A level and GCSE Results: The ABC of Legal and Regulatory Challenges

2020 has been a year that no-one could have predicted. It is with some irony that one of the areas particularly affected – student grades for A levels and GCSEs – comes from the use of predictions rather than sit-down exams as usual.

On 17 August 2020 the exams regulator Ofqual announced that for GCSEs, AS and A levels (and some others) students would be awarded either their teacher submitted grades or the result calculated by algorithmic standardisation, whichever is higher. This U-turn from the original position to use standardised or calculated grades, subject to limited rights of appeal may have addressed some of the immediate concerns raised with the algorithmic approach, but it has left many students unhappy.

The expectation to honour any places based on calculated grades has also presented universities with unprecedented demands with implications for capacity management and funding.

This places both students and institutions in a dilemma: both will have to consider their options against potentially duplicative routes for legal and regulatory challenge and each with their different timing implications and costs.

From assessed grades to algorithms and back again

Teacher or centre assessment grades (CAGs) formed the basis

grades (CAGs) formed the basis for evaluation of students who would otherwise have sat examinations in Summer 2020 for their GCSEs, AS and A levels, Extended Project Qualification and Advanced Extension Awards (AEA) in maths. These were the grades the centre assessed a student would have been likely to achieve had they sat their exams. However, these grades were subject to a process of standardisation which drew on multiple sources of evidence with previous years and the centre's historic performance used to determine whether they were more or less optimistic than those expected by teachers.

This process meant that some students would receive different grades from those predicated by their teachers without regard to their individual performance. Whatever the merits of the original approach, this system unless corrected would have left some students poorly served. Opponents said this would have disproportionate effects on students from disadvantaged backgrounds.For example, a high performing student who significantly outperformed the results of their school could see their grade reduced based on the standardisation process which

did not reflect their individual circumstances.

In order to address concerns of potential unfairness in having results determined by factors extrinsic to the student, the government announced on 12 August a so-called 'triple lock' whereby students could accept their calculated grade, appeal to receive a valid mock result or sit their exams in Autumn 2020. All outcomes were expected to hold the same value in the eyes of universities, other higher education institutions and employers.

A level results were released on 13 August and faced a huge backlash. For many the computer effectively said 'no' to the teacher predictions causing them to miss the grade offer conditions from their first choice university. The anomaly was expected to continue with GCSEs results following a week later.

To compound the uncertainty faced by students weighing up their options, exams regulator Ofqual revoked the initial appeals

guidance for students and schools. The withdrawal of the guidance late on Saturday 15 August came within eight hours of its publication. It appears that the initial guidance was not consistent with the education secretary's claims in the triple-lock. It also came as a surprise to teachers by including a wider range of coursework evidence to support an appeal. It appears that the initial guidance suggested that only those students whose CAGs were higher than their calculated grades could appeal. Presumably, this would have limited appeals to those 39% whose results were downgraded following Ofqual's standardisation process.

On 17 August Ofqual announced changes to the awarding system and appeals process and subsequently issued revised guidance. In broad summary:

• AS and A level students receive their CAG as their final results, if it is higher than their calculated grade.

• Where the calculated grade is higher than the CAG, the higher grade will stand as the final result.

• Ofqual and the Department of Education are discussing the changes with UCAS and university representatives to try to support students as much as possible.

• GCSE students' final results will be the higher of their CAG or the calculated grade.

Regulatory appeal routes

There remain some limited routes to appeal final grades, initially before the examining board subject to a request for review through Ofqual's Examination Procedures Review Service. Appeals must be made by 17 September 2020 for GCSE, AS and A level and only schools and colleges can appeal.

An appeal is available on limited grounds such as where there has been an administrative error with the CAG or rank order information which underpinned the standardisation process. A change to rank order would not automatically change a CAG. Further, a centre cannot appeal the CAG that they determined was correct at the time of submission based on their judgement of the results that the student would have achieved had the exams gone ahead.

Cases where a student considers that any reasonable adjustments were not taken into account in their case or who believe they suffered from bias affecting the CAG are directed to raise these issues directly with the CAG or the examining board as appropriate.

Entry to Autumn 2020 exams will be open to all GCSE, AS and A level students registered in the summer 2020 series. For many students seeking admission to university in September and October 2020 this will be too late, so the priority now will be to engage with those institutions and their schools to try to achieve the best outcome.

The position of Universities

Much attention has been focused on the prospect of legal challenges to government and regulators against the unfolding events. Some say that Ofqual has been put in a difficult position against ministerial pronouncements which would have led to rampant grade inflation without some checks and balances. Others point to the intellectual and legal flaws in the use of algorithms in the first place, not least under Article 22 of the General Data Protection Regulation which provides a limited right for a data subject including a student not to be subject to fully automated decisions based on profiling.

Comparatively less attention has been focused on the position of universities. They are faced with the prospect of an excess of demand over supply where candidates would be eligible for places based on their CAG or calculated grades and where there is no legal cap on the places to be made available this year.

Anecdotal evidence and statements from education institutions presents a rather mixed picture. Before the U-turn on CAGs, some institutions stated that they had applied flexibility in awarding places to students who did not meet the original offer conditions – to find only days later that others now met the criteria and for whom there was no space left until 2021.

