



Complaint about the decision of a Board of Trustees to compulsorily charge for curriculum-related items

Ombudsman's opinion

Legislation:	Ombudsmen Act 1975, ss 13, 22; Education Act 1989, s 3
Agency:	Board of Trustees
Ombudsman:	Professor Ron Paterson
Reference number:	329013
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Summary

The complainant is a parent of secondary school students. In 2011, the complainant raised concerns the school was imposing compulsory charges for:

- photocopying;
- food items; and
- workbooks.

The complainant drew to the school’s attention the provisions of section 3 of the Education Act 1989 which guarantees the provision of a free education, complaining that the charges contravened it. The complainant further relied on the Ministry of Education’s *Education circular 1998/25: Payments by parents of students at state schools* (the circular)¹ which provides guidance on the payments schools may require.

My conclusion is that, in imposing compulsory charges for workbooks and any other curriculum-related materials, the Board of Trustees:

- has acted in a manner that appears to have been contrary to law as its actions contravene section 3 of the Education Act 1989.
- has acted unreasonably in this matter, in that it is refusing to apply the advice of the Ministry as set out in *Education circular 1998/25*; and has charged the complainant for curriculum-related material that he was lawfully entitled to have provided to his children free of charge.

¹ This was the Ministry’s relevant circular at the time of the request (2011). The Ministry has recently issued a fresh circular confirming the Ministry’s guidance re voluntary payments by parents at state schools (2013). Available at: www.minedu.govt.nz/NZEducation/EducationPolicies/Schools/PublicationsAndResources/Circulars/2013/Circular201306.aspx

Ombudsman's role

1. Under section 13(1) of the Ombudsmen Act (OA), I have the authority to investigate the administrative acts, decisions, omissions and recommendations of a Board of Trustees (BOT).
2. My role is to consider the administrative conduct of the BOT, and to form an independent opinion on whether that conduct was fair and reasonable (sections 22(1) and (2) of the OA).
3. The relevant text of these statutory provisions is set out in the Appendix.
4. My investigation is not an appeal process. Rather, I consider the substance of the act or decision and the procedure followed by the BOT, and then form an opinion as to whether the act or decision was properly arrived at and was one that the BOT could reasonably make.

Background

5. The complaint to the Ombudsman is that the secondary school is not invoicing for materials correctly. Specifically, that *"workbooks; photocopying and consumables that are used in the delivery of the curriculum"* are being compulsorily charged for, when in fact these items, being curriculum delivery materials, ought to be funded by the school.
6. The complainant, a parent, was also concerned that if the charges are not paid, the school denies children access to curriculum delivery resources to which they are entitled free of charge.

Correspondence

7. The complainant put his concerns to the school directly, before he approached the Ombudsman, and referred to the relevant circular, seeking a meeting that was held with the then Principal on 8 July 2011. Later that day, the complainant emailed the school regarding his concerns. The email is reproduced in full below.

"Thanks for making the time to meet with me this morning. As I mentioned I have some concerns around certain aspects of what [the school] are invoicing us for, that relate to the teaching and provision of the school curriculum. My concerns relate to invoicing that is occurring consistently across all our children's year groups and across all curriculum areas.

I also don't buy into the notion that education is free, however I believe that where the Ministry of Education sets out clear statements for schools and parents, that are intended to clarify the legalities contained within the Education Act, then they need to be followed.

I am using the Ministry of Education – Education circular 1998/25: Payments by parents of students at state schools, as my main source of reference. Specifically the following paragraphs:

‘Paragraph 7

In particular, a board of trustees may not demand a fee to cover the cost of either tuition or materials used in the provision of the curriculum.

Paragraph 20

To a greater or lesser degree, teachers in all subject areas use various materials to assist them to deliver the curriculum. Some schools seek to recover the cost of these materials by charging parents for them. Such charges are very difficult to justify. It has already been stated that the right to free education implies that there should be no charges for materials used in the delivery of the curriculum. Only where there is a very clear take-home component would a board be on firm ground in levying a charge for materials.

Appendix 1: Specific questions and answers about various aspects of payments by parents of students in state schools

Paragraph 9

Can a board legally charge an amount to cover photocopying costs in some subject areas?

No, except in exceptional cases.

Paragraph 18 of the circular has dealt in general terms with charges aimed at recovering costs for materials used in delivering the curriculum in certain subjects. Photocopying charges are a prime example of such a practice. It is very difficult to justify photocopied sheets of paper as constituting a "take home component" in the same way as the wood involved in the construction of a woodwork project. Although there may be exceptional cases, such as when students produce and photocopy their own magazine, photocopying should be seen as part of the normal business of curriculum delivery and should not be charged for.

Paragraph 16

Can a board legally require the purchase of a workbook in some subjects?

No. In some subjects, the teaching programme may be based very closely on a particular course (available commercially or produced by the school) and students use the workbook which accompanies the course. Workbooks lie somewhere between textbooks, which are provided free to students, and stationery, which students are expected to provide for themselves. Because

of the cost factor that is normally involved, it is not considered appropriate to demand that students purchase workbooks. Boards might consider the possibility of explaining the usefulness of workbooks and making purchase optional.'

