

Other routes of redress

Leon Glenister

Things to consider

- Taking exams in the autumn series
- Challenging school predictions
- Challenging the standardisation model

Taking exams again in the autumn

- This is the obvious answer for most students.
- Confirmed exam boards must make examples available in all GCSE, AS and A level subjects in autumn series. These are in the same subjects and same format as the summer 2020 series would have been.
- No non-exam assessment except in art and design.
- Exam boards will be *required* to issue replacement certificates if students request.

Taking exams again in the autumn

- These will run from October 2020 with flexibility depending on changing circumstances.
- This will not (necessarily) assist those who are about to transition to a new phase of education.
- See further:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/903953/Summer_2020_grades_for_GCSE_AS_and_A_level_Extended_Project_Qualification_27072020.pdf

Challenges in relation to school predictions

- Can request predictions from school as subject access request, but not required to be provided until 40 days after results day (Data Protection Act 2018, Schedule 2, Part 2, paragraph 25)
- The prediction model was considered by Education Committee in report published on 11 July 2020 titled 'Getting the grades they've earned'. It received written submissions.

Challenges in relation to school predictions

- It noted concerns of unconscious bias, for example:
 - Sutton Trust evidence that low income families are more likely to have their grades incorrectly predicted than more affluent peers.
 - The Runnymede Trust said similar for BAME students.
 - Concerns in relation to SEN students, e.g. did mocks have access arrangements?

Challenges in relation to school predictions

- Education Committee were “unconvinced that safeguards - such as additional guidance and practical recommendations – put in place by Ofqual will be sufficient to protect against bias and inaccuracy in calculated grades”.
- It welcomed Ofqual’s commitment to “publish a full programme of evaluation in the autumn”.

Challenges in relation to school predictions

- What are the potential legal challenges:
 - A judicial review challenging the model that has been adopted.
 - Discrimination claim against a school
 - Discrimination claim against Ofqual

Challenging the standardisation model

- The standardisation model is not public. However consultation response says will draw on historical outcomes for each centre, prior attainment of this years' students and those within previous years within each centre, expected national grade distribution for the subject.
- Addresses concern about year groups out performing previous year groups.
- Still gap where individual student who has excelled compared to peers in their year and previous years.

Challenges to standardisation model: concerns

- Considered by Education Committee who said “more transparency is needed urgently”.
- Concerns for:
 - “atypical students”
 - small SEND specialist providers with highly variable year on year cohorts
 - “turnaround schools” which will likely to disproportionately serve poorer communities

Challenges to standardisation model: concerns

- Education Committee conclusions:
 - Extremely concerned that Ofqual's standardisation model does not have mechanism to ensure BAME pupils, FSM eligible pupils, LAC or pupils with SEND are systematically disadvantaged.
 - Ofqual should publish model immediately for transparency with explanatory memorandum for decisions and assumptions made in development process.
 - Should collect data as to who has appealed, including type of school attended, region, gender, SEND status, LAC and FSM.

Challenges to standardisation model: duty to publish

- In Eisai Ltd v NICE [2008] EWCA Civ 438, NICE was required to provide the model by which it said a drug was “cost effective”, because of it was “discharging an important public function which engaged a strong public interest” and required “an exceptional degree of disclosure and consultation”.
- Maxwell and Tomlinson argue this principle applies here:
<https://ukconstitutionallaw.org/2020/07/28/jack-maxwell-and-joe-tomlinson-model-students-why-ofqual-has-a-legal-duty-to-disclose-the-details-of-its-model-for-calculating-gcse-and-a-level-grades/>

Challenges to standardisation model: duty to publish

- “Gunning principle” that a consultation needs to provide sufficient reasons for the proposal to allow for intelligent consideration and response.
- Ofqual have published a short film and factsheet on model, and said on 27 July “we will publish the precise details of the model used on results day”.
- Potential consultation challenge:
 - Publication now, or on results day, does not answer consultation point.
 - However, even now, probably a timing issue.

Concluding remarks: wider challenges

- Guardian reported pre-action correspondence in relation to (1) standardisation model, (2) appeal right, by sixth former called Lexie Bell. However, according to CrowdJustice page, insufficient funds were raised.
- What if clear issues arise results day similar to IB, or when model is published? Could be potential challenge, and note Apprenticeship, Skills, Children and Learning Act 2002, which established Ofqual requires it to implement assessments which “give a reliable indication of achievement” (see sections 128 and 129).

Concluding remarks: wider challenges

- If potential legal flaws, e.g. consultation or breach of duty, note practical issues:
 - Timescales
 - Alternative remedy
 - Practical remedy
 - It was a “rescue mission”
- Wider points are likely to come out in public discourse

Concluding remarks: individual challenges

- The broad options for individuals are:
 - To take the autumn series of exams
 - To appeal their mark on the grounds set out this seminar, through their centre
 - To bring a discrimination claim either against (1) school or (2) Ofqual

Questions?

Thank you for listening

© Copyright Landmark Chambers 2020

Disclaimer: The contents of this presentation do not constitute legal advice and should not be relied upon as a substitute for legal counsel.

London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham

4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us

✉ clerks@landmarkchambers.co.uk
🌐 www.landmarkchambers.co.uk

Follow us

🐦 @Landmark_LC
🌐 Landmark Chambers