

Importance:

OUT of SCOPE

From: [REDACTED] *of an official*  
Sent: 21 September 2012 12:45  
To: [REDACTED] *DfE official*  
Cc: [REDACTED], Jeremy Benson  
Subject: FW: ENGLISH GCSE 2012 PROPOSED JUDICIAL REVIEW - CONFIDENTIAL - NOT FOR DISCLOSURE  
Importance: High

PROTECTED

AS discussed please find attached a copy of the two letters before action received last night by Ofqual.

I can't share the annex's with you [REDACTED] as these detail student names.

You will see on the ASCL site that the list of signatories to these letters has been published – you may find this helpful. Here is the link

[http://www.ascl.org.uk/opinion/press\\_releases/pupils\\_join\\_educational\\_alliance\\_legal\\_challenge\\_gsce\\_grading](http://www.ascl.org.uk/opinion/press_releases/pupils_join_educational_alliance_legal_challenge_gsce_grading)

Finally here are our press lines if asked today

An Ofqual spokesperson said: "We can confirm we have received correspondence about proposed legal action. The matter is now in the hands of our lawyers and we will respond in due course. We cannot comment further at this time."

Hope this helps

1. NAME OF THE PARTY

2. ADDRESS OF THE PARTY

3. DATE OF THE PARTY

4. TIME OF THE PARTY

5. PLACE OF THE PARTY

6. REASON FOR THE PARTY

7. LIST OF GUESTS

8. LIST OF DONORS

9. LIST OF SPONSORS

10. LIST OF VOLUNTEERS

11. LIST OF SPEAKERS

12. LIST OF PERFORMERS

13. LIST OF ENTERTAINERS

14. LIST OF MUSICIANS

15. LIST OF DANCERS

16. LIST OF ACTORS

17. LIST OF COMEDICIANS

18. LIST OF SINGERS

19. LIST OF INSTRUMENTALISTS

20. LIST OF OTHERS

21. LIST OF PHOTOGRAPHERS

22. LIST OF VIDEOGRAPHERS



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23 October, 2012  
Our ref JR 80109/ITR  
Your ref

Dear Sirs

e-mail: [troy.robinson@lewisham.gov.uk](mailto:troy.robinson@lewisham.gov.uk)  
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**RE: JUNE 2012 AQA ENGLISH GCSE EXAMINATION  
PROPOSED JUDICIAL REVIEW**

1. *This is a Pre-Action Letter written in accordance with the Pre-Action Protocol for Judicial Review ("the Protocol"). You will wish to note the following matters:*

(a) The proposed Claimants are a number of local authorities, schools, trade unions representing teaching staff, and students (details of which are provided in the attached schedule). This proposed challenge is being co-ordinated by the London Borough of Lewisham and Leeds City Council. The address to which your response to this Pre-Action Letter, and all future correspondence, should be sent, is Troy Robinson, London Borough of Lewisham, Town Hall, Catford, London SE6 4RU (e-mail: [Troy.Robinson@lewisham.gov.uk](mailto:Troy.Robinson@lewisham.gov.uk)).

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- (b) We set out in §§4-21 below a clear summary of the facts on which our proposed claim is based in accordance with §10 of the Protocol.
- (c) We set out in §2 below the dates and details of the decisions that we propose to challenge, also in accordance with §10 of the Protocol.
- (d) We set out in §52 below the details of the action that we expect you to take, in accordance with §6 of Annex A to the Protocol.
- (e) In the circumstances of this case, given the immediate impact that the decisions have had on educational and career opportunities for affected students and their schools, and in light of the fact that the proposed Defendants have already spent considerable time looking into the matters in question, we expect you to respond to this letter no later than Thursday 27<sup>th</sup> September 2012.
- (f) We also draw your attention to §13 of the Protocol with respect to sanctions for failing to comply with the Practice Direction.

2. The proposed Claimants seek judicial review in respect of:

- a. AQA's decision, on an unknown date in July/August 2012, but published on 23<sup>rd</sup> August 2012 to increase the scaled mark grade boundary to achieve a C grade in the June 2012 English GCSE Foundation tier written examination (ENG1F) by 10 marks from the grade boundary applied to the January 2012 English GCSE Foundation tier examination ("the AQA decision"); and
- b. Ofqual's decision, on an unknown date in July/August 2012, to approve the AQA decision and/or its on-going failure to issue

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statutory directions reversing the AQA decision ("the Ofqual decision"),

(together, "the Decisions").

## 2. Summary of Challenge

3. In summary, the Decisions were:

(i) conspicuously unfair and/or an abuse of power, breaching (without justification) the legitimate expectations of students taking the AQA English GCSE examination, and the legitimate expectations of their schools, that the grade boundary for a C grade would not be changed other than at the margins and/or the grade boundary would not be changed radically unless specific and focused warning or notification of the possibility of such a change had been provided;

(ii) irrational, and in contravention of the cardinal principle of good administration that all persons who are in a similar position should be treated similarly;

(iii) taken in breach of a mandatory relevant consideration, namely the legitimate expectation(s) that had been engendered (see (i) above for detail);

(iv) made following a misdirection of law that inter-year consistency should prevail over intra-year consistency, and/or in contravention of Ofqual's own policy or criteria with respect to questions of comparability;

(v) taken in breach of the public sector equalities duty: no regard at all appears to have been had to this duty;

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(vi) in breach of the Human Rights Act 1998; and, in particular, Article 2, Protocol 1.

### 3. The Facts

4. In 2010 AQA, along with the other examination bodies in England and Wales, introduced a new English GCSE course, for completion in 2012. Components of the new exam could be taken from January 2011 onwards. The new AQA English GCSE differs in various material respects from the previous AQA English GCSE, and is marked by: (i) examination, carrying 40% of the total marks; and (ii) controlled assessment, carrying 60% of the total marks.
5. In the 2011/2012 academic year, students were able to take the examination component either in January 2012 or June 2012. Approximately 54,000 students took the examination in January 2012 ("the January Cohort"). Approximately 141,000 students took the examination in June 2012 ("the June Cohort").
6. After the January Cohort's exam scripts had been marked and moderated, AQA (and/or Ofqual) decided that the C grade boundary for the Foundation tier paper (ENG1F) should be set at 43 marks (out of a maximum scaled mark of 80). This was broadly similar to the grade boundary for the June 2011 examination paper for the Foundation tier (44 out of a maximum scaled mark of 80). The C grade boundary of 43 marks for the Foundation tier paper in January 2012 was also broadly similar to the C grade boundary of 41 for the Higher tier paper (ENG1H).
7. In March 2012, AQA (and/or Ofqual) published the January 2012 grade boundary to students and schools throughout English and Wales.

