September 30, 2008 *@issue*. Although the BCTF has grieved the entire document, following are their main areas of disagreement with respect to the application of the Kinzie award:

- FSA materials do not have to be shared, vetted or discussed with the employer prior to distribution
- No prior approval from the employer is required
- Although they agree that the FSA pamphlets must be accurate and not misleading, they do not believe that information requesting parents to withdraw their children from the FSA for reasons of opposition to the FSA is inaccurate and/or confusing; i.e., they believe that these statements accurately reflect the Ministry's guidelines
- That "extenuating circumstances" under the Ministry's guidelines can be interpreted to include opposition to FSA
- The pamphlets can contain information to parents on how to withdraw their children from the FSA (e.g., including providing letters for parents to send to principals, suggesting parents not send their children to school), and advising parents what they can do to manage principals
- The pamphlets can also contain information explaining why teachers are (unlawfully) refusing to administer the FSA (this was in pamphlets prior to the LRB Order)
- Any issues with respect to accuracy can be dealt with after the fact in the BCTF policy grievance.

BCPSEA Response

BCPSEA is clearly not in agreement with the BCTF interpretation and application of the Kinzie award. It is recognized that respectful debate about methods of student assessment is important. In that regard, judicial and arbitral jurisprudence has clarified that teachers have the right to engage in political discussion and the freedom to express their views to parents on such educational issues under section 2(b) of the *Charter of Rights and Freedoms*.

However, teachers' right to debate with parents must also be balanced with society's interest in an effective and efficient school system which maintains the confidence of students, parents and the public.

This new FSA pamphlet and/or any other union/political information, to the extent that it is distributed in schools, must be considered within this context and, in particular, the guidance provided by Arbitrator Kinzie in his award dated May 2, 2008 in School District No. 5 (Southeast Kootenay).

Following are excerpts from the Kinzie and Hall awards that we believe directly address the issues raised by the BCTF.

- **Prior Approval**

Subject to Charter considerations, school districts have the management right to control what is sent home to parents through students.

Page 35 of the Kinzie award states:

“Having considered all of the evidence and argument, I am of the view that the Employer has the right to control what is sent home to parents through the medium of their children/students at its schools. In my view, this right flows from its responsibilities under the *School Act* and its management rights under the provincial collective agreement with its teachers. In this regard, I note that the Union is not pursuing in this proceeding its grievance in respect of its members' professional autonomy rights under that agreement.”

The Hall award, at page 13, agrees with and quotes from the Kinzie award:

“Finally, and regardless of what is found in the Consent Award, the Employer “has the right to control what is sent home to parents through the medium of their children/students at its schools” (Cranbrook award, at page 35) – subject, of course, to Charter considerations.”

- **Section 1 Restriction to the *Charter of Rights and Freedoms***

There is no absolute right for the union to send out information with respect to FSA. For example, Arbitrator Kinzie found that inaccurate and misleading information was a “pressing and substantial” concern which would justify being dealt with in a reasonable way by the employer under Section 1 of the Charter.

Page 50 of the Kinzie award states:

“Having considered the matter, I am of the view that this confusion and conflict constituted a “pressing and substantial” concern that the Employer would have been justified in addressing in a reasonable way.”

Page 52 of the Kinzie award states:

“The only “pressing and substantial” concern with respect to the pamphlet relates to its content pertaining to the withdrawal of children from writing the tests. The pamphlet is misleading because it does not provide the whole story with respect to that subject matter. The evidence in School District No. 5 (Southeast Kootenay) is that the pamphlet’s misleading description of this process caused confusion and conflict within the schools concerned.”

▪ **Inaccurate and Misleading Information**

Arbitrator Kinzie found that the information in the pamphlet at issue in that case (including the tear-off) caused confusion and did not accurately reflect the Ministry of Education’s guidelines with respect to a parent requesting that their child be excused from writing the FSA. Arbitrator Kinzie also directly addressed the meaning of “extenuating circumstances” in the Ministry’s guideline. “Extenuating circumstances” does not include opposition to the FSA.

