ELC EDUCATION LAW CENTER

February 29, 2016

Hon. Thomas Betancourt, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: T.B. et al. v. New Jersey Department of Education
OAL DOCKET NO. EDU 17352-2015 N, Agency Ref. No. 236-9/15

Dear Judge Betancourt:

Please accept this letter brief in lieu of a more formal reply brief, filed on behalf of Petitioners T.B., *et al.*, in further support of Petitioners' Motion for Summary Decision ("Motion") and response to the Respondent New Jersey Department of Education's Cross-Motion for Summary Decision ("Cross-Motion") in the above referenced matter.

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INTRODUCTION

Petitioners' Motion for Summary Decision set forth the continuing legal violations by the Respondent New Jersey Department of Education ("DOE" or "State") that compel this Court to direct the State to cease imposing its illegal new graduation requirements. Petitioners demonstrated that DOE has egregiously violated the Graduation Standards Act ("Act") and existing Standards and Assessment regulations by refusing to administer the only two graduation exams—HSPA and AHSA—that have been duly adopted in DOE's own regulations, and by imposing new policies comprised of PARCC and other assessments that are neither authorized by the Act or existing regulation. Petitioners also demonstrated that DOE's new graduation policies constitute rules under the Administrative Procedure Act ("APA") and therefore must be duly adopted under APA procedures before they can take effect and applied to students in New Jersey public high schools.

The State does not—and cannot—argue that it is complying with the Act and existing regulations governing high school graduation. Nor does DOE contend that it followed and completed the APA rulemaking process before imposing its new graduation policies on high school students. The DOE's sole defense of its unauthorized actions is that the Petition is moot because the State Board of Education ("State Board") has now, over a year after first imposing these policies, proposed regulations to codify them. This contention fails for two reasons. First, proposing regulations does not constitute their adoption. Rather, it is the beginning of a multi-step rulemaking process that *may* result, at some undetermined future point, in the adoption of rules that the agency can properly put in effect and apply to high school students. Second, the mere proposal of regulations clearly does not obviate the need for the relief sought by Petitioners, namely, a ruling that DOE's new graduation policies violate existing law, have not

been duly adopted, and, therefore, cannot be imposed on high school students. As long as DOE continues to impose unauthorized graduation requirements on students, including seniors scheduled to graduate in just a few months, Petitioner's claims are neither technical nor moot. Further, their requested relief – a directive that DOE halt the imposition of the illegal graduation requirements – is essential to protect their opportunity to obtain a high school diploma under existing law.

The State wholly ignores that thousands of high school students presently face the imminent prospect of being denied a diploma because they are unable to meet DOE's illegally imposed new graduation requirements. The fact that the State Board has belatedly begun the rulemaking process in no way cures the DOE's egregious and ongoing violations of law. Thus, this Court should deny DOE's Cross-Motion for Summary Decision, grant Petitioners' Motion for Summary Decision, and enter appropriate relief to prevent DOE from imposing its new graduation policies until the agency codifies those policies in regulation that have the full force and effect of law.

ARGUMENT

Petitioners move for summary decision on the grounds that DOE's imposition of new graduation policies violates the Act and the existing Standards and Assessment regulations, and that these policies were imposed in violation of the APA and New Jersey Constitution.[1] Petitioners' Motion for Summary Decision must be granted if there is no genuine issue of material fact and Petitioners are entitled to judgment as a matter of law. *N.J.A.C.* 1:1-12.5. DOE concedes that this matter is ripe for summary decision because no facts are at issue. Resp. Br. at

[1] Petitioners do not seek Summary Decision on all of the claims in the Petition. Petitioners do not waive these claims, but instead reserve the right to raise them, if necessary, at a later date.

12. DOE also does not contest Petitioners' legal argument that DOE's new graduation policies directly conflict with the Act and the existing assessment regulations. Instead, DOE asserts the position that its blatant legal violations have now been cured by the commencement of rulemaking under the APA. DOE's contention that the initiation of the APA process renders the Petition moot is wholly without merit. Thus, the Court should deny DOE's Cross-Motion, and grant Petitioners' Motion for Summary Decision.