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8. AQA and Ofqual's consistent, historic practice is that after grade boundaries have been applied and published in respect of one cohort of a particular academic year group, the published grade boundary is only subject to 'marginal' variation (between 1-3 marks) in respect of other cohorts within that academic year.
9. From March 2012 onwards, students and schools throughout the UK relied on this practice and the published grade boundary when deploying finite resources in preparing for the June 2012 exam. To take but one example, a student who was regarded as a 'safe' C candidate, having regard to the published January grade boundary and AQA and Ofqual's historic practice, but who was 'at risk' of failing to obtain a C grade in Mathematics would have reasonably focused more of his available time on his or her Mathematics than English. The student's English teacher would have reasonably focused more of his or her time on a student who was capable of attaining a C grade, but was not regarded as a 'safe' candidate.
10. While responsible schools and students appreciated that the boundaries might be subject to marginal revision (in line with AQA and Ofqual's consistent, historic practice) it could not be (and was not) reasonably expected that AQA and Ofqual would radically alter the basis of the assessment *within* an academic year group. Schools and students would quite reasonably assume that intra-year fairness would be upheld as a cardinal principle.
11. AQA and Ofqual were at all times well aware of the reliance placed on the published grade boundaries by students and schools, and of the significance to students and schools of the C grade boundary in particular. AQA officers are regularly in discussion with schools about grade boundaries. We note in this regard p.17 of Ofqual's report 'GCSE

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English Awards 2012 – A Regulatory Report’ (August 2012, Ofqual/12/5211) (“the Ofqual report”), where it was stated having reviewed the matter with schools that:

“it is clear that the C/D borderline is the boundary of strongest interest in most schools, and that most schools therefore invest considerable resources in getting borderline candidates up to or just above this level. . . . In practice, this means that most schools have a very strong need to know “what grade C looks like” in the context of each type of assessment.”

(emphasis added).

12. The only caveats, provisos or qualifications issued by AQA and Ofqual following publication of the January grade boundary were of the usual or ‘standard’ sort, that grade boundaries may vary.
13. Neither AQA nor Ofqual provided schools or student with any warning or notification that:
  - a. the published January grade boundary was unusually or exceptionally unreliable; and/or
  - b. there was any realistic prospect that they would radically depart from their historic, consistent practice by increasing the C grade boundary radically.
14. Consequently, students and schools were denied the opportunity to undertake extra or different preparation for the June 2012 GCSE English examination papers. If AQA and Ofqual had provided warning or notification in the terms referred to at §13 above, students and schools would have taken such action.

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15. After the June Cohort's exam scripts had been marked and moderated, AQA (with Ofqual's approval) decided that the C grade boundary for the Foundation tier paper should be increased to 53 marks (out of a maximum of 80). The C grade boundary for the Higher tier paper was set at 44 marks: an increase of just 3 marks from the January 2012 paper. (AQA, with Ofqual's approval, also decided that the C grade boundary for the controlled assessments should each be increased by 3 marks from 25 in January 2012 to 28 in June 2012, and from 51 to 54, for the same pieces of work).

16. The C grade boundary for the Foundation tier paper was, therefore, increased by **10 marks** above the C grade boundary applied to the January Cohort; an increase of **12.5%** and almost three standard deviations outside the mean. The effect of this decision (as compared with the Higher tier paper) was that candidates taking the June 2012 Foundation tier paper had to gain **17%** more marks than their contemporaries taking the Higher tier paper in order to gain grade C.

17. The inevitable effect of the Decisions is that AQA has awarded considerable numbers of students lower grades ('D' rather than 'C') than they would have received if they had taken the same exam in January 2012.

18. The consequences of the Decisions include the following:

a. The June Cohort has been treated with conspicuous unfairness:

i. First, it has been materially prejudiced as against the January Cohort. The students are part of the same academic year group and this inequality of treatment will have immediate, concrete adverse implications for the children affected. Amongst other things, it can reasonably

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be expected that those affected will be applying for the same educational and professional opportunities in future.

- ii. Second, the June Cohort has been materially prejudiced in conducting its exam preparation. It was given no warning that there might be a radical increase in the C grade boundary. The students affected were denied the opportunity to take preventative or mitigating steps. They were also denied the assistance of their schools and teachers in doing so.

- b. Schools and local authorities have been denied the opportunity to prepare the June Cohort properly for the June exam. The grades awarded pursuant to the Decisions are materially lower than would have been obtained if proper warning or notification was given. The results may have serious implications for the schools affected, as national comparative performance measures include the proportion of students achieving at least C grades in English and Mathematics.

19. Ofqual has purported to justify the Decisions on the following grounds:

- a. It asserts that the January C grade boundary was “overly generous”. To date, neither AQA nor Ofqual has provided any empirical or objective evidence to support this assertion.

Ofqual appears to accept that AQA erred in this respect, but contends that AQA is not to be regarded as culpable. Ofqual asserts that neither AQA nor it was at fault in setting and publishing the January 2012 C grade boundary because:

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- i. the 2012 AQA English GCSE course was a 'new qualification'; and
- ii. the January cohort was not sufficiently large in number to enable AQA and Ofqual to extrapolate reliable conclusions about overall standards.

If so, this begs the question as to why AQA and/or Ofqual did not provide a specific and focused warning that the January 2012 results ought to be treated with real caution and were not to be relied upon.

- b. It is stated that if the January C grade boundary had been applied to the June 2012 cohort and/or if AQA and Ofqual had complied with their consistent, historic practice this would have resulted in a higher percentage or proportion of the 2012 academic year group obtaining a C grade than in other (unspecified) academic years.
- c. Ofqual also asserts that the, materially increased, C grade boundary applied to the June Cohort was "right", because applying that boundary resulted in the percentage or proportion of students in that cohort receiving a C grade being 'comparable' or consistent with other (unspecified) academic years.

20. Ofqual thus contends that, but for the Decisions, a higher proportion of C grades would have been awarded in 2012 in comparison to other (unspecified) academic years. It is asserted that this would constitute unwarranted and significant 'grade inflation' and that this would be incompatible with Ofqual's statutory objectives (discussed below).

21. In short, AQA and Ofqual's position is that the June Cohort must bear the cost of AQA and/or Ofqual's mistake in January 2012, so as to

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ensure (Ofqual's conception of) 'comparability' or 'equivalence' between different academic years is not compromised.

#### 4. Legal framework

22. Ofqual is a statutory body created by the Apprenticeships, Skills, Learning and Children Act 2009 ("the Act"). Section 128 of the Act enumerates Ofqual's five statutory objectives:

- a. the qualifications standards objective,
- b. the assessments standards objective,
- c. the public confidence objective,
- d. the awareness objective, and
- e. the efficiency objective.

23. The 'qualifications standards' objective is to secure that regulated qualifications give a reliable indication of knowledge, skills and understanding and indicate a consistent level of attainment (including over time) between comparable regulated qualifications, and a consistent level of attainment (but not over time) between regulated qualifications and comparable qualifications (including those awarded outside the UK).

24. The 'assessment standards' objective is to promote the development and implementation of regulated assessment arrangements that give a reliable indication of achievement and indicate a consistent level of attainment (including over time) between comparable assessments.

25. The 'public confidence' objective is to promote public confidence in regulated qualifications and regulated assessment arrangements.

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26. The statutory objectives apply equally to ensuring consistency/reliability/public confidence regarding examinations within each academic year group ('intra-year' fairness'); as well as consistency between different academic years ('inter-year' fairness).

27. Ofqual regulates the exam bodies, including AQA. Ofqual is obliged by section 148 to publish a register of awarding bodies and certain specified information; by section 149 to review the activities of a recognised body; and by section 150 to review complaints in relation to the award of qualifications.

28. By section 151, Ofqual has the power to issue directions in relation to general conditions of recognition, and by section 151(7) Ofqual's directions are enforceable by a mandatory order. Section 151A allows Ofqual to impose monetary penalties on awarding bodies for breach of the general conditions of recognition, against which there is a statutory right of appeal to the First-Tier Tribunal. Section 152 provides for withdrawal of recognition. Section 153 requires Ofqual to give guidance to the awarding bodies on compliance with the general conditions of recognition.

29. AQA is a recognised body for the provision of the General Certificate of Secondary Education ('GCSE'). GCSEs are a 'regulated qualification' for the purposes of s. 130(1).

30. AQA and Ofqual's functions in the present context – in conducting and assessing examinations – are derived from the Act.

