

Distribution of Union Materials to Parents through Students

In September 2008 (*@issue* No. 2008-13), BCPSEA set out the criteria and suggested processes for determining what and how union materials can be distributed by teachers to parents either directly at school or home through students. As a number of school districts are now receiving notification of new materials intended for parents through schools, we are updating our advice on this topic. This *@issue* does not, however, apply to the specific Foundation Skills Assessment (FSA) materials covered by the recent BCPSEA/BCTF consent award protocol agreement for 2011 (i.e., the three BCTF pamphlets as well as the procedures included in the protocol).

BC Teachers' Federation Position

The BC Teachers' Federation (BCTF) had previously filed a provincial policy grievance with respect to the content of our September 30, 2008 *@issue*. Although the BCTF grieved the entire document, the following are their main areas of disagreement with respect to our interpretation of the May 2008 Kinzie award on the distribution of union materials:

- Union materials (anti-FSA pamphlets at that time) do not have to be shared, vetted or discussed with the employer prior to distribution to students for parents
- No prior approval from the employer for distribution is required
- Although the BCTF agreed that the pamphlets (FSA) 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 guidelines as "extenuating circumstances," which can be interpreted to include opposition to FSA)
- Union 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 or suggesting parents not send their children to school on testing days), and advising parents what they can do to "manage" principals.

BCPSEA Response

BCPSEA is not in agreement with the BCTF interpretation and application of the Kinzie award. Although we recognize that respectful debate about issues such as methods of student assessment is important, we also believe teachers' rights to put forward a point of view and discuss with parents must be balanced with society's interest in maintaining an effective and efficient school system which maintains the confidence of parents, students, and the general

public. Judicial and arbitral jurisprudence has clarified that teachers do 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* (Charter), but that right is not completely unfettered, nor without responsibility.

Any new union/political information intended for distribution in schools (whether related to FSA or not), 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 original award by the arbitrator and the subsequent award by Arbitrator Hall in January 2009, which we believe address the issues.

- **Prior Approval**

Subject to Charter considerations and any specific collective agreement provisions, school districts have the management right to control what is sent home to parents through students and what is distributed to parents at school and/or during school functions.

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.”

Arbitrator Hall, in his subsequent award at page 13, agrees with and quotes from the original award from Arbitrator Kinzie:

“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 or unfettered right for the union to send out information with respect to FSA or other topics that are political in nature. Arbitrator Kinzie found that inaccurate and misleading information was a “pressing and substantial” concern which would justify reasonable intervention 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 FSA pamphlet at issue in the case (including the specific tear-off form) 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; specifically, that “extenuating circumstances” does not include parent 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.

The effect of Arbitrator Kinzie’s ruling is a reasonable assurance to the employer that information provided to parents by the union must be accurate and not misleading. This does not, however, mean that the union is limited in its commentary to only information or opinion that the district agrees with. Although the district may not agree with the opinion of the union of a specific topic, the union maintains the right to share its opinion with parents through schools so long as the information is accurate and not misleading.

- **Kinzie Process**

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

Pages 51 and 52 of the Kinzie award provide insight into this balancing of rights:

"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."

In our view, this process envisions the union addressing these concerns on accuracy prior to the material going out to ensure the employer's reasonable expectation of accuracy. This interpretation is, however, at odds with the BCTF position that no prior discussion/vetting/approval with the employer is required prior to distribution.

It is also important to note that the union materials in question were to be distributed in sealed envelopes marked as having come from the union. Arbitrator Kinzie took into consideration the fact that students would be insulated from the materials in question. A degree of latitude was given to the union in part for this reason. The employer has the right to expect that union material for parents intended to be delivered home through students will be delivered in a manner which insulates students from political debate and which does not cause confusion concerning the author of the materials; e.g., in a sealed envelope clearly marked as having come from either the union local or the BCTF.

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

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

What is Presently Occurring

- The distribution of anti-FSA materials by union locals is proceeding appropriately in almost all districts as per the 2011 consent award protocol agreement
- Many districts are also distributing material on the FSA, including an explanation of expectations that the vast majority of grade 4 and 7 students write the tests
- Most union locals and employers are following the Kinzie process; they are meeting before any alternate material goes out (on FSA or any other topics) and are addressing any concerns regarding inaccurate, misleading or inflammatory comments.

It is our understanding that in the coming weeks and months, the BCTF campaign against the FSA, as well as commentary on other political topics, will intensify. As a result, your teachers' union local may be planning to distribute a variety of materials home to parents.

It is important that districts reinforce with your union local that expectations and processes as outlined by Arbitrator Kinzie are followed without exception or variance. As indicated previously, it is likely further clarification will be provided on this issue through future arbitrations. Consistency and reasonableness are critical during the current review and distribution processes in order to help ensure a positive outcome from those proceedings.

Next Steps

1. Contact your local union and remind them that if they intend to distribute materials to parents through students or at school, they must follow the Kinzie process. This expectation would apply to any and all materials except the three FSA pamphlets specifically covered in the 2011 consent award protocol agreement.
2. If the union local refuses to follow the Kinzie process or will not provide you with a response prior to distribution, BCPSEA can supply you with template response letters and suggested direction. The expectation is that the Kinzie process governs such distribution and that if there is a disagreement, the "*work now, grieve later*" principle be followed. Also ensure that you can verify the union's receipt of any letters, document the issue, and contact your BCPSEA labour relations liaison immediately.

Sample Letter to Union Local

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 discuss with parents educational issues applicable to their child 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 <TITLE pamphlet>, to the extent that it is distributed in schools or

through students to parents, must be considered within this context and, in particular, the guidance provided by Arbitrator Kinzie in his award dated May 2, 2008.

If you wish to distribute material in schools or through students, I ask that you provide me a copy of the material and the accompanying envelope 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 the district with a copy of the materials in advance of planned distribution, to address any identified inaccurate and/or misleading statements prior to distribution, and to enclose the material in an appropriately labeled envelope), the district will be directing teachers not to distribute such materials to parents, either at school or through students, without the prior authorization of their principal. The district would expect teachers to follow this directive and, if not in agreement, to follow the “*work now, grieve later*” principle and to raise their concerns with the union local.

We hope that you will work with the district in accordance with the Kinzie process on this matter so as to avoid any potential conflict, while still ensuring teachers maintain a reasonable right to express their views on educational issues to parents.

BCPSEA @issue No. 2008-13, dated September 30, 2008, also covered this topic in detail and is available on our public website at <http://www.bcpsea.bc.ca/access/publications/aissue/2008/ai2008-13.pdf>.

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.