

Answers to our members' questions on the boycott of SATs

Version 4: Thursday 29 April 2010

This is an updated and expanded version of the Q&As first published on 22 April 2010. You are welcome to circulate this widely, but do check our website to make sure you have the latest version.

Question 1: Is the proposed boycott of year 6 tests lawful?

Answer: The legal advice from the unions involved (NAHT and NUT) and the DCSF contradict each other. The NGA has not yet been convinced that the action would constitute a legal trade dispute, as it is hard to make the direct link between SATs administration and terms and conditions of employment. However, it now seems unlikely that ministers are going to mount a legal challenge to the boycott. Therefore the NGA is advising its members to conduct themselves as though the boycott is a legitimate trade dispute. We will inform members if a legal challenge to the boycott is mounted.

The unions have asked members from 4 May to:

- Refuse to follow the test opening, checking and administrative procedures;
- Refuse to carry out the 2010 tests;
- Refuse to ensure that all eligible and able pupils take the test.
- Store the unopened test papers securely until such time as they are collected.

The action covered by the ballot is therefore not to administer the tests at all from 4 May.

Remember this boycott is not strike action; any staff involved will be in school throughout the tests boycott. This action is limited to the NAHT and NUT; the other teaching unions/professional associations (ASCL, ATL, NASUWT and Voice) are not involved.

Question 2:

As a primary school governor, what do I need to do as regards the boycott?

Answer: Your chair should by now have asked the headteacher whether they are planning to boycott the SATs administration. If they are not going to boycott the SATs, the governing body does not need to do anything. Even if a head is an NAHT or NUT member, he or she might decide not to take the action. The unions have said that the action will not be mandatory, but "enabling", meaning members would be within their rights not to boycott the tests. NUT guidance to its members says "Members are free to decide how they will respond to this request [to take boycott action], regardless of the way that they voted in the ballot".

If the headteacher says that s/he is going to boycott the tests, the chair might want to remind him/her that administering SATs is a statutory duty: headteachers must ensure their schools comply with all aspects of the key stage 2 assessment and reporting arrangements. This legal duty falls directly on the headteacher and the NGA contends that the administration of the tests is an operational matter, and therefore not the province of the governing body. There is a legal requirement on governing bodies (in section 88(1A) of the Education Act 2002) to exercise their functions with a view to securing that the current assessment arrangements are implemented, as well as the duty under regulation 5 of the School Staffing (England) Regulations 2009, SI 2009/2680, to ensure that the head teacher “complies with the duties imposed upon the head teacher” by any order under section 122 of the 2002 Act. However, if the industrial action is lawful (as the NGA suggests it has to be considered until there is case-law to draw on) the NGA would caution governing bodies against making alternative arrangements.

If a headteacher decides to boycott the tests, the governing body should not get involved in operational matters and should not get involved in the administration of the tests. However it is reasonable for the chair to ask how the decision to boycott the tests is being communicated to children and parents/carers (see question 8 below). You may be interested to know that when gathering evidence on parents’ views of testing and assessment, DCSF found that 75% of parents who responded valued the information currently provided by the tests.

Governing bodies should also check that the headteacher has informed the QCDA’s National Curriculum assessments helpline on 0300 303 3013 if the tests will not be administered in the school.

Question 3: Our headteacher has asked if we will support the boycott?

Answer: The NGA does not support a boycott of the Key Stage 2 tests, and whatever members’ personal views may be as regards SATs, the NGA advises that governing bodies do not sign supporting statements. We have had some governors expressing concern that their governing body is split on whether or not to agree to support the headteacher. We would advise you that you do not need to come to a decision on this. It is not a material decision to make.

**Question 4:
Should governing bodies hold an emergency meeting to agree their positions?**

Answer: We do not think this is necessary, given the very limited actions governing bodies can take as outlined in the answer to question 2. The chair should keep other governors informed as to whether the tests are going ahead at the school, and only call an emergency meeting if s/he deems it necessary because of the particular situation at the school.

Question 5: The DCSF advice for governors published on 28th April suggest that we could ask the headteacher who is boycotting the tests to absent themselves from school while the tests are carried out by another person.

Answer: the NGA is not convinced that a governing body has the legal right to ask a headteacher who is failing to carry out their duty to administer SATs as covered by

the union ballot to absent themselves from the school. We have asked the DCSF to provide us with the legal argument which supports their advice, but we have not yet received any which we consider addresses the questions adequately.

The NGA advises any chair of governors who is considering this route to seek advice - from their local authority and from us - before taking this action. The Local Government Employers (LGE) has pointed out that there is case-law which does allow that "For partial performance of duties under a work to rule or go-slow, an employer can send the employee home and withhold all pay depending on the extent/impact of partial performance on the core purpose of the job." However the LGE concludes that "In the circumstances of the current dispute, however, this may not be an appropriate response and we would advise that the more measured approach would be to withhold a proportion of pay to reflect the work that is not being undertaken".

Question 6:

Should we be withholding pay from headteachers who join the boycott?