I. Commencing Rulemaking Under the APA Does Not Render the Petition Moot

DOE contends that because the State Board has begun the process of adopting amendments to the Standards and Assessment regulations, *N.J.A.C.* 6A:8, Petitioners' claims are moot. This contention erroneously conflates the proposal of new or amended regulations with the final adoption of those regulations. There is simply no basis for DOE's assertion that the proposed amendments to *N.J.A.C.* 6A:8 presently have the full force and effect of duly adopted rules so that they can continue to be imposed on high school students. Further, even if DOE could accurately predict whether and when the proposal will eventually be adopted, Petitioners requested relief— an immediate determination that DOE's new graduation policies violate existing law and cannot be imposed on current high school students — remains essential to safeguard their right to graduate and obtain a diploma.

The law is clear: regulations are not incorporated into the New Jersey Administrative Code and, therefore, do not take effect until they have been subject to the procedures for formal agency adoption set forth in the APA. *N.J.S.A.* 52:14B-4(a) (describing rulemaking procedures); *id.* at 52:14B-4(d) (rule invalid if not enacted in "substantial compliance" with APA). DOE has also adopted its own regulations setting forth its rulemaking process pursuant to the APA. *N.J.A.C.* 6A:6. A regulation has not been adopted, and does not have the force of law, until all

these steps are completed. *See, e.g.*, *In re Adoption of N.J.A.C. 5:96*, 220 *N.J.* 355, 359 (2014) (citing *N.J.S.A.* 52:14B–4(a)) ("adoption of . . . regulations requires a number of steps, beginning with the proposal of regulations, a public comment period, and final adoption"); *Educ. Law Ctr. v. N.J. State Bd. of Educ.*, 438 *N.J. Super.* 108, 114 (App. Div. 2014) (noting that "the formal process for amending" DOE regulations is contained in *N.J.A.C.* 6A:6).

DOE readily admits, as it must, that "adoption of a rule requires adherence to the APA." Resp. Br. at 15. DOE also identifies the numerous steps required for the State Board to adopt a rule pursuant to the APA. *Id.* ("The State Board's rulemaking procedures are codified in the Appendix to *N.J.A.C.* 6A:6-4.2."). These steps culminate in official adoption by the State Board and publication in the *New Jersey Register* to "establish the effective date of the adopted rule." Appendix to *N.J.A.C.* 6A:6-4.2. DOE acknowledges that the State Board has only recently begun the preliminary steps in this process, and no new rule has been adopted or published. Resp. Br. at 9, 16; Cert. of Skabla at 2-3. In fact, the State Board, which engaged in a Second Discussion of amendments to *N.J.A.C.* 6A:8 at its latest monthly meeting on February 10, 2016,[2] has not even reached the official "Proposal Level" of the rulemaking process, let alone the "Adoption Level" or publication of the final rule. *See* Resp. Br. at 15; Appendix to *N.J.A.C.* 6A:6-4.2. As DOE's recitation of the required procedure demonstrates, the amendments cannot be formally adopted for several months, at the earliest. Resp. Br. at 15 (detailing the multi-stage process for formal rulemaking by the State Board).

Yet, even though the rulemaking process by the State Board has barely begun, DOE continues to impose its new graduation policies on high school students. Current seniors were

[2] DOE's Second Discussion paper, presented at the February 10th meeting, is available at http://www.state.nj.us/cgi-bin/education/sboe/sboe.pl?y=2016&m=February&t=public.

denied opportunities to take HSPA and AHSA in the eleventh and twelfth grades, *see N.J.S.A.* 18A:7C-6; *N.J.A.C.* 6A:8-4.1(d)(4), 5.1(f), and are being forced to try to comply with the new requirements to obtain a diploma and graduate this spring. Juniors are also being denied the opportunity to take the HSPA, an opportunity that must be provided to them under the current assessment regulations. Sophomores are required to take tests for graduation that are not authorized by DOE's existing regulations. The DOE's egregious violation of these students' rights continues unabated, completely unaffected by the mere proposal of amended regulations.