31. AQA is an awarding body under Part 7 of the Act and can only act as such if it is recognised by Ofqual. The conditions of recognition are themselves part regulated by the Act: ss.133-137.

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## 5. Grounds of Challenge

32. The proposed Claimants consider that there are a number of grounds of challenge to the Decisions, and that as a result the Decisions are liable to be quashed.

### **(i) Conspicuous unfairness: legitimate expectation/abuse of power**

33. As you know, a 'substantive legitimate expectation' arises where departing from that expectation would be unfair or constitute an abuse of power. As Laws LJ explained in R (on the application of Bhatt Murphy (A Firm)) v Independent Assessor [2008] EWCA Civ 755 (at §28):

"Legitimate expectation of either [the substantive or procedural] kind may (not must) arise in circumstances where a public decision-maker changes, or proposes to change, an existing policy or practice. The doctrine will apply in circumstances where the change or proposed change of policy or practice is held to be unfair or an abuse of power: see for example Ex p Coughlan paragraphs 67 ff, Ex p Begbie [2000] 1 WLR 1115, 1129F — H. The court is generally the first, not the last, judge of what is unfair or abusive; its role is not confined to a back-stop review of the primary decision-maker's stance or perception...But these are ill expressed in very general terms; and it is notorious (and obvious) that the ascertainment of what is or is not fair depends on the circumstances of the case..."

34. Unfairness arises when a decision is made to renege on a representation that is pressing and focused: R v North and East Devon Health Authority, Ex parte Coughlan [2001] QB 213 at §86; Bhatt Murphy at §46.

35. A 'procedural legitimate expectation' may arise in two distinct ways: see Laws LJ in Bhatt-Murphy at §29: the 'paradigm' case where a public

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authority has provided “...an unequivocal assurance, whether by means of an express promise or an established practice, that it will give notice or embark upon consultation before it changes an existing substantive policy” (emphasis added). The second way in which a ‘procedural legitimate expectation’ can arise is where, even if there is no practice of consultation:

“... the impact of the authority's past conduct on potentially affected persons [is] pressing and focused. One would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit: not necessarily for ever, but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult”.

See Bhatt-Murphy at §49, per Laws LJ (emphasis added).

36. In the present case:

- a. the magnitude of the change imposed in respect of the C grade boundary is radical and unprecedented;
- b. the consistent, historic practice of AQA and Ofqual is that any intra-year grade boundary variations are only ‘marginal’;
- c. schools and students relied upon the published grade boundaries – and the historic, consistent practice that any changes are only ‘marginal’ – in teaching and studying for the June exam;
- d. AQA and Ofqual were well aware that students and schools would (and did) rely on the published January grade boundaries in making those preparations;

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- e. Neither AQA nor Ofqual provided students or schools with any specific or focused warning that the January grade boundaries would or might change radically in June;
- f. The June Cohort, and their schools and teachers, were consequently denied the opportunity to take preventative or mitigating steps. If the June Cohort had been provided with proper notification or warning, appropriate action could have been taken to avoid or mitigate the conspicuous unfairness inflicted by the Decisions.

37. In the circumstances, a legitimate expectation was engendered that:

*(i) the January C/D grade boundary would be applied in June, subject only to 'marginal' variation; and/or*

*(ii) AQA and Ofqual would not make a change of the magnitude imposed – a radical change - without providing students and schools with a specific and focused warning when the January C/D grade boundary was published.*

38. In considering whether AQA and Ofqual can justify frustrating this legitimate expectation, the Court will strike the balance between the competing interests, applying a proportionality analysis (Coughlan at p243); and AQA and Ofqual will bear the burden of satisfying the Court that there was an overriding public interest which defeated the legitimate expectation: Paponette v Attorney General of Trinidad and Tobago [2011] 3 WLR 219 at §36. The proposed Claimants consider that AQA and Ofqual will be unable to do so.

39. At this stage, we are aware of Ofqual's public pronouncements as to why it decided not to interfere with AQA's results. We have not seen the correspondence between Ofqual and AQA, or other evidence of

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communications between the two parties. Nor have we seen internal communications within Ofqual and AQA about these matters; or any of the communications between Ofqual and the Department for Education: these documents must be disclosed by Ofqual and AQA: see §§55-56 below.

40. We note that Ofqual has stated that it regards the Decisions as justified principally by reference to the objective of securing 'inter-year' consistency or comparability. It is not clear that this objective was, in fact, met. Further, in any event, this would have been an entirely inadequate justification for the conspicuous unfairness that the Decisions inflict on students and schools. We would draw your attention, in particular, to the following features of this case:

- a. the Decisions flagrantly breach the legitimate expectations of students and schools that rely on AQA and Ofqual in a context (education) that is fundamental to the affected children's future life prospects;
- b. even on AQA and Ofqual's own (best) case, the conspicuous unfairness is the exclusive responsibility and product of AQA and Ofqual's errors;
- c. while it is correct that 'inter-year' consistency is one, single, aspect of Ofqual's statutory objectives, it is not the only (or even the most significant) interest that is protected under the Act. The 'qualifications standards' objective necessarily requires Ofqual to secure 'intra-year' consistency.

41. Further, Ofqual's stated justification is not rationally connected to, and cannot explain or excuse, the failure to provide any proper warning or notice to affected students and schools.

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**(ii) Irrationality**

42. AQA and Ofqual's treatment of the June Cohort relative to the January Cohort is irrational. We remind you that "it is a cardinal principle of good public administration that all persons who are in a similar position shall be treated similarly": R v Hertfordshire County Council, ex p. Cheung, per Sir John Donaldson MR (The Times, 4th April 1986). See also Lord Hoffman in Matadeen v Pointu [1999] 1 AC 98, at 109: 'treating like cases alike and unlike cases differently is a general axiom of rational behaviour.'

43. It is inconceivable that two cohorts of students enrolled for the same course in the same academic year, who have undertaken the same work and invested the same effort, and who will be competing in future for the same opportunities, should be subjected to such radically different standards of assessment and award. The upshot of the Decisions is that student's future educational and professional opportunities will turn, and stand or fall, on pure happenstance: whether the school they happen to attend submits students for the January or June diet of exams.

44. This irrationality is compounded when AQA's decision to increase the 'C' grade boundary for the Foundation tier exam taken in June 2012 is aggregated with AQA's decision to increase by 3 marks the 'C' grade boundaries for each of the two controlled assessments submitted in June 2012, as compared with the controlled assessments submitted in January 2012.

**(iii) Failure to take into account relevant considerations**

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45. As you know, where a legitimate expectation arising from a representation or promise has been engendered, before resiling from it the decision-maker is required – at the very least – to take into account the representation that has given rise to the legitimate expectation and what has been done on the strength of it: see Paponette at §46; and R (Bibi) v Newham LBC (No1) [2001] EWCA Civ 607 at §39. The same principle would no doubt apply to the circumstances that gave rise to the legitimate expectation in this case (see the description of those legitimate expectations at §37 above).

46. In the present case, on the basis of Ofqual's public statements, it appears clear that neither AQA nor Ofqual had any (or any sufficient) regard to either of those legitimate expectations, and therefore failed to take into account a mandatory relevant consideration.

(iv) **Error of law regarding statutory objectives: inter-year v. intra-year**

47. Ofqual's public statements indicate that the Decisions were predicated on the assumption that the Act requires, or justifies, AQA and Ofqual treating 'inter-year' consistency or comparability as a peremptory or primary objective or consideration. This construction is erroneous. The Act provides no support for the proposition that 'inter-year' consistency has any special or privileged status.