It is encouraging to see that some institutions have pledged to honour all places. Inevitably, some tough decisions will be faced. Places face capacity constraints and events have undermined funding assumptions. Added to this in the backdrop of COVID-19 is the fact that a university education is a life experience beyond the course content and there are practical constraints to its delivery in a safe environment. Remote learning has replicated some of the features of its bricks and mortar equivalent but this was never going to be a perfect substitute. This raises an issue as to how universities can honour all places consistent with student expectations for as close as

realistic an approximation to a full learning and campus style environment.

What then are the prospects for students to safeguard their first choices and what is the position of universities presented with individual cases which have different merits depending on the prioritisation criteria they adopt?

The legal relationship between students and universities is a complex one. The boundaries between public and private have not been conclusively determined.

Students are consumers whose rights can be enforced through the courts. They also have access to the appeals process before regulators including Ofqual (typically, via schools) and the Office of the Independent Adjudicator for Higher Education (OIA) which was set up to remedy some of the deficiencies in the historic system of regulation of universities.

Universities and colleges are also subject to public law duties and, in certain circumstances, they are amenable to judicial review where they are acting unlawfully or abusing power. The grounds for judicial review are limited to where the institution has acted illegally, there has been procedural irregularity or it has taken a decision that is so unreasonable that no reasonable authority would have adopted it (so-called 'Wednesbury' unreasonableness). Yet these are grounds that students affected by decisions which have significant ramifications for their life and career choices may want to raise. It comes as no accident that students raising such claims often intend to pursue a career in medicine or law where they are making large investments in their education over a long period.

There is a delicate public-private divide where a question might arise as to whether a claim against an education institution is properly made as a private or public law claim. In some instances such as a dispute over procurement of paper clips it is straightforward to see a private law claim in contract. Increasingly, aggrieved students affected by decisions of universities, schools and colleges have sought to make claims in contract, consumer law and tort. There has been a traditional reluctance on the part of the court to interfere with matters that are treated as within the realm of academic discretion but recent authority suggests an expansion where the claim properly relates to the quality of service that the student is entitled to expect. There might even be an employment contract at issue where no issue of public law is involved. Where, however, and of most interest for present purposes the university or college is exercising a power or discretion over admissions, or analogous disciplinary proceedings, it is relatively settled that a claim could lie in judicial review subject to considerations of an adequate alternative remedy (see for example, *R (Griffiths) v Lewisham College* [2007] EWHC 809 (Admin) at para 6).

This presents students with a dilemma. Do they raise their concerns directly with the institution, a regulator or a court? The problem is compounded by the timing constraints of regulatory appeals and the requirement that a claim for judicial review must be brought promptly and, in any event, within three months of the relevant decision. While the regulatory route may seem more attractive and cost-effective there is a concern that by the time it is exhausted a claim for judicial review is out of time.

Unanswered Questions

The writer has been overwhelmed in recent days by inquiries from students, schools and universities who have seen grades fall from the levels predicated by teachers, in some cases dramatically, only to see their reinstatement days later. Among the questions raised from the perspectives of students and institutions include:

• Do universities have to honour the places they have already offered where the student has met the offer requirements based on the CAG which is higher than calculated grades but where those places have already been offered to others?

• What will be the impact on international places, including students taking the International Baccalaureate which are subject to different funding requirements?

• What is the position of home-educated students?

• What is the position of students who have taken Scottish Highers and how will this affect the places made available to students from England, Wales and Northern Ireland?

• What is the position of students who accepted places through clearing as a next best option but who have later found out that they met their offer conditions from their first choice university based on the CAG?

• What can a student do if they believe that they were affected by bias or discrimination in the awarding and admission process?

• What is the position of parents in engaging with the process

including their rights to information?

• What are the opportunities to re-sit the 2019/2020 academic year?

The back-tracking from the algorithm-generated results and the creation of more options to meet the grade that would secure university admission may cure some of the initial injustice of non-individualised decisions. Yet this state of affairs has still left many students scrambling in the queue for places in 2020 with deferral to 2021 a second best option. All testify to the emotional distress and the actual and potential impact on life choices. Universities may not always be in a position to keep places open while the appeals process runs its full course.

Many of the principles set out here are not unique to the circumstances of the pandemic but they have particular significance in that context. Given that 2020 was always going to be an anomaly, now more than ever it is important to subject decisions on awarding and admissions to robust scrutiny if there is to be confidence in the education and qualifications system.

The upshot of all is this as that a student weighing up their options may have to decide quickly how best to protect their interests. It will be critical to establishing credibility and also to preserve the avenues for subsequent challenge to engage with the school and higher education institution at the earliest opportunity. Yet the reality of the situation is that a student will not prefer to start their university career in an adversarial process. This means that the process of engagement must be handled sensitively and with an eye on the ongoing and future relationship.

Disclaimer: This briefing is for information purposes only. It covers a wide range of issues on which the law and practice are evolving and which are highly specific to individual cases. It does not constitute and should not be relied on as legal advice.

If you are affected by any of the issues above please contact Professor Suzanne Rab's clerk at swhitaker@serlecourt.co.uk

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Year of Call: 2013