

Legal issues arising from teacher assessed grades in a period of pandemic

Students can appeal TAGs in a number of ways. Considered & consistent communication on the school's position can help to avoid escalation.

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This year's GCSE, AS and A Level teacher assessed grade (TAG) results have been a resounding success and undoubtedly demonstrates the commitment and resilience of students, schools and school staff during these unprecedented times.

Despite many students having achieved exceptional grades, it is inevitable that schools will face challenges from some students who feel that they have not received a fair grade in one or more subjects.

The vast majority of these challenges are likely to be directed through the centre review and appeals process devised by the Joint Council for Qualifications (JCQ). However, there are other routes through which students may look to seek redress or information about how their grade was awarded.

JCQ centre review and appeals

The three grounds on which a student can challenge a grading decision through the JCQ process are that:

- there was an administrative error in relation to the result;
- the school did not follow its procedures properly or consistently in arriving at the result; or
- the school made an unreasonable exercise of academic judgement in the choice of evidence from which to determine the grade and/or the determination of that grade from the evidence.

Administrative errors are likely to be relatively easy to identify, such as the incorrect transposing of student grades. Procedural errors are more nuanced and includes a failure to apply appropriate access arrangements or reasonable adjustments at the time of an assessment used to determine a student's grade.

Schools (as exam centres) are only required to consider the first two grounds when undertaking a centre review (stage 1). Awarding organisations (exam boards) can consider appeals based on all three grounds (stage 2).

In determining whether there has been an unreasonable exercise of academic judgement, the starting point for the exam board is whether the TAG was patently unreasonable and not whether any other grade would have been reasonable in the circumstances.

Reasonable adjustments, special consideration and Equality Act challenges

There are a number of key provisions within the Equality Act 2010 which are relevant to TAGs for students with protected characteristics (including students with a disability). These include the right not to be directly or indirectly discriminated against and, for those students with disabilities, to have reasonable adjustments made to try and overcome any disadvantage as compared to other students.

The most difficult challenges are likely to be those based on the impact of the pandemic on student's physical, mental and emotional health, and to what extent schools and other exam centres put in place appropriate reasonable adjustments or awarded special

consideration in individual circumstances.

The legal definition of disability would consider mental health issues as a disability if they have a substantial (more than minor or trivial) and long-term (at least 12 months) adverse effect on the student to carry out normal day-to-day activities. Often, but not always, a student with a disability may also have special educational needs (SEN). Prior to determining TAGs, schools were directed where possible to formalise applications for access arrangements or reasonable adjustments and to ensure that approved arrangements were put in place for any assessments used to determine grades.

Schools were also directed to remind students to raise any mitigating circumstances which warranted special consideration, ideally at the time of assessment and prior to the submission of the grade. These might have included temporary illness, bereavement or domestic crisis, or perhaps concerns regarding access to IT or other resources, at the time of an assessment used to determine the student's TAG. Where appropriate, teachers were directed to select an alternative piece(s) of work completed by the student when he/she was unaffected by the adverse circumstances or, if not possible, to make a holistic judgement to determine the TAG on the available evidence.

There are numerous possible grounds of challenge relating to access arrangements, reasonable adjustments and special consideration, including:

- a failure to apply access arrangements or reasonable adjustments, either at all or appropriately, at the time of an assessment used to determine the TAG;
- wrongly determining that a student's circumstances did not meet the criteria for special consideration; and/or
- failing to put in place adequate special consideration measures to address a student's adverse circumstances.

In some instances, an eligible student could choose to bring a disability discrimination claim if they felt that reasonable adjustments had not been made or the grade or process for awarding it was in some way unfavourable because of their disability or circumstances arising from the same. The First Tier Tribunal (FTT) has remit to hear claims against an academy or maintained school that allegedly discriminates against a student because of a disability. The county court has jurisdiction in relation to discrimination claims based on other protected characteristics, such as religion or race.

Discrimination in relation to TAGs is not something that has been tested yet in the higher courts. However, we think it is unlikely that the FTT or court would want to seek to substitute academic judgements, even if discrimination was found. It is more likely that a the FTT or court would direct the school to reconsider the grade or write to the exam board with the finding of discrimination for them to consider. There would, of course, potentially be reputational issues for the school in the event of such a judgment.

Complaints

Where a student has made an appeal through the JCQ centre review and appeal process, they should not be permitted to bring a complaint under the school's own complaints policy on the same matter. However, an appeal can only be made against a result issued, so if a student is unhappy that a grade was not submitted at all in a subject because of insufficient evidence, this can be raised as a complaint. The grounds of a complaint might include what curriculum content had (or had not) been sufficiently covered to form part of a grading consideration and what existing evidence was available (or not) to inform a TAG. There may also be other matters indirectly related to the awarding of results where the complaints procedure should be used, for example, how a member of staff spoke to a student on results day.

Information requests and challenges

Students unhappy with their TAG in one or more subjects may want more information from the school about how their grade was awarded or how the awarding of their grade compared with others within the school. Schools will need to be ready to respond to subject access requests (SARs) under the Data Protection Act 2018 or requests for general information under the Freedom of Information Act 2010 appropriately and within the relevant statutory time periods. If requestors are not happy with the responses received, they can refer the matter to the Information Commissioner's Office (ICO) once the school has further reviewed the initial response.

Schools may also receive challenges from parents as to why information about their child is not being shared with them, or data breaches may have occurred during the process of determining TAGs or managing reviews and appeals which may give rise to action against the setting in the form of a complaint to the ICO and a claim for damages.

Conclusion

Schools spent a great deal of 2021 preparing for TAGs and for any student appeals and data requests arising after the results days. Early information sharing, collating detailed and readily accessible evidence and ensuring staff were appropriately trained and supported on TAGs will all have helped to ensure their success. The vast majority of students will be happy with their results or will find other ways of managing their disappointment, such as applying to higher education through clearing/deferral or sitting exams during the Autumn term.

Ensuring the school's position is set out clearly and comprehensively at the first point of challenge is vital where schools need to respond to challenges to the TAG awarded. This may be difficult, particularly in relation to the JCQ review and appeal process with its very tight timescales over the summer break and into the start of the Autumn term.

However, setting out a considered and consistent communication about the school's position at the outset can help to avoid escalation of the issue. It can also ensure the school's case is clearly set out in the event of further challenge, rather than having to bring in further information or evidence or change tack later, which may undermine the school's position. Schools should be particularly cautious about its responses to challenges based on reasonable adjustments, access arrangements and special consideration because of the potential for student claims for disability discrimination.

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