([Complainant's] note: I agree that payment may be requested if it is supplementary to the learning covered in the classroom (useful to have as a study resource or is optional) but not if it is used by the teacher as part of their teaching the curriculum.)

My concerns relate to the following school charges.

1. Workbooks

To date in Term 1 we have been invoiced for an English Book, PE Book and an Economics Book. One of these invoices referred to it as 'Yr 9 Core Fees' and I am only querying the workbook component of this invoice. I refer you to Paragraphs 7, 20 and Appendix 1 Paragraph 16.

In viewing these workbooks I see they are being used as part of the core teaching and are not supplementary or optional study resources. One teacher was withholding the workbook until payment was made and payment confirmed by the school financial management system. I understand that where textbooks are used there is a refundable bond. These workbooks are in effect used for the same purpose.

2. Photocopying

To date in Term 1 we have been invoiced for photocopying for Food and Nutrition, Textiles, and Science. There seems to be a standard cost. I refer you to Appendix 1 Paragraph 9.

3. Option Fee

To date in Term 1 we have received one invoice for an 'Option Fee' I refer you to Paragraph 7. I am unclear what exactly this was for, however it is likely to relate to one of my areas of concern.

I am a fan of school donations as a financial contribution for 'additional services' and fully understand the financial tightrope that schools walk everyday."

8. The complainant also enquired of the Ministry about the appropriateness of the charging. On 12 July 2011, the Ministry advised as follows:

"The Ministry circular 1998/25 is the correct one to use as your reference. It is still the one that all schools must abide by. It has also been accepted as correct by the IRD.

It is important that from time to time some schools need to be reminded that the Education Act 1989 states that education in state and state integrated schools is free. This means in reality that the delivery of the curriculum is free.

1. *Workbooks. These cannot be made compulsory. Although there has been a move in recent years to introduce workbooks, if a student does not wish to purchase one, then the school must provide the same work to the student in class by other means at no cost. Neither can a student be excluded from this subject for not purchasing a workbook. One option a school can use is to purchase the workbooks as textbooks.*
2. *Photocopying. If the paper is for use in class for curriculum delivery there should be no charge. If a student wishes to use it for extra work such as in an assignment, a charge is probably reasonable to be made. I cannot see why you should be charged for the subjects you list. If these are hand-out sheets, the subject school budget should pay for them.*
3. *Consumables. This can be a difficult area to determine charges. Certainly a charge can be made for major items such as building a desk to take away from a woodwork shop, but charges for food in a cooking class is debatable at least. Cooking a cake in a Food Technology class and keeping/eating it is little different from growing a crystal in a science class or painting a picture in an art class with no charges made. All these departments have budgets to run their programmes. All departments should budget for basic consumables used in delivering the curriculum. The Art Department doesn't charge for paint, nor the Science Department charge for chemicals, so how can Food Technology justify charging for cooking materials? They cannot.*

Grounds for concerns. If your information is correct, my response shows that there are grounds for concern here as to whether the charges being made to families are correct or not."

9. On 8 May 2012, the Minister of Education, Hon Hekia Parata, responded to the complainant as follows:

"Schools are free to request voluntary contributions, whether by way of invoice or by other means, to cover the costs of items such as those you have specified. Parents are free to choose to pay the requested amount in full, in part, or not at all."

10. The Minister noted this matter would be followed up, saying, *"I have been advised that the Ministry will be writing to the ... Board of Trustees seeking an assurance that any unlawful invoicing practices will cease."*

11. It is clear that the school gave careful consideration to the complainant's concerns. The Principal's response to his concerns, dated 16 September 2011, stated:

"As a general statement, I'm confident that where course charges are made by our school, we are on the right side of the law for charging them, even when they seem to be at odds with the MOE's rules and guidelines. I say this on the basis that the MOE guidelines allow us to charge for the take-home component of materials used in delivering the curriculum. That's the generalisation, now for the specifics.

1. *Our first position on workbooks is that we don't agree with the MOE's interpretation of the law with regards to them. Whilst they contain a teaching element, the fact that students write on and keep possession of them makes them different from text books and other teaching resources, such as tools in the workshop, set squares in Graphics or cameras in art. They fall into a category akin to stationery, because to some extent they replace the need for stationery. They are also akin to items made in technology, in that they are kept in the ultimate possession of the student and that their quality is determined to an extent by the student's care of them. They are unlike other teaching resources in that they cannot be recycled from one student to the next. Once used, their usefulness to others has expired.*
2. *We agree that the school should pay for ad hoc photocopying, but where the photocopying fee covers the production of a workbook, the same argument as that put forward above applies. What we don't advertise is that we don't carry charges for photocopied workbooks over from one year to the next, so if a family chooses not to pay, we write off the fee.*
3. *The option fee referred to is in relation to a Year 11 Workbook. I'm sorry this wasn't made clear.*

As you will be aware, [the school] experiences difficulties in breaking even financially. In the current funding environment, we receive less income than schools with lower deciles than ours (we're a decile 8 school). I'm not bemoaning this fact, as I support the concept of extra funding going to lower decile schools, but it creates a tight fiscal reality for us. In other circumstances, we would not make all the charges our parents are subjected to, but were we to change our practice, it would impact on our ability to deliver curricula at the quality currently enjoyed. It's been successive governments' position that high decile schools will generate more income from their families than low decile schools and charging for course materials is one of the ways we do so.

