Written evidence submitted by Emma Pemberton

Evidence to be submitted to the Education Select Committee on the impact of Covid-19 on education and children's services

I wish to submit evidence for the committee's consideration on the effect of cancelling formal exams, including the fairness of qualifications awarded and pupil's progression to next stage of education or employment.

I am an 18-year-old female student in West Oxfordshire. I go to an 'average' secondary school that has become part of a multi-academy trust in recent years.

My cohort are a significantly higher attaining year group than previous cohorts at the school. We were the first cohort to take the new GCSE exams and have also benefited from numerous improvements our head teacher has implemented at the school in recent years to move our school from special measures to Ofsted 'Good'.

The cancellation of A level exams because of Covid-19 and the process used to award A level grades at my school has left me significantly disadvantaged, with a deep feeling of unfairness about the grades I have been awarded.   The unwillingness of Ofqual and the DfE to allow schools to appeal on behalf of students is the continued cause of this unfairness and inability to progress to further education.

I use my personal circumstances to illustrate general points for consideration by the committee. Notably, the illegality of the approach.

1. The school has breached a number of articles in the GDPR and the DPA (2018) in arriving at the decision of my CAGs (my formally awarded A level grades). The school have acknowledged this in correspondence between their data protection officer and the ICO and sought advice on how to proceed but I await a reply. This breach must also apply to many other schools and exam boards who adopted the same approach. Further details are set out below. To be able to fulfil their obligations as data controllers, the school and exam board must have the ability to change awarded grades to be fair and accurate.

2. The Declaration signed by the head when he submitted my CAGs is inconsistent with the evidence of my academic ability. My head teacher has explicitly stated that my CAGs are not the grades the teachers consider, based on data and evidence, that I would have achieved had I been able to sit the exam. He has written letters to my chosen University making the case for ignoring my awarded grades and explicitly stating that they do not reflect my true potential or the grades I should be awarded. The University of Manchester pharmacy department are unwilling to accept anything other than formally awarded grades. This has a significant and long lasting impact on my future career trajectory and potential earnings.

3. There is no route for the school to appeal my CAGs without stating maladministration, which they are unwilling to do. They acknowledge that the CAGs were never intended to be formally awarded grades and are as inappropriate for students at my school as the now retracted nationally awarded grades. This needs to be addressed and an appeals route allowed for students and their schools in my situation to remove the remaining sense of unfairness and enable me to progress to University – albeit now a year later than I had planned. If I receive my teacher assessed grades I could progress and would not have lost my Uni place.

4. The process that my school chose to derive grades followed what has since become known as the 'ASCL approach' . It involved heavy moderation of they grades to fit a historical grade distribution. In doing so, the school have moved my grades away from grades my teachers consider, based on data and evidence, that I would have achieved had I sat the exam.

For many students at my school and across the country, this process was applied. For the majority of students this has meant that they may have received lower grades than they had hoped for but they have still been able to access their university course – largely insurance offers but also courses through clearing. The deep sense of injustice and unfairness still remains for them.

What compels me to write to you is the **continuing unfairness** and **significant disadvantages** and **barrier to progression onwards to university** or employment that remains **for me and other students because of the lack of any appropriate appeals route for schools to correct those grades, such as mine that were moderated down to match historical data.**

For me personally, I am unable to progress to my chosen university choices because my current grades (ABC) are not high enough to access the courses I wish to study. I had accepted a conditional offer for pharmacy at Manchester University, requiring ABB. Based on my school work and school reports, this was comfortably achievable for me.

On results day I received BDD – quite a different set of grades. Even once the U-turn to CAGs occurred, I only received ACC (since moved to ABC through an administrative appeal) which was insufficient to secure my place on pharmacy or any other biomedical course.

 My head teacher described my situation as caught in 'a perfect storm' of numerous flaws from a fundamentally flawed system. Whilst the U turn in August removed this unfairness at a national level, for students in my situation the iniquity and unfairness remains.

 I am now taking an unplanned gap year and trying to prepare for autumn exams – with only 4 weeks to prepare for an A level chemistry exam – a subject I have not studied since March, I am not hopeful.

The autumn exam series is not realistically a fair opportunity to correct grades awarded. Nor is it a suitable or fair substitute for an appeals process.

Having this as the only route for students to correct their grade discriminates against poorer students or those who do not have parental and school support.