48. Further, we note that material has entered into the public domain that indicates that under Ofqual's own policy guidance or criteria – because of changes in content and structure – the 2012 AQA English GCSE course should not be treated by Ofqual as comparable to previous AQA English GCSE courses<sup>1</sup>. It would appear, therefore, that Ofqual may

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<sup>1</sup> <http://www.tes.co.uk/article.aspx?storycode=6289101>: 'Ofqual rules should have prevented grading changes', TES, 7 September 2012.

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have departed from its own policy or criteria with respect to 'inter-year' comparability or consistency.

(v) **Breach of Public Sector Equalities duty**

49. We have been unable to detect any suggestion in Ofqual's public statements to date that either it or AQA paid any regard to their obligations under s.149 of the Equality Act 2010 when making the Decisions. If so, this would render their decisions unlawful.

(vi) **Breach of Article 2, Protocol 1; Human Rights Act 1998**

50. The students making up the June cohort have a fundamental right not to be subjected to arbitrary or discriminatory treatment by public bodies in the exercise of their right to education and/or in respect of the exercise of public bodies functions in relation to education (including school examinations) under Article 2 of Protocol 1 to the European Convention on Human Rights. The principle of 'foreseeability' is a touchstone of Convention rights: see Ali v. United Kingdom (2011) 53 E.H.R.R. 12 at §53.

51. The Decisions breach that right, and AQA and Ofqual's will not be able to satisfy a Court that their conduct constitutes a proportionate means of achieving a legitimate aim.

The Details of the action that AQA and Ofqual are expected to take

52. In the circumstances, and in light of the aforesaid conspicuous unfairness and unlawfulness, AQA and Ofqual are requested to rescind and quash the Decisions and procure that the June 2012 AQA English GCSE exam papers are re-graded in accordance with the C grade boundary applied in January 2012.

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### The Details of any Interested Parties

53. The proposed Claimants are not aware of any Interested Parties to this proposed claim.

### Further information

54. AQA and Ofqual are requested to disclose to the proposed Claimants all documents in their possession that are relevant and necessary to the issues raised by the grounds of challenge stated above.

55. In particular, AQA and Ofqual are requested to disclose all documents, including correspondence (e.g. e-mails, whether sent from personal or work e-mail addresses), letters, memos, notes, text messages, instant messages etc.) relating to:

- a. AQA and Ofqual's historic practice regarding the setting of grade boundaries between different cohorts within the same academic (and exam) year group for examination papers and controlled assessment submissions;
- b. the meaning, effect and application of Ofqual's statutory objectives, in particular the qualifications standards objective, the assessments standards objective and the public confidence objective;
- c. AQA and Ofqual's policy or criteria regarding the concept of 'consistency' and 'comparability' between the exam results of different academic year groups, in particular where significant changes occur to the course;
- d. Ofqual's position as to whether AQA's 2012 English GCSE course was to be regarded as 'comparable' with the GCSE courses administered by AQA in previous years;

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- e. The setting of the June 2011 grade boundary for AQA GCSE English, and in particular the Foundation tier paper (ENG1F);
- f. The setting of the January 2012 grade boundaries for GCSE English, and in particular the Foundation tier paper (ENG1F), including all work undertaken by AQA and Ofqual analysing the validity or reliability of the January 2012 grade boundaries and results;
- g. The publication of the January 2012 AQA English GCSE grade boundary;
- h. The setting by AQA of the June 2012 grade boundary for GCSE English, and in particular the Foundation tier paper (ENG1F);
- i. The decision of Ofqual to approve the AQA decision, and consideration of other options;
- j. The work undertaken by AQA and Ofqual analysing the validity or reliability of the June 2012 grade boundaries and results;
- k. The materials considered by Ofqual in preparing for and compiling the Ofqual report 'GCSE English Awards 2012 – A Regulatory Report' (August 2012, Ofqual/12/5211);
- l. The materials considered by Ofqual in preparing for and publishing the statement "Myths about Ofqual's report into GCSE English 2012" at <http://www.ofqual.gov.uk/help-and-support/94-articles/973-myths-about-ofquals-report-into-gcse-english-2012>.

56. Further, AQA and Ofqual are requested to disclose all documents, including correspondence (e.g. e-mails, whether sent from personal or work e-mail addresses), letters, memos, notes, text messages, instant messages etc.) with the Department for Education and other examination bodies relating to:

- a. The setting by AQA of the June 2012 grade boundary for GCSE English, and in particular the Foundation tier paper (ENG1F);

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- b. The decision of Ofqual to approve the AQA decision, and consideration of other options;
- c. The setting of grade boundaries for 2011/12 GCSE examinations (including, English);
- d. The decision to apply different grade boundaries to identical controlled assessment work based on the date when it was submitted.

Deadline for AQA and Ofqual to reply to this letter

57. Given the urgency of the matter for affected students, the proposed Claimants request AQA and Ofqual to provide their response by Thursday 27<sup>th</sup> September 2012 at the very latest. In the absence of such a reply, the proposed Claimants reserve their right to issue proceedings forthwith and to draw the lack of reply to the Court's attention in respect of costs.

Yours faithfully,

**Troy Robinson**  
for Head of Law  
London Borough of Lewisham

For and on behalf of the proposed claimants

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a. The design of the project is approved by the AIA Council and

the design of other projects.

c. The design of the project is approved by the AIA Council and

the design of other projects.

d. The design of the project is approved by the AIA Council and

the design of other projects.

submitted.

Decision by AIA and Council is final in this case.

2. Given the agency of the matter for consideration, the proposed

claims under AIA and Council is considered their request by

the AIA Council and Council is considered their request by

the AIA Council and Council is considered their request by

the AIA Council and Council is considered their request by

the AIA Council and Council is considered their request by

Yours faithfully,

Tracy H. Johnson

for Head of Law

London through the

For and on behalf of the proposed Company

copy of the proposed Company





DX139500 Lewisham 4

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23 October, 2012  
Our ref JR 80109/ITR  
Your ref

Dear Sirs,

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[www.lewisham.gov.uk](http://www.lewisham.gov.uk)

**RE: JUNE 2012 EDEXCEL ENGLISH GCSE EXAMINATION  
PROPOSED JUDICIAL REVIEW**

1. This is a Pre-Action Letter written in accordance with the Pre-Action Protocol for Judicial Review ("the Protocol"). You will wish to note the following matters:

(a) The proposed Claimants are a number of local authorities, schools, trade unions representing teaching staff, and students (details of which are provided in the attached schedule). This proposed challenge is being co-ordinated by the London Borough of Lewisham and Leeds City Council. The address to which your response to this Pre-Action Letter, and all future correspondence, should be sent, is Troy Robinson, London Borough of Lewisham, Town Hall, Catford, London SE6 4RU (e-mail: [Troy.Robinson@lewisham.gov.uk](mailto:Troy.Robinson@lewisham.gov.uk)).

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(b) We set out in §§4-39 below a clear summary of the facts on which our proposed claim is based in accordance with §10 of the Protocol.

(c) We set out in §2 below the dates and details of the decisions that we propose to challenge, also in accordance with §10 of the Protocol.

(d) We set out in §70 below the details of the action that we expect you to take, in accordance with §6 of Annex A to the Protocol.

(e) In the circumstances of this case, given the immediate impact that the decisions have had on educational and career opportunities for affected students and their schools, and in light of the fact that the proposed Defendants have already spent considerable time looking into the matters in question, we expect you to respond to this letter no later than Thursday 27<sup>th</sup> September 2012.

(f) We also draw your attention to §13 of the Protocol with respect to sanctions for failing to comply with the Practice Direction.

