

Your Reference



Our Reference



By email only
Lauren Moore

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19 September 2025

Dear Ms Moore

Response to letter before claim

We are instructed by the Office for Qualifications and Examinations Regulation (**Ofqual**) and write in response to your email of 12 September 2025 sent in accordance with the Pre-Action Protocol (the **Pre-Action Letter**).

1 THE CLAIMANT

1.1 The proposed Claimant is Ms Lauren Moore.

2 THE DEFENDANT

2.1 The proposed Defendant is Ofqual, of 2nd Floor, 1 Friargate, Station Square, Coventry, CV1 2GN.

2.2 Ofqual is represented in this matter by Gowling WLG (UK) LLP. Any relevant correspondence, including the service of court documents, should be directed to us by email for the attention of Kieran Laird using the details at the end of this letter.

2.3 Our reference number for this matter is 2035243/KXL3.

3 THE DECISION UNDER CHALLENGE

3.1 The Pre-Action Letter states that the decision under challenge is Ofqual's failure to provide a 'yes' or 'no' answer to the question of whether the current Regulated Qualifications Framework (the **RQF**) was designed or structured for learners with special educational needs and disabilities (**SEND**) or neurodiverse learners with Education, Health and Care Plans (**EHCPs**).

3.2 We set out Ofqual's response to the proposed claim in section 5 below. In summary, Ofqual did answer the above question in its email of 28 September 2025. In addition, none of the proposed grounds of claim demonstrate any arguable case that Ofqual has breached any relevant UK legal obligation.

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4 BACKGROUND

Ofqual's regulatory remit

- 4.1 Ofqual is a Non-Ministerial Government Department established under Part 7 of the Apprenticeships, Skills, Children and Learning Act 2009 (**ASCLA**).¹ There are regulators with similar functions to Ofqual in Wales and Northern Ireland.
- 4.2 Ofqual has statutory responsibility for regulating 'awarding organisations' (**AOs**) in England (that is to say, bodies which award or authenticate academic or vocational qualifications in respect of learners in England) to which it has granted 'recognition' under section 132. AOs are granted recognition in relation to descriptions of qualifications (such as GCSEs or Functional Skills Qualifications), or particular qualifications (e.g. GCSE history or Functional Skills English), which they intend to make available to learners.
- 4.3 Regulation by Ofqual is voluntary – no body is required under ASCLA to apply for recognition – but state funding only attaches to certain regulated qualifications in certain instances.² This means that state schools can only offer regulated qualifications, meaning that the bodies offering them are required to be regulated by Ofqual in order to be able to sell into those markets.
- 4.4 An applicant for recognition is assessed against Ofqual's Criteria for Recognition.³ The Criteria are split into four sections covering various aspects of the applicant's business and capabilities –
- (a) identity, constitution and governance,
 - (b) integrity,
 - (c) resources and financing, and
 - (d) competence.
- 4.5 When making decisions on whether to recognise an applicant, Ofqual's focus is on the attributes of the applicant itself, not the qualifications that it proposes to offer.
- 4.6 Once recognised by Ofqual, an AO becomes subject to Ofqual's General Conditions of Recognition (the **Conditions**). At present, the Conditions exist at a number of levels –
- (a) the General Conditions of Recognition, which apply to all AOs and all qualifications,
 - (b) Qualification Level Conditions, which apply to specific descriptions of qualification, and
 - (c) Subject Level Conditions, which apply to individual subjects within a particular description of qualification.

¹ All references in these instructions are to ASCLA unless otherwise stated.

² Section 96 of the Learning and Skills Act 2000.

³ Available at <https://www.gov.uk/government/publications/criteria-for-recognition/criteria-for-recognition>.