The New Jersey courts have previously rejected the argument that merely commencing the rulemaking process moots a claim of agency non-compliance with the APA rulemaking process. In *Education Law Center v. New Jersey Department of Education*, the plaintiff sought to compel the New Jersey Schools Development Authority ("SDA") to adopt regulations governing the delegation of school facilities projects to eligible districts. No. A-5191-09T3, 2012 WL 1080867, at *1 (N.J. Super. Ct. App. Div. Apr. 3, 2012) (unpublished).[3] As in this case, the agency asserted that the case was moot because it had taken preliminary steps to institute regulations, a position the court correctly rejected. *Id.* at *7 ("SDA argues that we should decline to grant plaintiff relief because . . . the matter is moot, since it has commenced the rulemaking process . . . . We are unpersuaded."). The court explained that "the matter is not moot so long as regulations are not promulgated," and held that the requirement to adopt rules would not be satisfied "[u]ntil [the agency] actually *adopts* regulations." *Id.* (emphasis added).

In its response to Petitioners' Motion, DOE cites two cases for the proposition that Petitioners' claim is moot because subsequent proper adoption of a rule cures initial procedural

[3] The New Jersey Court Rules state that an unpublished opinion may not be cited, except under limited circumstances, "unless the court and all other parties are served with a copy of the opinion and of all contrary unpublished opinions known to counsel." *R.* 1:36-3. A copy of the unpublished opinion cited here is accordingly attached to this brief as Appendix A.

violations. *See* Resp. Br. at 13 (citing *Assoc. of N.J. State College Faculties, Inc. v. Dungan*, 64 *N.J.* 338 (1974); *In re N.J.A.C. 11:1-20*, 208 *N.J. Super.* 182 (1986)). However, in both of these cases, the courts held that the adoption of the rule through the usual rulemaking process cured technical deficiencies that occurred under the APA's emergency rulemaking process. This is a far cry from DOE's continuing imposition of policies that violate law without undertaking and completing *any* rulemaking process under the APA, a prerequisite for these policies to have legal force and effect. *Dungan*, 64 *N.J.* at 348-49 (explaining that "[t]he resolutions were originally filed with the Secretary of State and were published in the New Jersey Register as 'emergency rules' under *N.J.S.A.* 52:14B-4(c)" and concluding that although it was "not prepared to say . . . that [the] original procedure was legally improper . . . subsequent action . . . was sufficient to satisfy *N.J.S.A.* 52:14B-4(a)"); *In re N.J.A.C. 11:1-20*, 208 *N.J. Super.* at 186, 196 (noting that the matter came before the court "on an emergency and then normal rule-making basis under the Administrative Procedure Act" and holding that "adoption of the rule on a normal basis cured [the] minor procedural defects in the emergency adoption"). Where, as here, DOE has just proposed – and not adopted – new regulations governing high school graduation, these decisions provide no support for DOE's bald assertion that Petitioners' claims are moot or that DOE's continuing violation of the APA has somehow been cured.

As DOE concedes, the proposed amendments to *N.J.A.C.* 6A:8 presented to the State Board on January 11, 2016 are now at the preliminary stage of a multi-step rulemaking process. Absent duly adopted rules, the current graduation requirements in *N.J.A.C.* 6A:8 remain in full force and effect. The rulemaking process requires additional presentations to and approvals by the State Board and publication in the *New Jersey Register* to provide interested parties notice and the opportunity for comment. Appendix to *N.J.A.C.* 6A:6-4.2; *see also N.J.S.A.* 52:14B-4(a).

The only way DOE could now conclude that its proposed amendments will ultimately be adopted is if the State Board does not intend to execute the process of public notice and comment in good faith. If the State Board intends to take seriously the procedural requirements of the APA—including public notice and comment on whether and in what form DOE should adopt new graduation rules—the DOE cannot credibly claim that the Petition is or will become moot.

Simply put, the State Board's rulemaking process that may ultimately result in the formal codification of DOE's new graduation policies has just begun. DOE's contention that the mere commencement of the process renders Petitioners' claims moot should be rejected outright.