2. The proposed Claimants seek judicial review in respect of:

a. Edexcel's decisions, on an unknown date in August 2012, but published on 23<sup>th</sup> August 2012:

(i) to increase the scaled mark grade boundary to achieve a C grade in the June 2012 English GCSE Higher and Foundation tier written examination papers by 8 marks from the grade boundaries applied to the January 2012 English GCSE Higher and Foundation tier examinations; and

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(ii) to increase the boundary mark to achieve a C grade in the June 2012 controlled assessment (5EH03)('Creative English') by 10 marks from the boundary mark applied to the same controlled assessment in January 2012 ("the Edexcel decisions"); and

b. Ofqual's decision, on an unknown date in August 2012, to procure and approve the Edexcel decisions and/or its on-going failure to issue statutory directions reversing the Edexcel decisions ("the Ofqual decision"),

(together, "the Decisions").

## 2. Summary of Challenge

3. In summary, the Decisions were:

(i) conspicuously unfair and/or an abuse of power, breaching (without justification) the legitimate expectations of students taking the Edexcel English GCSE examination (Foundation tier and Higher tier) and submitting the controlled assessments in June 2012 (5EH03)('Creative English'), and the legitimate expectations of their schools, that the grade boundary for a C grade would not be changed other than at the margins and/or the grade boundary would not be changed radically unless specific and focused warning or notification of the possibility of such a change had been provided;

(ii) irrational, and in contravention of the cardinal principle of good administration that all persons who are in a similar position should be treated similarly;

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(iii) taken in breach of a mandatory relevant consideration, namely the legitimate expectation(s) that had been engendered (see (i) above for detail);

(iv) made following a misdirection of law that inter-year consistency should prevail over intra-year consistency, and/or in contravention of Ofqual's own policy or criteria with respect to questions of comparability;

(v) taken in breach of the public sector equalities duty: no regard at all appears to have been had to this duty;

(vi) in breach of the Human Rights Act 1998; and, in particular, Article 2, Protocol 1.

### 3. The Facts

4. In 2010 Edexcel, along with the other examination bodies in England and Wales, introduced a new English GCSE course, for completion in 2012. Components of the new exam could be taken from January 2011 onwards. The new Edexcel English GCSE differs in various material respects from the previous Edexcel English GCSE, and is marked by:  
(i) examination, carrying 40% of the total marks; and (ii) controlled assessment, carrying 60% of the total marks.
5. In the 2011/2012 academic year, students were able to take the examination component either in January 2012 or June 2012.
6. After the January Cohort's examination scripts had been marked and moderated, Edexcel (and/or Ofqual) decided that the C grade boundary for the Foundation tier paper should be set at 66 marks (out of a maximum scaled mark of 96). This was broadly similar to the grade

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boundary for the June 2011 examination paper for the Foundation tier paper (65 out of a maximum scaled mark of 96).

7. The January 2012 C grade boundary for the Higher tier paper was set at 34 marks (out of a maximum scaled mark of 96). This was broadly similar to the grade boundary for the June 2011 examination paper for the Higher tier paper (33 out of a maximum scaled mark of 96).
8. The January 2012 C grade boundary for controlled assessment (5EH03)('Creative English') was set at 55 marks (out of a maximum scaled mark of 96). This was exactly the same as the grade boundary applied for the June 2011 controlled assessment in 'Creative English'.
9. In March 2012, Edexcel (and/or Ofqual) published the January 2012 grade boundaries to students and schools throughout English and Wales.
10. Edexcel and Ofqual's consistent, historic practice is that after grade boundaries have been applied and published in respect of one cohort of a particular academic year group, the published grade boundary is only subject to 'marginal' variation (between 1-3 marks) in respect of other cohorts within that academic year. Consistent with this practice, it was reasonably to be expected that the published grade boundary for controlled assessment submissions would only be subject to 'marginal' variation (between 1-3 marks).
11. From March 2012 onwards, students and schools throughout the UK relied on this practice and the published grade boundaries when deploying finite resources preparing for the June 2012 examinations. To take but one example, a student who was regarded as a 'safe' C candidate, having regard to the published January grade boundaries and Edexcel and Ofqual's historic practice, but who was 'at risk' of

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failing to obtain a C grade in Mathematics would have reasonably focused more of his available time on his or her Mathematics than English. The student's English teacher would have reasonably focused more of his or her time on a student who was capable of attaining a C grade, but was not regarded as a 'safe' candidate.

12. While responsible schools and students appreciated that the boundaries might be subject to marginal revision (in line with Edexcel and Ofqual's consistent, historic practice) it could not be (and was not) reasonably expected that Edexcel and Ofqual would radically alter the basis of the assessment *within* an academic year group. Schools and students would quite reasonably assume that intra-year fairness would be upheld as a cardinal principle.

13. Edexcel and Ofqual were at all times well aware of the reliance placed on the published grade boundaries by students and schools, and of the significance to students and schools of the C grade boundary in particular. Edexcel officers are regularly in discussion with schools about grade boundaries. We note in this regard p.17 of Ofqual's report 'GCSE English Awards 2012 – A Regulatory Report' (August 2012, Ofqual/12/5211) ("the Ofqual report"), where it was stated having reviewed the matter with schools that:

"it is clear that the C/D borderline is the boundary of strongest interest in most schools, and that most schools therefore invest considerable resources in getting borderline candidates up to or just above this level. . . In practice, this means that most schools have a very strong need to know "what grade C looks like" in the context of each type of assessment."

(emphasis added)

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14. The only caveats, provisos or qualifications issued by Edexcel and Ofqual following publication of the January grade boundaries were of the usual or 'standard' sort, that grade boundaries may vary.

15. Neither Edexcel nor Ofqual provided schools or students with any warning or notification that:

- a. the published January grade boundaries were unusually or exceptionally unreliable; and/or
- b. there was any realistic prospect that they would radically depart from their historic, consistent practice by increasing the C grade boundaries radically.

16. Consequently, students and schools were denied the opportunity to undertake extra or different preparation for the June 2012 GCSE English examination papers, and for the controlled assessment (5EH03) ('Creative English'). If Edexcel and Ofqual had provided warning or notification in the terms referred to at §15 above, students and schools would have taken such action. Further, with respect to the controlled assessment (5EH03) ('Creative English'), students and schools may have submitted available papers in January 2012 had they been aware that radical changes could be made to the grade boundaries for the same piece of work submitted in June 2012.

17. On 7<sup>th</sup> August 2012, Ofqual's Director of Standards and Research wrote to Edexcel's Head of Recognition and Standards. The letter referred to a meeting the previous day and questioned the grade C boundary that Edexcel proposed to set for the June 2012 GCSE English examination. It noted, without further explanation, that "awards...have proved challenging". It also thanked Edexcel for the efforts that it had *already* undertaken to produce results that "are close to predictions".