Pages 49 and 50 of the Kinzie award state:

“The third element to the Employer’s restricting teachers from sending this pamphlet home with students is that it recommends parents withdraw their children from writing the FSA tests and that they do this by writing a letter to the school principal. A sample letter to the principal is provided in the pamphlet.

On the other hand, the Ministry of Education’s guidelines for the FSA tests state that “all Grade 4 and Grade 7 students are expected to participate” with certain specified exceptions. The guidelines then state that:

“Parents may request the principal to excuse a student in the event of a family emergency, a lengthy illness or other extenuating circumstances.”

Family emergencies and lengthy illnesses are obviously serious matters. In my view, “other extenuating circumstances” would also have to be similar serious matters before a principal could excuse a student from writing the FSA tests. In my view, such an interpretation of that phrase makes sense in the context of the Ministry’s expectation that “all Grade 4 and Grade 7 students” will participate in the tests with only certain specified exceptions. It also makes sense in light of the *ejusdem generis* rule to the effect that “a general phrase, such as “or other causes”... takes into colour from the preceding specific words or phrases ...” See J. Willis, “Statute Interpretations in a Nutshell” (1938), 16 Can. Bar. Rev. 1, at 7 referred to in Brown and Beatty, *Canadian Labour Arbitration* (4th ed.) para. 4:2141.

Thus, excusing a Grade 4 or Grade 7 student from writing the FSA tests is no longer, if it ever was, a simple matter of the parent writing a letter to the principal. A case has to be made out. In this sense, I am of the view that the wording of the BCTF pamphlet that the Employer’s Grade 7 teachers wanted to send out to parents is confusing and does not provide parents with the whole story.”

- **Kinzie Process**

In order to address the employer's "pressing and substantial" concerns, Arbitrator Kinzie found that instead of banning its distribution outright, should the pamphlet contain inaccurate and/or misleading information, the employer should request that the union amend the pamphlet. This would impair the teachers' freedom of expression in a reasonable minimal way. If the union was not willing to make these amendments, the employer would then be justified in restricting the distribution of the entire pamphlet.

Pages 51 and 52 of the Kinzie award state:

"The Employer's outright refusal to permit the pamphlet to be sent home in this fashion overreaches their "pressing and substantial" concern and infringes upon its teachers' freedom to express their concerns to parents about the FSA tests. I will add though that if the Employer had requested that the Union amend the provisions of the pamphlet concerning parents requesting their children be excused from writing the tests so that they accurately reflected the Ministry's guidelines and the Union had refused, I am of the view that the Employer would have been justified in restricting teachers from distributing the pamphlet through its internal mail delivery system to parents. That refusal would have meant that an absolute ban would have been the only way that the Employer could have addressed this pressing and substantial concern."

Clearly, with respect to accuracy, this process envisions addressing these concerns prior to the pamphlet going out. This process is clearly at odds with the BCTF position that no prior discussion/vetting/approval with the employer is required prior to distribution.

- **Other "Pressing and Substantial" Concerns**

There may be other pressing and substantial concerns which would justify requesting revisions to pamphlets which teachers seek to distribute to parents through schools; i.e., statements that undermine the authority of principals or otherwise undermine public confidence in the public school system.

What is Presently Occurring

- Teachers are approaching the issue of distributing material on the FSA differently
- Many teachers are not distributing material on the FSA
- Many local unions and employers are following the Kinzie process; they are meeting before pamphlets are going out and addressing any concerns regarding inaccurate or misleading comments
- Some locals are not distributing material on the FSA through students
- Some locals are distributing pamphlets to teachers without first discussing and/or addressing accuracy concerns with their employer, as the BCTF have said is their right

- In some cases, although the employer has followed the Kinzie process and has advised the local union of the inaccuracies to be amended prior to distribution, the local union has ignored the employer and proceeded to provide teachers with pamphlets for distribution to parents through students
- In a few cases, the employer approved the pamphlet which contained inaccuracies as it was not aware of management's right to ensure that the content of the pamphlets was not inaccurate or misleading.