II. DOE's Continuing Violation of the Graduation Act, Existing Regulations and the APA Compels Granting Petitioners' Motion for Summary Decision

A. DOE's New Policies Violate the Act and Regulations Governing High School Graduation

As Petitioners make clear—and the State ignores—imposition of DOE's new graduation requirements violates the Act, *N.J.S.A.*18A:7C-1 *et seq.*, and DOE's existing assessment regulations, *N.J.A.C.* 6A:8. Most egregious is DOE's decision to abandon the HSPA and AHSA, even though these are the only assessments authorized by regulation to fulfill the statutory graduation exam requirement. *See N.J.S.A.* 18A:7C-2(a); *N.J.A.C.* 6A:8-1.3, 5.1(a)(6). DOE's continuing imposition of the new graduation policies on high school students is a clear and unequivocal violation of the explicit provisions of State statute and the agency's own rules.

The Act and regulations also require that students have multiple opportunities to pass a comprehensive statewide assessment first administered in the eleventh grade, with retesting opportunities in the twelfth grade. *N.J.S.A.* 18A:7C-6; *N.J.A.C.* 6A:8-4.1(d)(4), 5.1(f). The new PARCC exams—the centerpiece of DOE's new graduation policies—are individual end-of-course assessments administered when a student completes the corresponding class, with no

clear retesting provisions unless a student retakes the entire course. Karp Cert. ¶¶ 23, 55. Current seniors in the Class of 2016 received only a single opportunity to take the PARCC ELA 11 exam, when they were juniors in 2014-15, Pet'r. Br. at 12, and DOE acknowledged that approximately 30-40% of those juniors would be enrolled in a math class with no corresponding PARCC test, Verified Pet. ¶ 31 & Exh. A. Finally, the assessment regulations provide important accommodations to English language learners ("ELLs"), including the option of taking the AHSA in their native language when available. *N.J.A.C.* 6A:8-5.1(f)(1). Under DOE's new graduation policies, there is no opportunity to take the AHSA at all, let alone a translated version, and there is no native language ELA assessment. Karp Cert. ¶ 53 & Exh. J.

The DOE does not, and cannot, credibly refute Petitioners' claim that the Act and the existing assessment regulations are controlling law. *See supra* Section I. DOE makes no attempt to refute the plain fact that, as Petitioners claim, the new graduation policies it continues to apply to high school students violate both the Act and agency regulations which establish and govern the requirements for graduation.

B. DOE's Continuing Imposition of New Graduation Policies Violates the APA

Beyond the Act and the existing assessment regulations, DOE also continues to violate the APA by imposing graduation requirements that do not have the full force and effect of law because they have not been formally adopted through agency rulemaking. As explained above, the recent commencement of rulemaking by the State Board is no substitute for the adoption of regulations and simply does not permit or authorize DOE to impose its new graduation requirements on high school students.

The State does not dispute that DOE's new graduation requirements constitute a "rule" that must be adopted pursuant to APA rulemaking procedures. *See N.J.S.A.* 52:14B-2; *see also,*

e.g., *Metromedia, Inc. v. Dir., Div. of Taxation,* 97 *N.J.* 313 (1984). Thus, it is clear that DOE may not impose the new requirements on high school students unless and until they are duly adopted following application of the APA rulemaking process. *N.J.S.A.* 52:14B-4(d) (rule not valid unless enacted according to APA process).

DOE acknowledges that the State Board has just begun the rulemaking process to codify these requirements, yet the agency has imposed them on high school students since 2014 and, even more troubling, continues to do so. Resp. Br. at 9, 16.[4] As DOE makes clear, the State Board has just started – and certainly not completed – the rulemaking process under the APA, *N.J.S.A.* 52:14B-4, and the procedures set out in its own APA implementing regulations, *N.J.A.C.* 6A:6. Thus, DOE's new graduation policies lack the effect of law and are, therefore, invalid, *N.J.S.A.* 52:14B-4(d). Yet, despite this fundamental legal defect, DOE continues to impose them on high school students in direct contravention of the APA.[5]

Finally, DOE tries to excuse the delay in promulgating new regulations by asserting that "the State Board reasonably awaited the results of the Study Commission" and then

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[4] DOE characterizes the requested relief as prospective and thus rendered moot by the initiation of rulemaking. Resp. Br. at 16-17. In fact, the proposed rules attempt to retroactively codify illegal actions already imposed on high school students. Under the still-operative regulations, current seniors should have taken the HSPA in the spring of their junior year and AHSA this year. Instead, DOE ceased administering these exams to juniors, and began administering PARCC, in Spring 2015 but did not propose—let alone adopt—amended regulations until January 2016.