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18. The letter stated that the reasons for Ofqual's intervention and opposition to Edexcel's proposed grade C boundary were: (i) because the course was a 'new' qualification – "[i]t is important to make sure that these first awards allow us to carry forward an appropriate national grade standard"; and (ii) the need for consistency in 2012 between different exam boards – "...alignment between the examination boards".
19. The letter asserted that "in order to achieve that aim" exam boards had previously agreed with Ofqual to "use predictions based on [students] prior attainment at key stage 2".
20. Ofqual stated that Edexcel's proposed boundary was 8% above "the prediction", and that the agreed tolerance was  $\pm 1\%$  on "the predictions". It referred to Edexcel quoting a figure of 41.5% at the previous day's meeting and noted that this remained "some way from 34.7%". It also asserted that "we have not received any evidence to support those outcomes as appropriate".
21. The letter 'asked' Edexcel to revise its proposed boundary "in order to produce outcomes that are much closer to the predictions and so in line with national standards". It specifically admitted that: "This may require you to move grade boundary marks further than might normally be expected".
22. The letter concluded by requiring Edexcel to respond by close of business the next day and reminding Edexcel of Ofqual's statutory power to issue directions.
23. On 8<sup>th</sup> August 2012, Edexcel responded to Ofqual. The letter stated that Edexcel had taken account of "all the available evidence", that it had further reviewed its proposed grade boundary in line with Ofqual's letter

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and that following this exercise it “still [felt] that [its proposed boundary] is a fair award”.

24. Edexcel referred to the award being “problematic” because of:

- a. the change of structure in GCSE English, in particular the use of controlled assessment and ‘banked’ units;
- b. the separation of GCSE ‘English Language’ and ‘English’, which “created two new qualifications with different cohorts”; and
- c. the 100% increase in Edexcel’s examination cohort.

25. Edexcel noted that it had to take account of “all” of these variables. It explicitly stated “these [KS2] predictions can only be, at best, an indicator of performance”. Edexcel expressly stated that “we would be negligent not to take into account as much information as possible in making an award”.

26. The letter noted that Edexcel had provided Ofqual with evidence at the 6<sup>th</sup> August 2012 meeting that supported its conclusion that its proposed grade boundary was appropriate (it also re-attached the evidence to its letter).

27. Edexcel referred to the proposed outcomes from all examination bodies for 2012 GCSE English and commented that “this is a severe award from all awarding organisations”. Edexcel specifically asked Ofqual to confirm that it was confident that KS2 predictions were sufficient to justify requiring it to radically alter the grade boundaries.

28. Edexcel asked that “[i]f you wish us to take further action, we would be grateful for your response to the points raised”.

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29. The letter concluded, in bold that **“We believe this to be compelling evidence that our award is a fair award and we do not believe a further revision of our grade boundaries is justified”** (emphasis in the original).

30. On 9<sup>th</sup> August 2012, Ofqual wrote to Edexcel in response. The letter asserted that Edexcel was obliged under Ofqual’s general conditions to “make sure that its results are consistent with other boards”.

31. Ofqual stated that “It is our expectation...that Edexcel will produce outcomes...that are within 1% of the overall prediction, as is the case for AQA and OCR. It is for you to decide how that is achieved”.

32. The letter concluded by demanding a response by 10 am the next day.

33. After this exchange of correspondence, Edexcel (with Ofqual’s approval) decided that:

- a. the C grade boundary for the Foundation tier paper should be increased to 74 marks (out of a maximum of 96);
- b. the C grade boundary for the Higher tier paper should be increased to 42 marks (out of a maximum of 96); and
- c. the C grade boundary for the controlled assessment (5EH03)(‘Creative English’) should be increased to 65 marks (out of a maximum of 96).

34. The C grade boundary for both the Higher and Foundation tier papers were therefore increased by 8 marks from the corresponding January 2012 papers. Further, the C grade boundary for the controlled assessment (5EH03)(‘Creative English’) was increased by 10 marks from the January 2012 boundary. **Indeed, a student obtaining a mark of 63 or 64 on the controlled assessment in January 2012 would**

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have fallen within the 'B' grade boundary; in June 2012 the student with a mark of 63 or 64 would have fallen within the 'D' grade boundary.

35. The inevitable effect of the Decisions is that Edexcel has awarded considerable numbers of students lower grades ('D' rather than 'C') than they would have received if they had taken the same exam in January 2012 and/or submitted their controlled assessments at that time; and that Ofqual has both procured and ratified that outcome.

36. The consequences of the Decisions include the following:

a. The June Cohort has been treated with conspicuous unfairness:

i. First, it has been materially prejudiced as against the January Cohort. The students are part of the same academic year group and this inequality of treatment will have immediate, concrete adverse implications for the children affected. Amongst other things, it can reasonably be expected that those affected will be applying for the same educational and professional opportunities in future.

ii. Second, the June Cohort has been materially prejudiced in conducting its exam preparation. It was given no warning that there might be a radical increase in the C grade boundary. The students affected were denied the opportunity to take preventative or mitigating steps. They were also denied the assistance of their schools and teachers in doing so.

b. Schools and local authorities have been denied the opportunity to prepare the June Cohort properly for the June exam. The

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grades awarded pursuant to the Decisions are materially lower than would have been obtained if proper warning or notification was given. The results may have serious implications for the schools affected, as national comparative performance measures include the proportion of students achieving at least C grades in English and Mathematics.

- c. With respect to the controlled assessment 5EH03 ('Creative English'), schools and students have been denied the opportunity of submitting their work at a time when the paper would receive a more advantageous mark; and/or were denied the opportunity of preparing appropriately for the work to be submitted in June 2012.

37. Ofqual has purported to justify the Decisions on the following grounds:

- a. It asserts that the January C grade boundary was "overly generous". To date, neither Edexcel nor Ofqual has provided any empirical or objective evidence to support this assertion.

Ofqual appears to accept that Edexcel erred in this respect, but contends that Edexcel is not to be regarded as culpable. Ofqual asserts that neither Edexcel nor it was at fault in setting and publishing the January 2012 C grade boundary because:

- i. the 2012 Edexcel English GCSE course was a 'new qualification'; and
- ii. the January cohort was not sufficiently large in number to enable Edexcel and Ofqual to extrapolate reliable conclusions about overall standards.

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If so, this begs the question as to why Edexcel and/or Ofqual did not provide a specific and focused warning that the January 2012 results ought to be treated with real caution and were not to be relied upon.

b. It is stated that if the January C grade boundary had been applied to the June 2012 cohort and/or if Edexcel and Ofqual had complied with their consistent, historic practice this would have resulted in a higher percentage or proportion of the 2012 academic year group obtaining a C grade than in other (unspecified) academic years.

c. Ofqual also asserts that the, radically increased, C grade boundary applied to the June Cohort was "right", because applying that boundary resulted in the percentage or proportion of students in that cohort receiving a C grade being 'comparable' or consistent with other (unspecified) academic years.

38. Ofqual thus contends that, but for the Decisions, a higher proportion of C grades would have been awarded in 2012 in comparison to other (unspecified) academic years. It is asserted that this would constitute unwarranted and significant 'grade inflation' and that this would be incompatible with Ofqual's statutory objectives (discussed below).

39. In short, Edexcel and Ofqual's position is that the June Cohort must bear the cost of Edexcel and/or Ofqual's mistake in January 2012, so as to ensure (Ofqual's conception of) 'comparability' or 'equivalence' between different academic years is not compromised.

#### 4. Legal framework

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40. Ofqual is a statutory body created by the Apprenticeships, Skills, Learning and Children Act 2009 ("the Act"). Section 128 of the Act enumerates Ofqual's five statutory objectives:

- a. the qualifications standards objective,
- b. the assessments standards objective,
- c. the public confidence objective,
- d. the awareness objective, and
- e. the efficiency objective.

41. The 'qualifications standards' objective is to secure that regulated qualifications give a reliable indication of knowledge, skills and understanding and indicate a consistent level of attainment (including over time) between comparable regulated qualifications, and a consistent level of attainment (but not over time) between regulated qualifications and comparable qualifications (including those awarded outside the UK).

42. The 'assessment standards' objective is to promote the development and implementation of regulated assessment arrangements that give a reliable indication of achievement and indicate a consistent level of attainment (including over time) between comparable assessments.