Answer: The Local Government Employers (LGE) has advised that in law an employer may withhold pay where an employee is not ready and willing to undertake all contractual duties. It would be possible, therefore, to withhold pay from headteachers who do boycott the SATs, but the deduction must be commensurate with the duties that the headteacher has failed to perform: see <http://www.lge.gov.uk/lge/core/page.do?pagelid=5382244>

The difficulty is in calculating how much pay is reasonable to deduct. Some local authorities are issuing guidance on this point. We understand some local authorities may be advising that a deduction in the range of half-a-day to a whole day would be reasonable. Before you take a decision on this, seek advice from your local authority.

Question 7: How should we respond if a headteacher wants to boycott the test, but another member of the leadership team and/or the Year 6 teacher wants to administer them?

Answer: NGA believes that the ability of another person to 'administer' the tests rests on the headteacher's willingness to co-operate. The chair of governors should ask the headteacher whether they are planning to take part in the boycott and if so, would they be willing for another member of staff to administer the tests. If the answer to this second question is yes, then it appears to the NGA that it would be possible for the SATs to go ahead. Although the statutory duty to administer the tests falls on the headteacher, paragraph 57.4.2 of the School Teachers' Pay and Conditions document allows for delegation of duties to other members of staff. If the headteacher is unwilling to administer the SATs, but is willing for another member of staff to do so then this would appear to be allowable.

If the headteacher is undertaking the boycott and is not willing to allow such delegation then it does not appear to the NGA that there is any power for the governing body to intervene and instruct a third person to do so. We appreciate that this differs from the DCSF line which states "If necessary, you may consider whether to instruct the headteacher to remain absent from school at times when the tests are due to take place, while another person administers the tests." The NGA is not convinced that the action suggested by the DCSF has a firm legal basis (see above,

answer to questions 1&2) and also suggests that such an action could be extremely detrimental to future relations between the headteacher and the governing body.

Question 8: Here the headteacher is non-NAHT/NUT but Year 6 teachers are NUT, can the headteacher organise for alternative staff to administer the tests?

Answer: The headteacher can do the administration him/herself, or organise for alternative staff (whether internal or external) to administer them. Although some headteachers, especially those who are union members, may be reticent to use alternative people on the grounds that a fellow union member is undertaking industrial action, the Chair could remind them that classroom teachers were not balloted about the boycott. Classroom teachers therefore should not be undertaking the boycott and can be expected to undertake their usual duties. However a year 6 teacher can argue, as the NUT does, that “Classroom teachers cannot be required to routinely participate in administration or invigilation arrangements that do not call for the exercise of professional skills and judgement so will not be expected to undertake such duties relating to SATs”.

Question 9: Have you got advice on how the news of a boycott should be communicated to parents?

Answer: Given the sensitivity of this situation, it is reasonable for the chair of governors to ask to see the draft in order to see if the content and tone would bring the school into disrepute. If the chair is happy with it, it can be sent in the headteacher’s name and does not need to be signed by the chair of governors. If the chair is unhappy with it, s/he should attempt to negotiate an acceptable version, as it would not be a good course of action to issue two letters, one from the headteacher and another from the governing body.

Question 10: How do we deal with complaints from any parents who are unhappy with the decision to boycott the tests?

Answer: you should follow the usual process for complaints against a headteacher’s decision. These complaints should not be dealt with by the headteacher.

Question 11: How should we respond if a headteacher decides to go ahead with the SATs, and other staff, who are NUT members, picket or put pressure on children and their parents to boycott them?

Answer: We do not expect that staff will formally ‘picket’ as this is not strike action and they will be working in school. We very much hope teachers will not put pressure on children and parents and we have no information to suggest that this is happening, but if it does please let us know and we will advise our members how to proceed depending on what has been said.

Question 12: What if the headteacher wants to administer the SATs but not submit them for official external marking and instead have them locally marked; would the governing body have the right to see the pupil outcomes?

Answer: If the headteacher suggests this as a course of action, you should inform them that this would not be legitimate industrial action as it is not covered by the union ballot (see question 1). However we understand that a few headteachers may be considering getting children to sit the tests, but not submitting them to the statutory external marking. (Swapping the tests for marking with another school would not fulfil the statutory requirement for 'external marking'). This is contrary to the advice of their union which has made clear that if heads are taking part in the boycott they should not open the 2010 test papers. We think it more likely that where a boycott is taking place the head will issue a previous year's papers to pupils and make arrangements for them to be marked internally or by external colleagues. In either of these situations in the NGA's opinion, the governing body could reasonably request to see the outcomes of the tests.

Question 13: How can the school carry out the requirement to pass pupils' test results on to their secondary schools if the tests have not taken place?

Answer: Again it is the statutory responsibility of the headteacher and not the governing body. If Key Stage 2 tests have not been administered at your school s/he will not be able to pass that data on to secondary schools. The school will still have teacher assessments which will be passed on to the secondary school.

Question 14: How will I, as a secondary school governor, manage without Key Stage 2 test data?

Answer: Again this is not yet determined. It may be that teacher assessments will be used.

Question 15: Are teacher assessments likely to be recognised by Ofsted inspectors, for schools which have boycotted the tests?

No decision has been made on this. NGA will keep asking these questions of the Department and will update our answers when we are able.

If you are a member of NGA and have further questions you would like answered, please feel free to telephone us or e-mail:

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National Governors' Association