I am lucky that my parents can afford to pay over £500 for additional tutoring sessions to help me prepare for the exam.   Despite this, I am not hopeful that I will be able to do my best with only 4 weeks of preparation following months of no study since schools were closed. It feels very much a last resort after the DfE, my school, and Gavin Williamson have all turned their backs on me and are so unwilling to listen.

I have submitted maladministration complaints to the relevant exam boards and am awaiting a response. Prior to that I submitted formal complaints to the school, but the school were unable to take further action. I understand they have submitted evidence to you as part of this enquiry.

Further detail regarding GDPR breaches by the school in deriving my CAGs are set out below. I have also included a letter from the school to Manchester University confirming that my CAGs are not grades that reflect my academic ability.

The school potentially face significant fines for these GDPR breaches. This is a consequence of the decisions and actions of the Department for Education and Gavin Williamson not to permit CAGs appeals. This decision prevents the school from fulfilling their obligations as data controllers to correct inaccurate and unfair data.

Detail of GDPR breaches.
The standardisation process applied by the school involved profiling of individuals based on their personal information, without consent. It also engages the requirements of fairness and accuracy.

Article 4(4) defines profiling as "any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements."

The process by which my School generated my CAGs for biology and chemistry A levels meets this definition. The ICO state you are carrying out profiling if you:

- create profiles that you apply to individuals; or

- predict individuals' behaviour based on their assigned profiles.

The school determined my CAGs from my teacher assessed grades (TAGs) by profiling. Considering only the historic performance of the school and the ranking of individuals within the group. The centre head has stated explicitly that he did not consider my personal data and evidence when deriving my CAG.

Article 5(1)a GDPR imposes an obligation on the data controller to process personal information fairly and accurately. It highlights risks to individual's rights and freedoms when profiling is undertaken, including processing leading to discrimination, loss or significant economic social disadvantage. Crucially, fairness is influenced by the expectations of the data subject whose personal information is being processed. Particularly if, as in my case, it has led to differential impacts on me compared with other individuals.

Article 5(1)(d) GDPR imposes **an obligation of accuracy on controllers and a duty of rectification where personal data are inaccurate**, having regard to the purposes for which they are processed.
The legal precedent confirming that the accuracy principle applies to the assessment of students' academic work through the judgement of the Court of Justice of the European Union in the case of Peter Nowak v Data Protection Commissioner C-434/16 (20 December 2017).

Notable is Recital 71 which states that the controller should "**implement technical and organisational measures appropriate to ensure, in particular, that factors which result in inaccuracies in personal data are corrected and the risk of errors is minimised**".
The head of centre has breached the duty of fairness in Article 5(1)(a) because he profiled me and my grades not on the basis of my academic performance as assessed by my teachers, but predominantly on the historic performance of the school and the relative academic performance of my cohort.

Critically, the centre head has explained to me that in standardising grades to derive CAGs he did not refer back to either the individual's data and evidence or the relevant teachers/heads of subject to confirm that the outcome of the automated decision/profiling to derive my CAGs resulted in accurate and fair grades. He has explained that he considered us as a group and not as individuals. This is a fundamental flaw in the process of CAG derivation by this centre.

The outcome of this profiling for me is that my grade has been influenced by factors completely outside my control, does not have any connection to my demonstrable academic achievements and relates to other data subjects. In doing so, it does not conform with the duty for accuracy as set out in Article 5(1)(d) GDPR. Grades only comply with the accuracy principle of the GDPR if they accurately reflect the academic level of the individual. For example, for me the CAG awarded in biology (B) does not reflect my documented academic ability which supports award of an A.

As noted above, I have been significantly disadvantaged because of this outcome, having not been able to secure either my conditional university offer or suitable alternative courses through clearing. This has significant and lifelong impacts on my career trajectory and consequent earning potential.

I would also like to bring to your attention a breach of Article 22 GDPR and Section 14 DPA. The breach by the school concerns their reliance on automated decision making, including profiling to assign CAGs to individuals through use of ranking and application of historic data to this cohort. The process that has since been removed at a national level because of concerns over unfairness and illegality but remains for those students such as me where the centre head applied the same approach at the school level.

Article 22(1) GDPR states that the data subject "shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or significantly affects him or her"

Article 22(3) stipulates data subjects must have the individual right to appeal, exercisable in a way that permits a new substantive decision to be made.

Article 5(f) states that organisations must identify essential steps, depending on purpose, to erase or rectify inaccurate data without delay.