It's usual for us to be stretched financially, despite generating independent income through donations, trust funds, international students, the canteen and uniform shop. When I took over as principal, I inherited a situation where

deficits had been recorded annually for several years. These posed a threat to our ability to maintain the school and its equipment. We have reversed that trend and are once again investing in infrastructure, such as ICT, buildings & equipment maintenance and so on. One of the ways we have achieved this is through careful monitoring of income from fees and donations, and ensuring that we are charging correctly for take-home elements of courses.

The simple fact is that were we to interpret the law as the MOE recommends, we would have to abandon the use of workbooks, because we are not in a position to purchase them. In the recent Community Survey, parents did not take the opportunity to complain about our charges, so I infer that there is general acceptance.

Of course, no parent would complain at reduced costs, but perhaps they would give the saving a second thought if they knew it would be at the expense of quality of educational delivery.

We have a number of families who find the costs of school beyond their ability to pay, for which we are privileged to have the ... Scholarship Trust to assist. I know this doesn't describe your situation (and I note with gratitude, and without surprise, that you are a family that pays all bills in a timely fashion) but it gives us a means to assist those who aren't as well off as most.

I hope this assists in explaining our position."

12. A further inquiry by the complainant to the BOT elicited a response on 5 October 2011, noting that:

"The board agrees with and endorses our principal's letter of response dated 16th September to you. We also wish to add that measures are underway to review definitions of curriculum material, stationery, and workbooks, in response to your concerns. When this review is complete we would be very happy to share the outcomes with you to hopefully allay your current concerns."

However, the review was subsequently discontinued.

Complaint

13. The complaint was made to the Ombudsman in the following terms:

"... the type of invoicing I refer to below is in direct contradiction to the Ministry's instructions to schools and to the Ministry of Education circular 1998/25. The Minister states that schools should not levy charges to parents for the items I have raised.

I am specifically referring to invoicing for:

- a. Workbooks (when used as the primary teaching and learning resource)²*
- b. Photocopying (carried out to photocopy learning resources)*
- c. Consumables e.g. ingredients for cooking as part of the technology curriculum.”*

The complainant noted that for his three children he was charged \$205.21 in March/April 2012 for nine items of the type listed above.

14. On 30 November 2012, the Ombudsman notified the BOT of the intention to investigate the complaint, that:

- The decision by the BOT to compulsorily charge the complainant \$205.21 for workbooks, photocopying and consumables was unreasonable, or unlawful.

A response was sought from the BOT to the following two matters:

- Are the items above curriculum delivery items, or not?
- If the above items are curriculum delivery items, is it lawful or reasonable for the Board to compulsorily charge for the items?

Comments received during investigation

15. The Principal of the school provided a response to the investigation on 18 December 2012, followed by further information on 19 December 2012. Further advice was subsequently obtained from the Ministry.

16. Those responses set out the school’s position on the issue, as follows:

- The school’s financial position:
 - › The school has had a “*chequered*” financial position for several years. The MOE has consistently advised the school to ensure it “*stay[s] on track financially*”.
 - › The school is a decile 8 school with the corresponding implications for funding.
 - › The school receives \$260,000-310,000 per annum from non-Government funding to supplement its income.

² An example of the type of workbook at issue was provided to the Ombudsman.

- In relation to charges, the school's response states (in part):

"Please note that any student can construct a course which results in minimalistic course fees, and all fees are for take home components. In Food Technology students are required to bring items of food. If they do not, they may learn by watching others make dishes. Alternatively, they could engage in research. However, students prefer to bring ingredients and to consume their work, sometimes after they have taken it home and sometimes while at school. Therefore, we are comfortable with equating the food componentry in Food Technology with the timber component in Hard Materials Technology. Custom and practice also play a part in our reasoning: we've always asked parents to contribute items for Food Technology. It has happened for generations of students at this school, as for the majority of secondary schools in the country.

In the Ministry of Education circular 1998/25, Paragraph 15 contradicts Paragraph 16 under the heading of Appendix 1. In one breath, the circular allows the Board to legally charge parents the costs involved in project work taken home, in the next it calls workbooks something other than project work. Yet the value of the information in the workbook, and the quality of the work in the woodwork project are both of intrinsic value, and have durability. The workbook 'project' can be referred to from home for years to come.

The requirement for fees to cover take-home components at [the school] does not interfere with the student's right to free enrolment and free education. However, inability to pay fees, either historical or current, may preclude students from entry into a particular course or another. We offer over forty courses in each of Years 12 and 13, so there are plenty of options available to students of families who are unable to pay fees ... Are we better to require payment as a prerequisite of [a] course, or take [a] course off our curriculum in order to protect our financial position? As students do not have to enrol in [a] course, we believe the answer is obvious.

In regards to workbooks, these do more than replacing the need for stationery. Students can opt not to purchase the workbooks thereby copying the printed material from somebody else. We think that is not a good educational use of time, so we're comfortable that the price of workbooks reflects the added value of what's printed in them. Were we to resort to providing the workbooks as a textbook that we recycled each year, students would waste considerable time in copying, many taking short cuts, providing answers without having the ability later on to see the context in which they were written.