- 4.7 Thus, an AO offering A level English language must comply with the General Conditions,⁴ Qualification Level Conditions that apply to all A levels and the Subject Level Conditions that apply only to that subject.⁵ The Conditions are supplemented by statutory guidance published under section 153.
- 4.8 Ofqual has no role in setting the curriculum for schools in England (which is the responsibility of the Secretary of State for Education). Nor has it any role in setting or regulating educational pathways or the progression of learners.
- 4.9 Once recognised, an AO can choose what qualifications to make available, so long as these are within the scope of its recognition. Those qualifications must comply with the Conditions. Ofqual cannot require an AO to provide particular qualifications.
- 4.10 The Pre-Action Letter focuses on the RQF which was brought into force in 2015 (replacing a previous framework – the Qualifications and credit Framework or QCF⁶).
- 4.11 The RQF is a shorthand term referring to the requirements of two Conditions. Condition E7 requires an AO to assign to each of its qualifications a number of hours for Total Qualification Time and Guided Learning. These are used as measures for the size of a qualification. They represent the number of hours of taught learning (Guided Learning) together with an estimate of the number of hours of independent learning and assessment which an average student is likely to spend on the qualification outside such teaching (Total Qualification Time).
- 4.12 Condition E9 requires an AO to assign one or more levels to each of its qualifications. These are indications of the knowledge, skills and understanding that a learner is expected to achieve through taking the qualification and comprise an 11 point scale with Entry Levels 1 to 3 followed by levels 1 to 8. Levels 1 and 2 cover GCSEs and Level 8 representing a doctorate.
- 4.13 The purpose of the RQF is to facilitate the comparison of qualifications on the basis of their size and complexity or demand.
- 4.14 This includes the international comparison of qualifications to support their mobility and portability. This is because the use of frameworks signalling size and demand is widespread internationally. For example, the level descriptors that are used by AOs to assign levels to their qualifications are designed to align with those used in the European Qualifications Framework and the Framework for Higher Education Qualification in England, Wales and Northern Ireland.
- 4.15 All qualifications, regardless of their function, subject, structure or target audience must comply with Conditions E7 and E9. As such, the RQF is not focused on any one particular group of qualifications, or qualifications sharing particular attributes. It is designed to apply to all regulated qualifications.

⁴ Ofqual, *General Conditions of Recognition*, available at <https://www.gov.uk/guidance/ofqual-handbook>.

⁵ The Qualification Level Conditions and Subject Level Conditions are available at <https://www.gov.uk/guidance/awarding-organisations-understanding-our-regulatory-requirements#qualification-specific-requirements>.

⁶ Ofqual's consultation on withdrawing the QCF is available at <https://assets.publishing.service.gov.uk/media/5a7edb94ed915d74e6226e6d/2014-07-24-a-consultation-on-withdrawing-the-regulatory-arrangements-for-the-qualifications-and-credit-framework.pdf>.

- 4.16 If, for example, an AO proposed a qualification targeted at learners with SEND it would need to assign values for Total Qualification Time and Guided Learning, and a level, to that qualification under Conditions E7 and E9.
- 4.17 Those values would not relate to how learners were taught the qualification or what support they were given in that regard as these are matters outside Ofqual's remit. Rather the values would simply indicate how much time would usually be invested in taking the qualification and the relative complexity of the material it contained. This would then allow learners, employers and others to compare that qualification to others in the market in terms of size and demand.
- 4.18 It is not the purpose of the RQF to achieve any outcome for learners, or particular groups of learners, outside facilitating a better comparative understanding of the qualifications that they may wish to take or have obtained.

5 RESPONSE TO THE PROPOSED CLAIM

- 5.1 The Pre-Action Letter states that the decision under challenge breaches a range of legal provisions grouped into the following five categories –
- (a) Sections 19, 20 and 149 of the Equality Act 2010.
 - (b) Section 42 of the Children and Families Act 2014.
 - (c) The *Special educational needs and disability code of practice: 0 to 25 years* (the **SEND Code of Practice**).
 - (d) Article 2 of Protocol 1 to, and Article 14 of, the European Convention on Human Rights (the **ECHR**) as given effect in the UK by the Human Rights Act 1998.
 - (e) Article 24 of the Convention on the Rights of Persons with Disabilities (the **CRPD**).

Preliminary points

- 5.2 As stated in the Pre-Action Letter, the decision under challenge is Ofqual's purported failure to answer the question –

Was the current Regulated Qualifications Framework (RQF) designed or structured for SEND/neurodiverse learners aged 14–16 with EHCPs? Yes or No.

- 5.3 We note that the Pre-Action Letter simply contains a list of legal provisions and states that Ofqual's failure to answer the question above has breached them. It does not explain how Ofqual has breached any of the provisions cited. It is difficult to see how the failure to answer that question could give rise to any of the purported breaches listed above.
- 5.4 However, more fundamentally, it is incorrect to state that Ofqual has not answered the question. In its email to you of 28 August 2025 Ofqual stated –

You have asked whether we agree with a particular statement about the Regulated Qualifications Framework (RQF). The simplest answer we can give is that we do not agree with that statement.