Further precedent and legal basis for your consideration is set out in an article by Mischon de Reya[1] which cites an appeal brought by CCN (the previous name of what is now Experian), against a decision of the Data Protection Registrar (now, the Information Commissioner) under the 1984 Data Protection Act (now, GDPR and the Data Protection Act 2018), in the Data Protection Tribunal (now, the First Tier Tribunal).

The case was about this: it turned out that in giving someone a credit rating, CCN would look at the credit ratings of others who had lived at the same address, and would also look at the address itself. So, if someone lived with someone else who was a bankrupt, the former got a poor credit score; and if the previous resident had a poor credit rating, so too would the current resident.

The Tribunal found that whilst the Enforcement Order of the Data Protection Registrar was too wide, nonetheless,

"from 1 January 1993, personal data relating to the financial status of individuals must cease to be processed by reference to the current or previous address or addresses of the subject of the search whereby there is extracted in addition to information about the subject of the search any information about any other individual who has been recorded as residing at any time at the same or similar current or previous address or addresses as the subject of the search."

That was subject to certain close family/dependents exemptions, but, it is certainly arguable that, at least since 1 January 1993, the principle of 'fairness of processing' should generally mean that third party data could no longer be used to make decisions about an individual.

How does this relate to the A-Level results submitted by XXXXXXXXXX School?

One of the key factors in determining the school's A level results this summer has been a look-back at the school's past three years of results. This year's students' data was processed by reference to the data of previous students from the school of the data subject, whereby there was extracted in addition to information about the data subject, information about other individuals who had been recorded as attending the same school as the data subject. In other words, because this year's cohort of students were a higher attaining group than previous years, this year's grades were moderated down by the school simply because other students who had attended that same school had obtained poor results. That is simply not allowed. There is a good argument for saying that it hasn't been for over 28 years.

The school as data processors and data controllers, have contacted the ICO, asking advice on how to proceed, noting that they have breached GDPR but are unable to apply their duty to rectify the inaccurate data for me due to the lack of clear route for appeal.

As an awarding organisation recognised by Ofqual, the exam boards certain statutory obligations in respect of their functions and are the joint data controller. In this instance I have written to them, asking that they enact their obligations and duty and rectify the inaccurate data they currently hold for me. This would mean awarding me ''**the grade honestly and fairly represented that the student would have been most likely to have achieved if the exams had taken place, based on the teacher's professional judgement.**

18th August 2020

Supporting evidence

University Admissions Office
University of Manchester

Dear Sir/Madam

The above student has applied to study Pharmacy at your university. She was originally rejected based on the grades calculated nationally by the algorithm that has now been overturned. I am writing to ask you to accept the Teacher

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[1] https://www.mishcon.com/news/potential-data-protection-challenges-to-a-level-results

Assessed Grades for this student as set out below rather than the Centre Assessed Grades (CAG) because I know that these are a true reflection of the capability of this student.

Although CAGs appear from to be appropriate for each student, they were in fact subject to a dampening down process regardless of student ability and therefore have built in iniquity for some individual students. Following government and Ofqual guidance, schools were required to ensure that schools' overall performance this year was in line with historical data. Our year 13 this year was a significantly higher attaining group compared with previous years and therefore we were required through the moderation process to reduce grades in some subjects which matched historical performance rather than current potential. The dampening process was applied objectively using the rankings but inevitably this resulted in grade reduction for some students assessed by teachers to be at the higher grade. This and this alone required us to lower our CAGs.

I can attest that the original Teacher Assessed Grades are a true reflection of XXXX's capability. I urge that these are considered when making final decisions on places at university this year so that no student is unfairly excluded. We will be supporting an appeal's process but we are concerned that this will not be completed in time to make a difference and hence am appealing to you directly to recognise the Teacher Assessed Grades. I would not endorse such an approach unless I was confident of the student's ability.

XXXXXX grades were:

	Teacher Assessed Grade	Centre Assessed Grade	Grade awarded by algorithm
Geography	A	A	B
Biology	B	C	D
Chemistry	B	C	D
EPQ	A*	Taken in 2018-19	

XXXXX is an outstandingly resourceful student and she will be an asset to your institution. I fully endorse Holly's application and unreservedly recommend them. I thank you for considering this appeal and ensuring that the flaws in the grading process do not adversely affect XXXXX future.

Yours sincerely

[signature of head teacher removed]

Cc Robert Courts MP (Witney)

September 2020