Families are all informed that if payment is difficult or impossible for them, they can apply to [a scholarship] for assistance. This facility is

advertised widely to parents through a variety of channels, subsequently we dispense between \$3,000 to \$5,000 per annum to families for this purpose.

In summary, we are comfortable with our practices for the following reasons:

- a. As a decile 8 school, we are not resourced adequately.*
- b. Parents agree to pay course fees, after receiving information that describes the extent of them.*
- c. The first \$50 of printing is covered by the school.*
- d. A wide range of courses is available, so students may select courses that require the payment of minimalistic fees. Our community is strongly supportive of the fee-paying courses, such as engineering.*
- e. Asking parents to contribute to curriculum resourcing enables us to move students from theory to practice, especially in practical classes, and doing so falls into the trend over time around the country.*
- f. In relation to [the complainant's] specific complaint about bringing ingredients for Food Technology, our Board of Trustees struggles to see the difference between bringing food for Food Technology and timber for Hard Materials Technology, when both are taken home in one form of ownership or another.*
- g. Workbooks, which we cannot provide free of charge, allow students the time to focus on learning rather than on copying.*
- h. The MOE circular 1998/25 devalues the intrinsic value and durability of workbooks.*
- i. [A scholarship] is available to assist families who are unable to pay fees.*

Following the Board Chair's response to [the complainant's] letter (5 October 2011) no subsequent change was made because upon further review, we felt it was more reasonable to lend our weight to quality curriculum delivery rather than to the desires of one complainant."

Analysis and findings

Summary of the school's response

17. The school's arguments may be summarised as follows:

- The school does not consider the position of the Ministry to be reasonable, as the school does not accept that workbooks are a curriculum delivery resource.
- The school notes that the workbooks are used by the individual student to record their work, thus –
 - › conferring the primary benefit of the workbook on the student, and
 - › rendering them unusable by any other student.
- The school considers workbooks are more accurately classified as 'take home components' of a particular subject and therefore able to be legitimately charged for. This is primarily because workbooks are kept permanently by the student, supporting the view that they are replacing stationery, and not textbooks, and thus are not part of the curriculum.
- The school cannot afford to provide workbooks without charge without compromising its financial position.
- Parents who do not wish to pay the compulsory charge for workbooks may:
 - › enrol their child in classes for which workbooks are not required,³ and/or
 - › apply for financial assistance.
- In addition, parents:
 - › are given notice of the likely costs of the courses and of attending the school in terms of fees and the requested level of donation;
 - › sign an agreement to meet fees and charges; and
 - › benefit from the workbooks costing less than stationery items that might otherwise be required.

³ In the school's view this supports its argument that either the charge is optional (as it can be avoided), or that workbooks are not curriculum-related as not all courses require them, despite all courses adhering to a curriculum.

Relevant legislation

18. The starting point for my consideration is the relevant legislation, which binds the Ministry and the school.
19. The Education Act 1989 (the Act), section 3 states:

“Right to free primary and secondary education

Except as provided in this Act or the Private Schools Conditional Integration Act 1975 every person who is not an international student is entitled to free enrolment and free education at any State school during the period beginning on the person's fifth birthday and ending on 1 January after the person's 19th birthday.”

20. The right to a free education is a central principle of the Act.

Ministry of Education guidance/advice

21. What does a ‘right to a free education’ entail on a day-to-day basis when a school is faced with making operational decisions about cost recovery?
22. This question is a significant one for schools, and led the Ministry to issue guidance in the circular.
23. The circular is not law or regulation but is clearly intended to clarify the position of the Ministry in relation to what payments may be lawfully collected from parents of students, within the framework of free education at state schools.
24. The complainant identifies the provisions of the circular that relate to the specific matters he raises. Relevant provisions include:

7. *“In particular, a board of trustees may not demand a fee to cover the cost of either tuition or materials used in the provision of the curriculum.*

...

18. *In subjects with a practical component such as clothing and workshop technology, a board may charge for materials where the end product belongs to the student and may, if paid for, be taken home. At the beginning of a year, parents should be made aware that charges for materials are a feature of courses in practical subjects.*

...

20. *To a greater or lesser degree, teachers in all subject areas use various materials to assist them to deliver the curriculum. Some schools seek to recover the cost of these materials by charging parents for them. Such charges are very difficult to justify. It has already been stated ... that*

*there should be no charge of materials used in the delivery of the curriculum. **Only where there is a very clear take-home component would a board be on firm ground for levying a charge for materials.***

(emphasis added)

25. Appendix 1 of the circular states:

9. *“Can a board legally charge an amount to cover photocopying costs in some subject areas?”*

No, except in exceptional cases.

...

16. *Can a board legally require the purchase of a workbook in some subjects?*

No.