- 5.5 Therefore, Ofqual has already answered the question you asked in the negative. The remainder of the email goes on to explain that answer. As such, the failure to provide an answer identified in the Pre-Action Letter has, as a matter of fact, not taken place. The (unparticularised) 'breaches' identified in the Pre-Action Letter therefore fall away.
- 5.6 However, for the avoidance of doubt, to the extent that the proposed challenge may seek to criticise the RQF itself, it may be of assistance to briefly outline why Ofqual cannot have breached the provisions cited in any way through the RQF.

The Equality Act 2010

- 5.7 Section 19 of the Equality Act 2010 precludes indirect discrimination and section 20 provides an obligation to make reasonable adjustments.
- 5.8 It is not arguable that Ofqual has breached either of these provisions through the RQF. The RQF does not apply to individual learners; it applies to AOs who then apply it to their qualifications. Nor can it be suggested that the RQF puts a disabled person at any disadvantage in comparison with persons who are not disabled.
- 5.9 Section 149 of the Equality Act 2010 requires that Ofqual has due regard to specified matters when exercising its functions. It is a duty of process, not a requirement to achieve any particular result.
- 5.10 Ofqual included an equalities analysis in the consultation document on the adoption of the RQF in 2015.⁷ In doing so it explicitly referenced the specified matters in section 149. The consultation asked specific questions on the equalities impact of the adoption of the RQF, with the responses reflected in the analysis of consultation responses.⁸ As such, it is clear that Ofqual has complied with its section 149 duty in relation to the RQF.

The Children and Families Act 2014

- 5.11 Section 42 of the Children and Families Act 2014 requires a local authority to secure for a child or young person the special education provision set out in any relevant EHCP.
- 5.12 Ofqual is not a local authority and the obligation in section 42 does not apply to it. Therefore, Ofqual cannot be in breach of section 42. This is unsurprising as Ofqual has no role in the provision of regulation of frontline education to learners. It regulates qualifications and assessments but not the teaching and learning, or the educational support that is offered to learners through an EHCP, in order to obtain a particular qualification. Teaching, learning and support are the responsibility of schools, local authorities, the Department for Education and Ofsted among others.

⁷ Ofqual, *After the QCF: A New Qualifications Framework*, 2015, p. 22, available at <https://assets.publishing.service.gov.uk/media/5a7f4a3140f0b6230268e99a/2015-03-25-after-the-qcf-a-new-qualifications-framework.pdf>.

⁸ Ofqual, *Analysis of Responses to our Consultation 'After the QCF: A New Qualifications Framework'*, p. 22 – 23, available at <https://assets.publishing.service.gov.uk/media/5a817e7a40f0b623026979b3/analysis-of-responses-to-our-consultation-after-the-qcf-a-new-qualifications-framework.pdf>.

The SEND Code of Practice

- 5.13 The SEND Code of Practice provides statutory guidance on certain duties, policies and procedures relating to Part 3 of the Children and Families Act 2014 and associated secondary legislation. The bodies to which the guidance applies are set out in section 77(1) of the Act. That list does not include Ofqual as Ofqual has no duties under Part 3 of the Children and Families Act 2014. As set out above, Ofqual's remit does not include teaching, learning or educational support, but rather the regulation of qualifications designed and offered by AOs.
- 5.14 Therefore, the SEND Code of Practice does not apply to Ofqual and Ofqual cannot be in breach of it in relation to the RQF or otherwise.

The Human Rights Act 1998

- 5.15 Article 2 of Protocol 1 to the ECHR states that no-one shall be denied the right to education and that the state shall respect the religious and philosophical convictions of parents in the education and teaching it provides to their children.
- 5.16 The RQF requires AOs to assign measures of size and one or more levels to regulated qualifications. It does not operate to deny any person the right to education. Nor does it impinge on the religious or philosophical convictions of parents. There can be no credible argument that Ofqual has breached Article 2 of Protocol 1.
- 5.17 Article 14 ECHR requires that all the rights in the ECHR are secured without discrimination. As Ofqual has not breached any of the rights in the ECHR, Article 14 is not engaged.