[5] The fact that DOE imposed "substitute assessments" as an alternative to passing PARCC for the next few years does not cure the APA violation. As with PARCC exams, the substitute assessments cannot be legally imposed as options to meet the graduation exam requirement without following APA rulemaking procedures. Indeed, DOE's inclusion in its proposed regulations of graduation criteria for the class of 2016 and other classes currently in high school—as opposed to solely proposing regulations for later classes that will be required to pass PARCC or use appeals—is an unequivocal admission that changes to the existing rules for current high schoolers must also be effected through regulation. *See* Skabla Cert. Exh. 2.

"immediately initiated its rulemaking process." Resp. Br. at 17. Petitioners take no issue with the State Board seeking input before initiating any rulemaking process. But neither could DOE begin imposing its new graduation requirements on high school students before the State Board initiated and then completed that process. If DOE now asserts that the State Board had to await the Commission's findings in order to commence rulemaking, the agency is legally bound to await completion of that process before imposing new policies on students. Because DOE imposed its policies in the absence of duly adopted regulations codifying them, the agency has acted, and continues to act, in flagrant disregard of the APA.[6]

In sum, DOE's violation of the Act and the existing assessment regulations, as well as the APA and DOE's rulemaking regulations, is clear, unrefuted and ongoing. Accordingly, Petitioners' Motion for Summary Decision must be granted.

III. A Directive That DOE Halt Imposition of its Illegal Graduation Policies is Essential to Ensure the Legal Rights of Current High School Students

DOE's new graduation policies not only violate the Act, the assessment regulations, and the APA, the continuing imposition of these policies is also depriving current students of their right to obtain a diploma, if they qualify to do so under existing law. Accordingly, appropriate relief is urgently required to remedy the ongoing violation of these students' rights and ensure they are not denied a high school diploma under DOE's illegally imposed policies.

A. DOE's Ongoing Imposition of Illegal Graduation Policies Harms Current High School Students, Most Urgently Seniors

[6] Under the New Jersey Constitution, "[n]o rule or regulation made by any department, officer, agency or authority of this state, except such as relates to the organization or internal management of the State government or a part thereof, shall take effect until it is filed either with the Secretary of State or in such other manner as may be provided by law." N.J. Const. Art. 5, § 4, para. 6. Because DOE's imposition of the new graduation requirements violates the APA, which sets forth the process agencies must follow to adopt a valid rule or regulation, it also violates this provision of the New Jersey Constitution.

DOE's abandonment of HSPA and AHSA in favor of its unauthorized graduation policies is having a profound negative impact on New Jersey high school students. Based on DOE's own data, approximately 30,000-35,000[7] students in the senior class of 2016 will not be able to use their PARCC scores to satisfy the graduation exam requirement. Karp Cert. at ¶ 48.[8] These students are left to attempt to obtain a diploma through the other options in DOE's new policies,

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[7] More recent data from DOE indicates that, at a minimum, approximately 53,000 students in the class of 2016 will not be able to use PARCC to satisfy the new graduation requirements. These students either did not take or did not pass the eleventh grade ELA test. *See* New Jersey Department of Education, "New Jersey Statewide Assessment Reports, 2015 PARCC Results," http://www.state.nj.us/education/schools/achievement/15/parcc/excel.htm. Additional students are at risk of not satisfying the math requirement.