In some subjects, the teaching programme may be based very closely on a particular course (available commercially or produced by the school) and students use the workbook which accompanies the course. This is a vexed question. Workbooks lie somewhere between text books, which are provided free to students, and stationery, which students are expected to provide for themselves. It is not absolutely necessary to write answers in the workbook itself; they could be written in an exercise book. The workbook could then be used by students in subsequent years. On the other hand, workbooks can have ongoing usefulness to students. Because of the cost factor that is normally involved, it is not appropriate to demand that students purchase workbooks. Boards might consider the possibility of explaining usefulness of workbooks making purchase optional.”

26. The quoted portions of the circular indicate that the Ministry views workbooks as curriculum-related material which, consistent with section 3 of the Act, should not be charged for.

Can it be established that the school is compulsorily charging for workbooks?

27. I turn to the issue of workbooks. Two initial matters require determination:

- Is the item in question a workbook?
- Is the workbook being compulsorily charged for?

28. The complainant provided one of the workbooks used by his children. I have reviewed it. It is clearly the sort of item referred to by the Ministry in its circular guidance. Both the school and the complainant accept that the items in question are workbooks.
29. The complainant also provided details of charges in relation to workbooks. I note that the school advised on its *Year 12 Subject Selection 2012* form, that:

“These courses have a compulsory fee, charged to cover material or workbooks. Payment should be arranged at commencement of the course (see the course booklet with the amount charged).”

Further, the school charges GST on workbooks, which it views as compulsory fees, in contrast to donations on which GST may not be charged.

30. The key question is whether the workbook charge that is applied is consistent with the Act and the circular.

The school’s position – workbooks are take-home projects, not curriculum-related items

31. The school notes the Ministry’s position that curriculum-related material is to be provided free of charge, although items considered ‘take home projects’ can be charged for *“where there is a very clear take-home component”* (Para 20, the circular). However, the Ministry’s circular further states that a BOT would be on *“firm ground for levying a charge for materials”* only when that ‘take-home’ component has been established.
32. I note this squarely puts the onus on schools to justify an item as being a ‘take-home’ project rather than a curriculum-related item.
33. The school’s core argument is that the workbooks are not correctly classified. Therefore the school rests its decision to depart from the Ministry’s position and justify levying the charge on its view that the Ministry is wrong in principle, in that the Ministry has:
- misjudged the status of workbooks. They should be considered ‘take-home’ projects for a course and thus able to be compulsorily charged for;
 - overlooked that the school cannot afford the provision of workbooks without a compulsory charge.
34. However, I consider the Ministry’s position to be a reasonable one. It clearly states a compulsory charge for a workbook associated with the teaching programme may not be imposed when to do so contravenes the Act. The question then arises – on what basis can the school reasonably take a different approach from the Ministry on this issue?
35. I have considered this question in three stages:
- a. curriculum delivery;
 - b. take-home projects; and

- c. financial viability (including the parent contract).

Curriculum delivery

36. Curriculum delivery is not optional for state schools. Schools are tasked to deliver the curriculum, and resourced to do so.
37. I have viewed the example of a *Year 11 Science NCEA Level 1 Workbook*. It contains core teaching material based on the curriculum. The workbook includes examples for students to work through. The information and material contained within the workbooks does not appear to be optional (as, for example, a project associated with the curriculum may be).
38. The school states that an alternative is for students to work from textbooks with printouts, or to use their time to copy the examples from other student's workbooks, then complete them.
39. I consider this underscores the point at issue here. Regardless of the method employed to convey the learning (textbook and printout, or workbook), there is no option for the student in relation to the matter. To obtain mastery of the subject matter, the student must review the material and complete the exercises.
40. It appears that workbooks parallel the situation where previously students read textbooks, and carried out their work on example sheets provided by the school. The textbooks and the example sheets were provided free-of-charge. A student might also purchase a stationery book to record their notes, and insert their example sheets – but such books were optional extras.
41. The format may have changed from textbook and stationery to an all-in-one workbook, but in my opinion the purpose and content of workbooks is to assist schools to deliver the curriculum. Thus if a school requires students to use them, they must be provided free of charge.

Take-home items

42. It appears that the principles used to define take-home items in the circular can be usefully summarised as follows:

A project *associated with* (but not a core part of) the curriculum,

 - in which students may *choose* to participate, and
 - produce a unique or *individualised* item (garment, etc),
 - which the student has the *option* to take home and pay for.
43. Further, the student does not have to carry out the project in order to master the course of learning, as the project is distinct from the curriculum itself.

44. With regard to determining which items qualify as take-home items, the school states its position as follows:

“In Food Technology students are required to bring items of food. If they do not, they may learn by watching others make dishes. Alternatively, they could engage in research. However, students prefer to bring ingredients and to consume their work, sometimes after they have taken it home and sometimes while at school. Therefore, we are comfortable with equating the food componentry in Food Technology with the timber component in Hard Materials Technology.

...

The requirement for fees to cover take-home components at [the school] does not interfere with the student’s right to free enrolment and free education ... Are we better to require payment as a prerequisite of [a] course, or take [a] course off our curriculum in order to protect our financial position? As students do not have to enrol in [a] course, we believe the answer is obvious.”