The CRPD

- 5.18 Under Article 24 of the CRPD state parties recognise the right of persons with disabilities to education. Amongst other things, parties are required to ensure an inclusive education system and ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others.
- 5.19 Although the UK ratified the CRPD in 2009, it has not been incorporated into UK law.⁹ Rather it is given effect through other UK domestic law such as the Equality Act 2010 and the Human Rights Act 1998.
- 5.20 An unincorporated treaty does not form part of UK law and cannot impose obligations that will be adjudicated by the domestic courts.¹⁰ As such, Ofqual cannot be subject to judicial review for a breach of the CRPD.
- 5.21 However, for the avoidance of doubt, Ofqual's imposition of requirements on AOs to assign indicators of size and complexity to regulated qualifications does not adversely affect the right of disabled persons to education.

⁹ See the response to Parliamentary Question PQ 18932 on 27 February 2000, available at <https://questions-statements.parliament.uk/written-questions/detail/2020-02-21/18932>.

¹⁰ See, for example, *R (SC) v Secretary of State for Work and Pensions* [2022] AC 223 at [77, 91] and *Belhaj v Straw* [2017] AC 964 at [123].

Conclusion

- 5.22 For the reasons given above, Ofqual has in fact answered the question asked of it. The answer is no.
- 5.23 However, there is no arguable case that Ofqual has breached any of the provisions set out in the Pre-Action Letter, whether because of the (incorrect) assertion that Ofqual has not answered the question or in relation to the RQF itself. Any suggestion as to the latter is based on a misunderstanding on what the RQF is, what it sets out to achieve and Ofqual's regulatory remit, which does not extend to teaching, learning or educational support, or to choosing what qualifications should be offered or funded.
- 5.24 Finally, the decisions on implementing the RQF were taken in September 2015.¹¹ Under paragraph 54.5 of the Civil Procedure Rules, a judicial review must be brought promptly and in any event within three months of the date on which the grounds of claim first arose. To the extent that the real target of the proposed grounds of claim is the RQF itself, any judicial review challenge would be ten years out of time.

6 THE REMEDIES SOUGHT

- 6.1 The Pre-Action Letter seeks the following remedies –

'1. Written confirmation from Ofqual that the RQF was not designed or structured for SEND/neurodiverse learners aged 14–16 with EHCPs.

2. Immediate engagement with the Claimant, MPs, and DfE to establish a parallel SEND RQF framework and regulator (LUNA SEN Regulator), with:

Independent recognition equal to Ofqual.

A SEN Learning Record (LLR) to log and secure achievements.

Pathways mapped to statutory duties under the Equality Act, CFA 2014, SEND Code, HRA, and UNCRPD.

3. Recognition that the LUNA SEN Regulator and LUNA Learning Record are already built, structured, and ready to operate, requiring only formal government recognition and adoption. This ensures immediate compliance, employability at 16, and lawful parity with peers.'

- 6.2 As stated above, the relevant question was answered in the negative by Ofqual on 28 August 2025.
- 6.3 In relation to the second and third remedies, the establishment of a new regulator would require legislation and is not within Ofqual's ability to grant.

7 ALTERNATIVE DISPUTE RESOLUTION

- 7.1 In line with its response to the proposed grounds set out above, Ofqual does not consider this matter suitable for ADR.

¹¹ Ofqual, *After the QCF: A New Qualifications Framework - Decisions on Conditions and Guidance for the Regulated Qualifications Framework (RQF)*, 2015, available at <https://assets.publishing.service.gov.uk/media/5a7f7690ed915d74e622a9c0/after-the-qcf-a-new-qualifications-framework-decisions-on-conditions-and-guidance-for-the-rqf.pdf>.

8 ADDRESS FOR FURTHER CORRESPONDENCE AND SERVICE OF COURT DOCUMENTS

- 8.1 Judicial review claims can be complex and costly. Although we have not sought to answer the substance of points made in the Pre-Action Letter, we have set out the applicable law in detail in Section 5 above.
- 8.2 Ofqual hopes that, in light of the foregoing, you will not pursue the threatened challenge, particularly in view of the fact that you are likely to be liable for Ofqual's costs if unsuccessful. If, however, a challenge is brought, we request that any further correspondence and service of court documents be directed to us.
- 8.3 Please send any correspondence or court documents by email to kieran.laird@gowlingwlg.com and lara.epsley@gowlingwlg.com.

Yours faithfully

Gowling WLG (UK) LLP

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