43. The 'public confidence' objective is to promote public confidence in regulated qualifications and regulated assessment arrangements.

44. The statutory objectives apply equally to ensuring consistency/reliability/public confidence regarding examinations within each academic year group ('intra-year' fairness); as well as consistency between different academic years ('inter-year' fairness).

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45. Ofqual regulates the exam bodies, including Edexcel. Ofqual is obliged by section 148 to publish a register of awarding bodies and certain specified information; by section 149 to review the activities of a recognised body; and by section 150 to review complaints in relation to the award of qualifications.
46. By section 151, Ofqual has the power to issue directions in relation to general conditions of recognition, and by section 151(7) Ofqual's directions are enforceable by a mandatory order. Section 151A allows Ofqual to impose monetary penalties on awarding bodies for breach of the general conditions of recognition, against which there is a statutory right of appeal to the First-Tier Tribunal. Section 152 provides for withdrawal of recognition. Section 153 requires Ofqual to give guidance to the awarding bodies on compliance with the general conditions of recognition.
47. Edexcel is a recognised body for the provision of the General Certificate of Secondary Education ('GCSE'). GCSEs are a 'regulated qualification' for the purposes of s. 130(1).
48. Edexcel and Ofqual's functions in the present context – in conducting and assessing examinations – are derived from the Act.
49. Edexcel is an awarding body under Part 7 of the Act and can only act as such if it is recognised by Ofqual. The conditions of recognition are themselves part regulated by the Act: ss.133-137.

#### 5. Grounds of Challenge

50. The proposed Claimants consider that there are a number of grounds of challenge to the Decisions, and that as a result the Decisions are liable to be quashed.

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**(i) Conspicuous unfairness: legitimate expectation/abuse of power**

51. As you know, a 'substantive legitimate expectation' arises where departing from that expectation would be unfair or constitute an abuse of power. As Laws LJ explained in R (on the application of Bhatt Murphy (A Firm)) v Independent Assessor [2008] EWCA Civ 755 (at §28):

"Legitimate expectation of either [the substantive or procedural] kind may (not must) arise in circumstances where a public decision-maker changes, or proposes to change, an existing policy or practice. The doctrine will apply in circumstances where the change or proposed change of policy or practice is held to be unfair or an abuse of power: see for example Ex p Coughlan paragraphs 67 ff, Ex p Begbie [2000] 1 WLR 1115 , 1129F — H. The court is generally the first, not the last, judge of what is unfair or abusive; its role is not confined to a back-stop review of the primary decision-maker's stance or perception...But these are ill's expressed in very general terms; and it is notorious (and obvious) that the ascertainment of what is or is not fair depends on the circumstances of the case..."

52. Unfairness arises when a decision is made to renege on a representation that is pressing and focused: R v North and East Devon Health Authority, Ex parte Coughlan [2001] QB 213 at §86; Bhatt Murphy at §46.

53. A 'procedural legitimate expectation' may arise in two distinct ways: see Laws LJ in Bhatt-Murphy at §29: the 'paradigm' case where a public authority has provided "...an unequivocal assurance, whether by means of an express promise or an established practice, that it will give notice or embark upon consultation before it changes an existing substantive policy" (emphasis added). The second way in which a 'procedural

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legitimate expectation' can arise is where, even if there is no practice of consultation:

"... the impact of the authority's past conduct on potentially affected persons [is] pressing and focused. One would expect at least to find an individual or group who in reason have substantial grounds to expect that the substance of the relevant policy will continue to enure for their particular benefit: not necessarily for ever, but at least for a reasonable period, to provide a cushion against the change. In such a case the change cannot lawfully be made, certainly not made abruptly, unless the authority notify and consult".

See Bhatt-Murphy at §49, per Laws LJ (emphasis added).

54. In the present case:

- a. the magnitude of the change imposed in respect of the C grade boundary is radical and unprecedented;
- b. the consistent, historic practice of Edexcel and Ofqual is that any intra-year grade boundary variations are only 'marginal';
- c. it was to be reasonably expected that any change to controlled assessment grade boundaries would only be 'marginal';
- d. schools and students relied upon the published grade boundaries – and the historic, consistent practice that any changes are only 'marginal' – in teaching and studying for the June exam, and preparing for the controlled assessment (5EH03)('Creative English') submitted in June 2012; and/or submitting controlled assessment work in June 2012 rather than in January 2012;
- e. Edexcel and Ofqual were well aware that students and schools would (and did) rely on the published January grade boundaries in making those preparations;

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- f. Neither Edexcel nor Ofqual provided students or schools with any specific or focused warning that the January grade boundaries would or might change radically in June;
- g. The June Cohort, and their schools and teachers, were consequently denied the opportunity to take preventative or mitigating steps. If the June Cohort had been provided with proper notification or warning, appropriate action could have been taken to avoid or mitigate the conspicuous unfairness inflicted by the Decisions.

55. In the circumstances, a legitimate expectation was engendered that:

*(i) the January C grade boundaries would be applied in June, subject only to 'marginal' variation; and/or*

*(ii) Edexcel and Ofqual would not make a change of the magnitude imposed – a radical change - without providing students and schools with a specific and focused warning when the January C grade boundaries were published.*

56. In considering whether Edexcel and Ofqual can justify frustrating this legitimate expectation, the Court will strike the balance between the competing interests, applying a proportionality analysis (Coughlan at p243); and Edexcel and Ofqual will bear the burden of satisfying the Court that there was an overriding public interest which defeated the legitimate expectation: Paponette v Attorney General of Trinidad and Tobago [2011] 3 WLR 219 at §36. The proposed Claimants consider that Edexcel and Ofqual will be unable to do so.

57. At this stage, we are aware of Ofqual's public pronouncements as to why it decided not to intervene in respect of Edexcel's results. (We have seen the correspondence between Ofqual and Edexcel referred to

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above (though not the attachments to those letters)). We have not seen the other communications between the two parties. Nor have we seen internal communications within Ofqual and Edexcel about these matters; or any of the communications between Ofqual and the Department for Education: these documents must be disclosed by Ofqual and Edexcel: see §§73-74 below.

58. Ofqual has stated that it regards the Decisions as justified principally by reference to the objective of securing 'inter-year' consistency or comparability. It is not clear that the asserted objective of consistency or comparability was, in fact, met. Further, in any event, this would have been an entirely inadequate justification for the conspicuous unfairness that the Decisions inflict on students and schools. We would draw your attention, in particular, to the following features of this case:

- a. the Decisions flagrantly breach the legitimate expectations of students and schools that rely on Edexcel and Ofqual in a context (education) that is fundamental to the affected children's future life prospects;
- b. even on Edexcel and Ofqual's own (best) case, the conspicuous unfairness is the exclusive responsibility and product of Edexcel and Ofqual's errors;
- c. while it is correct that 'inter-year' consistency is one, single, aspect of Ofqual's statutory objectives, it is not the only (or even the most significant) interest that is protected under the Act. The 'qualifications standards' objective necessarily requires Ofqual to secure 'intra-year' consistency.

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59. Further, Ofqual's stated justification is not rationally connected to, and cannot explain or excuse, the failure to provide any proper warning or notice to affected students and schools.

(ii) **Irrationality**

60. Edexcel and Ofqual's treatment of the June Cohort relative to the January Cohort is irrational. We remind you that "it is a cardinal principle of good public administration that all persons who are in a similar position shall be treated similarly": R v Hertfordshire County Council, ex p. Cheung, per Sir John Donaldson MR (The Times, 4th April 1986). See also Lord Hoffman in Matadeen v Pointu [1999] 1 AC 98, at 109: 'treating like cases alike and unlike cases differently is a general axiom of rational behaviour.'