45. The examples provided above appear to be of *optional* project work, undertaken to supplement the required teaching provided via the curriculum, and offered to the students to provide an additional opportunity for learning and understanding via practical mastery of the subject at hand.
46. The school notes that if a student does not participate in the project work, the student *“may learn by watching others Alternatively, they could engage in research”* which further supports the optional nature of these examples.
47. The school’s interpretation above is consistent with the Ministry position on ‘take-home’ components.
48. However, the school argues that a workbook ought to be considered a ‘take-home’ component:

“In regards to workbooks, these do more than replacing the need for stationery. Students can opt not to purchase the workbooks thereby copying the printed material from somebody else. We think that is not a good educational use of time, so we’re comfortable that the price of workbooks reflects the added value of what’s printed in them. Were we to resort to providing the workbooks as a textbook that we recycled each year, students would waste considerable time in copying, many taking short cuts, providing answers without having the ability later on to see the context in which they were written.”

49. It appears that the school is relying on the fact that because the workbook *may* be taken home, it is a ‘take-home’ component.
50. In this regard, I note the advice of the Ministry in the circular that *“boards cannot insist that students take the finished project home just so that the parents can be charged”*.

This supports the view that it is the purpose, not the final destination, of the item that differentiates curriculum-related material, and 'take-home' projects.

51. It appears that a decision whether or not an item is curriculum-related turns on whether the item originates from the core curriculum and conveys the teaching of the curriculum. The test for this may be as simple as whether or not the student can learn the course without it; if the item is 'core' in the way described, it must be a curriculum-related item.
52. If the item provides an opportunity to practise mastery of the course by way of an optional project that is related to, but not a core part of, the teaching concepts, in my view the item is a project for which the school may require payment of a fee.
53. From the information provided, the workbooks used at the school to deliver the curriculum are not optional, and are not uniquely or individually the creation of the student. It is a requirement of the school that workbooks are used for classes.
54. I am not persuaded by the school's argument that it is "very clear" (para 20, the circular) that workbooks are 'take-home' items, and can see no justification for its decision to depart from the advice of the Ministry that workbooks are curriculum-related items.

Financial viability

55. Thus far, I have noted that the Ministry has provided advice on the issue of workbooks. The school has departed from this advice, and supports this action because it considers the Ministry is wrong in principle.
56. If it is wrong in this approach, the school further maintains that its individual financial situation justifies departing from this principle.
57. As far as I am aware, the school remains concerned about its financial position, and has raised the issue of its ability to provide courses for students in a financially prudent manner with the Ministry. The response of the Ministry has been that the school needs to carefully consider which courses it provides and funds. Knowing of the school's financial position, the Ministry has formally advised the school that it cannot charge for workbooks. On 21 May 2012, it wrote to the school's BOT in the following terms:

"The matter of inappropriate invoicing by your school has been raised with us. We have been advised that the school is invoicing parents to make compulsory payments for curriculum-related items or costs such as:

- *Workbooks (when used as the primary teaching and learning resource rather than an optional extra)*
- *photo copying (carried out to photo copy learning resources)*
- *consumables (for example, ingredients for cooking as part of the technology curriculum)*

If your invoices do not make it clear that a request for payment for these compulsory items or operational costs is a request for a donation, but rather a request for a compulsory payment, then such a practice is unlawful.

...

Your board is free to request voluntary contributions, whether by way of invoice or by other means, to cover the costs of items such as those identified above. Parents are free to choose to pay the requested donation in full, in part, or not at all.”

58. I observe that the Ministry decides the funding of schools, and in providing taxpayer funds it has a legitimate expectation that its guidance about authorised use of funds will be followed. Its guidance clearly states that Ministry funding may be legitimately spent on workbooks. Further, in full knowledge of the financial position of the school, it advised that any compulsory charges applied to workbooks could not be defended, and are “unlawful”.
59. In my view, the position of the Ministry is reasonable, and the financial situation of the school does not justify it departing from the advice of the Ministry that workbooks are to be considered curriculum-related items and to be provided free of charge.

Summary – workbooks

60. I have now considered the three matters on which the school relies to depart from the Ministry’s position that compulsory charging for workbooks does not accord with section 3 of the Act.
61. I conclude that workbooks are curriculum-delivery items, and should be funded by the school. Further, the school has not established that workbooks fit within the ‘take-home component’ exception. Finally, the financial position of the school does not justify its decision to diverge from the Ministry’s guidance on the application of section 3 of the Act.

Charges for food and photocopying

62. I now turn to the examples of compulsory food and photocopying charges. In researching these examples, the complainant sought guidance from the Ministry directly. It stated:⁴

“Photocopying. If the paper is for use in class for curriculum-delivery there should be no charge. ... If these (charges are for) handout sheets, the subject school budget should pay for them.

Consumables. This can be a difficult area to determine charges. Certainly a charge can be made for major items such as building a desk to take away

⁴ Email from Ministry of Education, 12 July 2011.

from a woodwork shop, but charges for food in a cooking class is debatable at least. Cooking a cake in a Food Technology class and keeping/eating it is little different from growing a crystal in a science class or painting a picture in an art class with no charges made. All these departments have budgets to run their programmes. All departments should budget for basic consumables used in delivering the curriculum. The Art Department doesn't charge for paint, nor the Science Department charge for chemicals, so how can Food Technology justify charging for cooking materials? They cannot."

