

Ofsted v Durand - outcome of the appeal

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In 2017, we wrote about Durand Academy Trust's ("Durand") case against Ofsted and the High Court's decision that Ofsted's complaints procedure was unfair for those schools judged to require special measures or have serious weaknesses (see [here](#)). Ofsted subsequently appealed the High Court's decision and, in December 2018, the Court of Appeal allowed the appeal, finding that Ofsted's procedure was, in fact, fair and proper. We examine the latest decision below and identify the key points for our clients to take away from this important case law development.

The background – a reminder

The case was brought following the Ofsted inspection of Durand Academy in late 2016 and the associated report dated February 2017, in which Ofsted judged that the academy required special measures. Durand disputed the inspection outcome asserting that the judgement itself was unreasonable. In addition, Durand argued that Ofsted's complaints procedure was unfair in that, unlike schools graded as 'outstanding', 'good' or 'requires improvement', schools deemed to be inadequate were unable to challenge the grade given by Ofsted under step 2 of its complaints procedure.

The High Court agreed with Durand that, as Ofsted's complaints procedure did not allow a substantive challenge to be made to the report's judgement of special measures, it was neither fair nor rational. This finding in itself resulted in the report being quashed and there was therefore no ruling on Durand's other argument around the unreasonableness of the special measures judgement.

Despite the High Court's ruling, Ofsted did not amend its complaints procedure and decided to take the matter to the Court of Appeal.

The Court of Appeal's findings

The Court of Appeal has now found in Ofsted's favour, allowing the appeal. Its analysis explains that, to determine whether the process in question is fair, there needs to be a review of the overall process of inspection, evaluation and reporting, not just a review of the complaints procedure itself.

As part of that overall review, the Court of Appeal highlighted the "additional statutory and non-statutory procedural safeguards" which, in its view, justify the Ofsted complaints procedure's different treatment of schools judged to be inadequate. It was also keen to emphasise that most of these protections operate before finalisation and publication of the report.

The additional internal quality assurance and moderation which Ofsted undertakes for schools deemed inadequate had not convinced the High Court on fairness. However, the Court of Appeal's view was that the review and checking carried out by Ofsted as part of the moderation exercise amounted to more than adequate protection, such that the ability to also challenge the grade as a step 2 complaint following finalisation of the report "would have added nothing".

The fact that the complaints procedure for schools judged 'outstanding', 'good' or 'requires improvement' was different did not matter. As Lord Justice Hamblen stated, "fairness does not require equivalence".

The alternative process

Although the decision is perhaps not the one some schools were hoping for, the case offers interesting insight into the process followed by Ofsted when a school is judged to require special measures or have serious weaknesses. The “procedural safeguards” referred to and which have been judged by the Court of Appeal sufficient to negate the need for schools to have the right to complain about the judgement under the complaints procedure include:

1. The opportunities available to raise concerns during the inspection, for example during the meetings between the head teacher and lead inspector, lesson feedback and final feedback meeting;
2. The ability to raise concerns under step 1 of Ofsted’s complaints procedure;
3. The discussion with the senior HMI which should take place at the end of the first day if the inspection team are forming the view that the school is inadequate;
4. The school’s ability to comment on any element of the draft report and receive the lead inspector’s comments in response;
5. The extended period of quality assurance and moderation;
6. The fact that if a complaint is made about the judgements before the report is finalised, that complaint will be referred to and considered by those carrying out the quality assurance and moderation exercise;
7. The inadequate judgement requiring authorisation by the Chief Inspector or a Regional Director on their behalf.

Implications for schools

Some of these “protections” are perhaps more valuable than others. One wonders, for example, to what extent sign off by the Chief Inspector actually addresses a school’s misgivings about the judgement. Even the arguably more meaningful stage of extended quality assurance is ultimately an internal exercise with no facility for the school to respond or understand the reasoning involved. Though numerous on paper, many schools will find it easy to empathise with Durand’s case that these safeguards are no substitute for the school having the opportunity to reflect, review the final report and articulate in written form its issues with the judgement for review by someone independent of the inspection, as step 2 of the complaints procedure would offer.

However, in light of the Court of Appeal’s decision, we would advise schools graded inadequate to make full use of these different stages. In particular:

- **Raise a step 1 complaint** – as soon as concerns arise during a inspection visit, speak with the lead inspector. Ofsted’s complaints procedure is very clear that a step 1 complaint can include concerns about the provisional judgements. If the school’s concerns cannot be resolved through the lead inspector, the school can ask to speak to an Ofsted manager. We would also advise that, even at this more informal stage, the school keeps a record of the concerns raised and the response(s) received.
- **Submit full comments on the draft report** – having received the draft report the school will be asked to complete what is still referred to as the “factual accuracy check”. For a school provisionally graded inadequate, this stage is about more than factual accuracy and represents the school’s opportunity to detail in writing exactly why it disagrees with the contents of the draft report.
- **Consider requesting a delay to publication** – Ofsted will only agree to delay publication of a report in exceptional circumstances but if you believe there are clear and serious issues with the inspection which go to the heart of the judgements and report it is worth seeking further advice regarding this option.
- **Raise a step 2 complaint regarding process and/or conduct** – although the judgements within the report are usually the main concern, often it is the failure to follow process or the manner in which an inspection has been carried out that has resulted in fundamental flaws to an inspection. There is nothing which prevents schools graded inadequate from submitting a step 2 complaint in respect of process or conduct concerns. Indeed, as we have commented previously, given the amount of discretion Ofsted has when it comes to judgements, the reality is that a school is more likely to successfully challenge a report on matters of process or conduct.

The rationality argument

With regard to the other part of Durand’s original claim that Ofsted had not acted rationally in designating the academy to require special measures, this was not considered any further by the Court of Appeal.

Status of Ofsted’s complaints procedure

At the time of writing, Ofsted’s complaints procedure, although dated May 2018, remains unchanged in relation to the application of step 2 to schools deemed inadequate and the Court of Appeal’s ruling will no doubt serve to entrench the current approach further.

As part of the Durand case however, the Court of Appeal did express that it would be preferable for the minimum quality assurance procedures to be actually set out in the complaints procedure document. This would be a welcome development as there must be very few, if any, school leaders who are experienced in navigating the repercussions of a genuinely disputed inadequate judgement. It seems only right and fair then that, during what is indisputably a stressful, emotive and time-pressured period, there is clarity and consistency in dealing with schools' concerns.

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