61. It is inconceivable that two cohorts of students enrolled for the same course in the same academic year, who have undertaken the same work and invested the same effort, and who will be competing in future for the same opportunities, should be subjected to such radically different standards of assessment and award. The upshot of the Decisions is that student's future educational and professional opportunities will turn, and stand or fall, on pure happenstance: whether the school they happen to attend submits students for the January or June diet of exams.

62. This irrationality is particularly acute in respect of the grade boundaries applied to controlled assessment (5EH03) ('Creative English'), as here students are being assessed by reference to radically different standards in relation to precisely the same work depending on when the work was submitted by their school. **Indeed, the same piece of controlled assessment work receiving 63 or 64 marks would have**

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fallen within the 'B' boundary in January 2012, but within the 'D' boundary in June 2012.

**(iii) Failure to take into account relevant considerations**

63. As you know, where a legitimate expectation arising from a representation or promise has been engendered, before resiling from it the decision-maker is required – at the very least – to take into account the representation that has given rise to the legitimate expectation and what has been done on the strength of it: see Paponette at §46; and R (Bibi) v Newham LBC (No1) [2001] EWCA Civ 607 at §39. The same principle would no doubt apply to the circumstances that gave rise to the legitimate expectation in this case (see the description of those legitimate expectations at §55 above).

64. In the present case, on the basis of Ofqual's public statements, it appears clear that neither Edexcel nor Ofqual had any (or any sufficient) regard to either of those legitimate expectations, and therefore failed to take into account a mandatory relevant consideration.

**(iv) Error of law regarding statutory objectives: inter-year v. intra-year**

65. Ofqual's public statements indicate that the Decisions were predicated on the assumption that the Act requires, or justifies, Edexcel and Ofqual treating 'inter-year' consistency or comparability as a peremptory or primary objective or consideration. This construction is erroneous. The Act provides no support for the proposition that 'inter-year' consistency has any special or privileged status.

66. Further, we note that material has entered into the public domain that indicates that under Ofqual's own policy guidance or criteria – because

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of changes in content and structure – the 2012 Edexcel English GCSE course should not be treated by Ofqual as comparable to previous Edexcel English GCSE courses<sup>1</sup>. It would appear, therefore, that Ofqual may have departed from its own policy or criteria with respect to ‘inter-year’ comparability or consistency.

**(v) Breach of Public Sector Equalities duty**

67. We have been unable to detect any suggestion in Ofqual’s public statements to date that either it or Edexcel paid any regard to their obligations under s.149 of the Equality Act 2010 when making the Decisions. If so, this would render their decisions unlawful.

**(vi) Breach of Article 2, Protocol 1; Human Rights Act 1998**

68. The students making up the June cohort have a fundamental right not to be subjected to arbitrary or discriminatory treatment by public bodies in the exercise of their right to education and/or in respect of the exercise of public bodies functions in relation to education (including school examinations) under Article 2 of Protocol 1 to the European Convention on Human Rights. The principle of ‘foreseeability’ is a touchstone of Convention rights: see Ali v. United Kingdom (2011) 53 E.H.R.R. 12 at §53.

69. The Decisions breach that right, and Edexcel and Ofqual’s will not be able to satisfy a Court that their conduct constitutes a proportionate means of achieving a legitimate aim.

**The Details of the action that Edexcel and Ofqual are expected to take**

<sup>1</sup> <http://www.tes.co.uk/article.aspx?storycode=6289101>: ‘Ofqual rules should have prevented grading changes’, TES, 7 September 2012.

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70. In the circumstances, and in light of the aforesaid conspicuous unfairness and unlawfulness, Edexcel and Ofqual are required to rescind and quash the Decisions and procure that the June 2012 Edexcel English GCSE Higher and Foundation tier exam papers and controlled assessment work for (5EH03)('Creative English') are re-graded in accordance with the C grade boundaries applied by Edexcel in January 2012.

#### The Details of any Interested Parties

71. The proposed Claimants are not aware of any Interested Parties to these proposed proceedings.

#### Further information

72. Edexcel and Ofqual are requested to disclose to the proposed Claimants all documents in their possession that are relevant and necessary to the issues raised by the grounds of challenge stated above.

73. In particular, Edexcel and Ofqual are requested to disclose all documents, including correspondence (e.g. e-mails, whether sent from personal or work e-mail addresses), letters, memos, notes, text messages, instant messages etc.) relating to:

- a. Edexcel and Ofqual's historic practice regarding the setting of grade boundaries between different cohorts within the same academic (and exam) year group for examination papers and controlled assessment submissions;
- b. the meaning, effect and application of Ofqual's statutory objectives, in particular the qualifications standards objective, the

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assessments standards objective and the public confidence objective;

- c. Edexcel and Ofqual's policy or criteria regarding the concept of 'consistency' and 'comparability' between the exam results of different academic year groups, in particular where significant changes occur to the course;
- d. Ofqual's position as to whether Edexcel's 2012 English GCSE course was to be regarded as 'comparable' with the GCSE courses administered by Edexcel in previous years;
- e. The setting of the June 2011 grade boundary for Edexcel GCSE English (both the Higher and Foundation tier papers);
- f. The setting of the January 2012 grade boundaries for GCSE English (both the Higher and Foundation tier papers), including all work undertaken by Edexcel and Ofqual analysing the validity or reliability of the January 2012 grade boundaries and results;
- g. The decision to apply different grade boundaries to identical controlled assessment work based on the date when it was submitted;
- h. The publication of the January 2012 Edexcel English GCSE grade boundary;
- i. The setting by Edexcel of the June 2012 grade boundary for GCSE English (both the Higher and Foundation tier papers);
- j. The decision of Ofqual to procure and approve the Edexcel decisions, and consideration of other options;
- k. The work undertaken by Edexcel and Ofqual analysing the validity or reliability of the June 2012 grade boundaries and results;
- l. The materials considered by Ofqual in preparing for and compiling the Ofqual report GCSE English Awards 2012 – A Regulatory Report' (August 2012, Ofqual/12/5211);
- m. The materials consider by Ofqual in preparing for and publishing the statement "Myths about Ofqual's report into GCSE English

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2012" at <http://www.ofqual.gov.uk/help-and-support/94-articles/973-myths-about-ofquals-report-into-gcse-english-2012>.

74. Further, Edexcel and Ofqual are requested to disclose all documents, including correspondence (e.g. e-mails, whether sent from personal or work e-mail addresses), letters, memos, notes, text messages, instant messages etc.) with the Department for Education and other examination bodies relating to:

- a. The setting by Edexcel of the June 2012 grade boundary for GCSE English (both the Higher and Foundation tier papers);
- b. The decision of Ofqual to procure and approve the Edexcel decisions, and consideration of other options;
- c. The setting of grade boundaries for 2011/12 GCSE examinations (including, English); and
- d. The decision to apply different grade boundaries to identical controlled assessment work based on the date when it was submitted.

Deadline for Edexcel and Ofqual to reply to this letter

75. Given the urgency of the matter for affected students, the proposed Claimants request Edexcel and Ofqual to provide their response by Thursday 27<sup>th</sup> September 2012 at the very latest. In the absence of such a reply, the proposed Claimants reserve their right to issue proceedings forthwith and to draw the lack of reply to the Court's

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attention in respect of costs.

Yours faithfully,

**Troy Robinson**  
**for Head of Law**  
**London Borough of Lewisham**

For and on behalf of the proposed Claimants

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