63. In its correspondence to the school of 21 May 2012,⁵ the Ministry put the matter thus:

"We have been advised that the school is invoicing parents to make compulsory payments for curriculum-related items or costs such as:

- *workbooks (when used as the primary teaching and learning resource rather than an optional extra.)*
- *photocopying (carried out to photocopy learning resources)*
- *consumables (for example, ingredients for cooking as part of the technology curriculum).*

If your invoices do not make it clear that a request for payment for these compulsory items or operational costs is a request for a donation, but rather a request for compulsory payment, then such practice is unlawful ... (y)our Board is free to request voluntary contributions, whether by way of invoice or by other means, to cover the costs of items such as those identified above. Parents are free to choose to pay the requested donation in full, in part, or not at all."

64. I have not requested details of the food or photocopying items for which the complainant was compulsorily charged. However, I note the Ministry's circular advice that a school board should *"be on firm ground in levying a charge for materials"*. In the absence of specific evidence relating to the food and photocopying charges levied on the complainant, I proceed on the basis that the items charged for were curriculum-related.
65. If the items of photocopying or food are being used to practise mastery of the course by way of an optional project that is related to, but not a core part, of the subject, the items may be validly considered 'take-home' projects, for which the school could charge a fee.
66. However, the school has not justified its decision to depart from the advice of the Ministry, nor has it established that it is *"very clear"* (the circular, para 20) that the photocopying or food items are solely 'take-home' projects or that the financial position of the school justifies making the charge compulsory.

⁵ Letter from Ministry of Education to the Chair, Board of Trustees.

67. I conclude that insofar as the food and photocopying charges are curriculum-delivery items, they ought to be funded by the school and not compulsorily charged for.

Parental contract

68. I note a further submission by the school in support of the charges. It stated that when parents enrol a child at a school, they sign the following agreement:

“In signing this enrolment form, I/We agree:

- a. to pay the General Purpose donation and any other fees or charges fixed from time to time by the ... Board of Trustees.”*

69. The school argues that it obtained parental consent from the complainant (who signed the enrolment form) to pay for the costs of the workbook, as it is a *“fee or charge fixed ... by the ... Board ...”*.
70. However, the agreement of a parent to pay an unlawful charge cannot validate the school’s unlawful act. If the school seeks to levy an unlawful charge it has exceeded the bounds of its authority and this act cannot be made lawful by an agreement with a private party.
71. I note that the school does not need the agreement of parents to apply lawful charges. It obtains this authority from the Act and any other supporting legislation.
72. Further, this agreement appears to me to blur the distinction regarding fees, charges and donations. With regard to a donation, its essence is that it must be voluntary. Parents must not be faced with a penalty if they choose not to make a donation. However, I note that the *Year 12 subject selection* form states:

*“These courses have a compulsory fee, charged to cover material or workbooks. Payment should be arranged at commencement of the course (see the course booklet with the amount charged). **If you have any outstanding fees from year 11 you will not be permitted to take any of these indicated courses.**”*

(emphasis added)

73. If a workbook payment was truly a voluntary donation, no penalty could be applied for non-payment. Nor can the parental agreement be considered to authorise the payment of *any* donation requested by the school beyond the specified *‘General Purpose donation’*.
74. Therefore, I do not consider that the parental agreement alters the situation.

Ombudsman's opinion

75. The situation, as I see it, is that:

- Pupils have a right to a free education.
- Curriculum-related material may not be compulsorily charged for without contravening section 3 of the Education Act.
- In its *Education circular 1998/25*, the Ministry specifically advises that workbooks that are provided as part of the curriculum may not be compulsorily charged for.
- In providing subject instruction, the school requires students to use workbooks, photocopied items, and food ingredients.
- These items are compulsorily charged for, and students may be penalised – by non-entry into courses – if the charges are not paid.
- The school considers that the Ministry advice is misguided, in that the items should not be considered part of curriculum delivery, but rather 'take-home' components, as they are in fact taken home.
- The school further justifies its decision to compulsorily charge due to the need to be financially prudent.
- The Ministry advised the school that the items are curriculum-related materials and that it must stay within the law and provide the items free of compulsory charge. It may however request a donation.
- The school has maintained its compulsory charging, and seeks to validate the levying of charges by parental consent at the time of enrolment.
- A private agreement between a school and parents does not validate an unlawful charge.

76. Having assessed those factors I have formed the opinion, with regard to compulsory charging for workbooks (and any other curriculum-related materials, eg, photocopying and food ingredients), that the BOT:

- has acted in a manner that appears to have been contrary to law as its actions contravene section 3 of the Education Act 1989.
- has acted unreasonably in this matter, in that it is refusing to apply the advice of the Ministry as set out in *Education circular 1998/25 – Payments by parents of students at state schools*; and has charged the complainant for curriculum-related material that he was lawfully entitled to have provided to his children free of charge.