It is our understanding that in the next few days and/or weeks, the BCTF campaign against the FSA will continue and possibly intensify, to persuade parents to withdraw their children from participating in the FSA. As a result, your local teachers' union may be distributing more and possibly different FSA pamphlets to parents that are inconsistent with the Ministry's guidelines.

It is important that your district follow the process with your local teachers' union as outlined by Arbitrator Kinzie. The reality is that whatever personal opinions school trustees, district staff, the BCTF, and teachers may hold with respect to the FSA (or any other educational initiative for that matter), the FSA is an initiative of the Ministry of Education and is required by the *School Act* and Regulations. Boards are obliged to ensure that the FSA proceeds as required without disruption to the workplace. Further, this issue is not confined to FSA materials — districts may have to address union pamphlets on other educational issues in the future.

As indicated earlier, it appears that further clarification will be provided on this issue in arbitration.

Next Steps

1. Contact your local union and ask if they intend on distributing union FSA pamphlets to parents through students and, if so, whether they will follow the Kinzie process; i.e., prior to distribution, review the FSA materials and address any inaccuracies.
2. If they say yes, then set up a process consistent with the Kinzie award.
3. If they say no or will not provide you with a response, we have attached template letters you may wish to provide your local teachers' union and grades 4 and 7 teachers. The expectation is that the Kinzie process be followed and if there is a disagreement, that the *work now, grieve later* principle be followed. If this is not the case, please ensure that you can verify the teacher's receipt of this letter, document the issue and contact your BCPSEA labour relations liaison immediately.

Letter to Local Union

It is recognized that respectful debate about methods of student assessment is important. In that regard, judicial and arbitral jurisprudence has clarified that teachers have the right to engage in political discussion and the freedom to express their views to parents on such educational issues under Section 2(b) of the *Charter of Rights and Freedoms* (the Charter), subject to restrictions which are justified under Section 1 of the Charter.

Accordingly, teachers' right to further the debate with parents must be valued, but it must also be balanced with society's interest in an effective and efficient school system which maintains the confidence of students, parents and the public. This new Foundation Skills Assessment (FSA) pamphlet, to the extent that it is distributed in schools, must be

considered within this context and, in particular, the guidance provided by Arbitrator Kinzie in his award dated May 2, 2008 in School District No. 5 (Southeast Kootenay).

If you wish to distribute material through the schools, I ask that you provide me a copy of the material in advance of it being sent home. This is consistent with the Award of Arbitrator Kinzie. In the event that your local union does not intend to follow the Kinzie process (i.e., provide me with a copy of the FSA materials in advance and address any inaccurate and/or misleading statements prior to distribution), the district will be directing teachers not to distribute FSA materials to parents through students without the prior authorization of their principal. The district expects teachers to follow this direction and, if not in agreement, to follow the *work now, grieve later* principle. I understand that the BCTF has already filed a grievance in relation to this matter, which may provide additional guidance on this important matter.

In the meantime, I hope that you will reconsider your position and work with the district in accordance with the Kinzie process on this very difficult matter.

Letter to Grades 4 and 7 Teachers

Memo to all Teaching Staff in Grades 4 and 7
From: Superintendent
Subject: Distribution of Union Materials to Parents

It has come to my attention that some teachers may have been advised by their union that they have the right to distribute material on the Foundation Skills Assessment (FSA) to parents through the school, without the permission of the school Principal. The purpose of this memorandum is to notify all teachers that any such union publications which are intended to be distributed to parents through students at the school must be approved for distribution by your Principal prior to the material being sent home.

The district is attempting to reach a resolution with the local union on a process to provide the district with a copy of the FSA materials and address any issues related to the publication prior to its distribution.

If you have any questions or are not clear on this notification of this direction, please contact your Principal.

Questions

If you receive union FSA material for distribution to parents, please contact your BCPSEA labour relations liaison for discussion and review of the pamphlet. It is important that we remain consistent in our approach.