Recommendation

77. Pursuant to section 22(3) of the OA, I recommend that the Board of Trustees:
- apologise to the complainant for the incorrect compulsory charging of \$205.21 for curriculum-related materials.
 - confirm to the complainant that the practice of compulsory charging for curriculum-related material will cease.
78. I also recommend that the Board of Trustees:
- review what voluntary charges (if any) it wishes to request from parents, and specifically assess the practice of charging for consumables in food technology and photocopying in subjects to ensure that there is a clear practice regarding identifying when an item is associated with curriculum delivery, and when it is not.
 - publish the results of this review to the school community.
79. This opinion will be published on the Ombudsman's website, in light of the issues of national significance canvassed in this investigation.

Further comments

80. I have decided against making a recommendation that the complainant be refunded the fees that he has been incorrectly charged. Although this might seem a logical step, I do not consider it appropriate in this case, for the following reasons:
- Although the complaint was made in a personal capacity about the charges the complainant faced,⁶ the complainant's concerns were not based on personal hardship; the issue was one of principle.
 - That principle has now been resolved in favour of the complainant.
 - As the matter affects all parents equally, considering a retrospective personal refund to the complainant only would be inappropriate – the complainant and all parents are entitled to equal treatment: all offered a refund, or none.
 - A refund to all parents would potentially pose the following difficulties:
 - › Uncertainty in determining the retrospective period(s) for which the refunds would be appropriate;
 - › Were the correct process to have been followed, and had workbook costs been specified as a donation, it is probable that many families would have

⁶ As required under the Ombudsmen Act 1975.

paid that donation. Although it would be possible to consult and request parents to make their views on such a donation known, the time/effort involved would be considerable. It would drain administrative resource from the school and, until the outcome of consultation was known, make the school uncertain of its financial obligations for the coming financial year, making it difficult to plan ahead.

- › It is also possible that consultation could lead to an outcome that is significantly financially adverse to the school (if all parents sought refunds).
- › Any recommendation that required the school to repay previously regarded past funds could compromise the school's immediate financial future and negatively affect the quality of education for current pupils.

Postscript

81. Since this investigation commenced, the practice of compulsory charging for curriculum-related items at the school has ceased. Thus, the practices described in this report no longer represent the current practice at the school. In particular, the school has discontinued the practice of compulsory charging for photocopying, workbooks and food items, undertaken a review of the manner in which charges were being made, and informed parents of the outcome of that review. The school has also provided a letter of apology to the complainant.

Appendix 1. Relevant statutory provisions

Education Act 1989

3 Right to free primary and secondary education

Except as provided in this Act or the Private Schools Conditional Integration Act 1975, every person who is not an international student is entitled to free enrolment and free education at any State school during the period beginning on the person's fifth birthday and ending on 1 January after the person's 19th birthday.

Ombudsmen Act 1975

13. Functions of Ombudsmen

- (1) Subject to section 14, it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted, whether before or after the passing of this Act, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the departments or organisations named or specified in Parts 1 and 2 of Schedule 1, or by any committee (other than a committee of the whole) or subcommittee of any organisation named or specified in Part 3 of Schedule 1, or by any officer, employee, or member of any such department or organisation in his capacity as such officer, employee, or member.
- (2) Subject to section 14, and without limiting the generality of subsection (1), it is hereby declared that the power conferred by that subsection includes the power to investigate a recommendation made, whether before or after the passing of this Act, by any such department, organisation, committee, subcommittee, officer, employee, or member to a Minister of the Crown or to any organisation named or specified in Part 3 of Schedule 1, as the case may be.
- (3) Each Ombudsman may make any such investigation either on a complaint made to an Ombudsman by any person or of his own motion; and where a complaint is made he may investigate any decision, recommendation, act, or omission to which the foregoing provisions of this section relate, notwithstanding that the complaint may not appear to relate to that decision, recommendation, act, or omission...

22 Procedure after investigation

- (1) The provisions of this section shall apply in every case where, after making any investigation under this Act, an Ombudsman is of opinion that the decision, recommendation, act, or omission which was the subject matter of the investigation—
 - (a) appears to have been contrary to law; or
 - (b) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or

- (c) was based wholly or partly on a mistake of law or fact; or
 - (d) was wrong.
- (2) The provisions of this section shall also apply in any case where an Ombudsman is of opinion that in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that, in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.
- (3) If in any case to which this section applies an Ombudsman is of opinion—
- (a) that the matter should be referred to the appropriate authority for further consideration; or
 - (b) that the omission should be rectified; or
 - (c) that the decision should be cancelled or varied; or
 - (d) that any practice on which the decision, recommendation, act, or omission was based should be altered; or
 - (e) that any law on which the decision, recommendation, act, or omission was based should be reconsidered; or
 - (f) that reasons should have been given for the decision; or
 - (g) that any other steps should be taken—

the Ombudsman shall report his opinion, and his reasons therefore, to the appropriate department or organisation, and may make such recommendations as he thinks fit. In any such case he may request the department or organisation to notify him, within a specified time, of the steps (if any) that it proposes to take to give effect to his recommendations. The Ombudsman shall also, in the case of an investigation relating to a department or organisation named or specified in Parts 1 and 2 of Schedule 1, send a copy of his report or recommendations to the Minister concerned, and, in the case of an investigation relating to an organisation named or specified in Part 3 of Schedule 1, send a copy of his report or recommendations to the mayor or chairperson of the organisation concerned.