[8] This court can take notice of recent and overwhelming reports and documentation of the large numbers of high school seniors uncertain about whether they will meet DOE's new graduation policies and obtain a diploma. *See, e.g.*, Adam Clark, *Why some N.J. seniors are still scrambling to graduate*, Star-Ledger, Feb. 15, 2016, http://www.nj.com/education/2016/02/after_parcc_njs_class_of_2016_faces_graduation_pro.html#incart_river_mobile_home; John Mooney, *Proposal Tying Graduation To PARCC Exams Met With Skepticism, Hesitancy*, NJ Spotlight, Feb. 11, 2016, http://www.njspotlight.com/stories/16/02/10/proposal-tying-graduation-to-parcc-exams-met-with-skepticism/#; Adam Clark, *Parents, teachers draw line in the sand on PARCC as grad requirement*, Star-Ledger, Feb. 11, 2016, http://www.nj.com/education/2016/02/parents_teachers_pan_parcc_as_graduation_requireme.html#incart_river_home; Hannan Adely, *Education advocates urge N.J. not to base graduation standards on controversial test*, Record, Feb. 10, 2016, http://www.northjersey.com/news/education-advocates-urge-n-j-not-to-base-graduation-standards-on-controversial-test-1.1509353; Diane D'Amico, *Thousands of HS seniors face state appeal to graduate in June*, Press of Atlantic City, Feb. 9, 2016, http://www.pressofatlanticcity.com/education/thousands-of-hs-seniors-face-state-appeal-to-graduate-in/article_2340328e-cf4d-11e5-b80a-c3c443d55f12.html; David Levinsky, *Low PARCC scores posing graduation hurdle for some seniors*, Burlington County Times, Feb. 7, 2016, *http://m.burlingtoncountytimes.com/news/local/low-parcc-scores-posing-graduation-hurdle-for-some-seniors/article_491f7afa-cc37-11e5-bc64-c30060f30113.html?mode=jqm*; Hannan Adely, *New worry on N.J. school test scores; graduation in doubt for some who didn't pass*, Record, Feb. 4, 2016, http://www.northjersey.com/news/new-worry-on-n-j-school-test-scores-graduation-may-be-a-struggle-for-some-who-didn-t-pass-1.1505586; Jeff Green, *Nearly 200 Clifton High seniors at risk of not graduating because of new test*, Record, Jan. 22, 2016, http://www.northjersey.com/news/nearly-200-clifton-high-seniors-at-risk-of-not-graduating-because-of-new-test-1.1497752.

such as fee-based "substitute assessments," with only a few months of high school left. Thus, thousands of seniors face being denied a high school diploma even if they have completed all other graduation prerequisites.

Since DOE implemented the AHSA alternative assessment and established the back-up appeals process in 2010, thousands of students each year have used these pathways to graduate and obtain a diploma. Karp Cert. at ¶ 47. By eliminating AHSA in its new policies, DOE has jeopardized the graduation prospects of thousands of students, Karp Cert. at ¶¶ 47, 53, not to mention placing burdens on school districts and educators, particularly in districts with high enrollments of ELLs and other students with special needs. Karp Cert. at ¶ 49-54. Students unable to achieve a passing score on PARCC or the various other assessments listed in DOE's policies are left to use a new and uncertain "portfolio appeals process" if they wish to graduate. Karp Cert. at ¶¶ 49-52. Furthermore, ELL students have relied disproportionately on the opportunity to retake HSPA in twelfth grade, as well as the option of taking a native language translation of AHSA; both of these opportunities have now been eliminated. Karp Cert. at ¶ 53.

DOE does not contest the compelling record on Petitioners' Motion that the DOE's imposition of its new graduation policies is depriving current students of the opportunity to obtain a diploma under existing law. Seniors in the class of 2016 were denied the opportunity to take HSPA in eleventh grade and retesting opportunities of both HPSA and AHSA in twelfth grade. Current juniors in the class of 2017 are also being denied the opportunity to take a comprehensive eleventh grade exam in the form of these two tests, the only ones authorized by state regulations. The DOE's continuing imposition of its illegal graduation policies clearly violates students' rights to graduate and obtain a diploma under existing law, jeopardizing the high school completion prospects of current students, most urgently Class of 2016 seniors.

B. Directing DOE to Cease Imposition of the New Graduation Requirements is Essential to Protect Students' Rights

Petitioners contend that, as long as the DOE's graduation policies are not codified as rules under the APA, the agency cannot apply those policies to current high school students. A directive that DOE cease imposing the new policies is necessary and appropriate to remedy DOE's continuing violation of the Act, existing regulations and the APA.[9] Thus, this Court should conclude that DOE has imposed new graduation policies without adherence to the APA and in violation of the Act and the assessment regulations. Further, the Court should issue an order directing DOE to cease imposing the illegal policies on high school students.

DOE characterizes the requested relief as limited to a declaration that DOE violated the APA and other legal provisions. Resp. Br. at 19. But Petitioners' requested relief is a "declaratory ruling that the DOE's new graduation requirements" violate existing statutes and regulations "and, therefore, cannot be applied to, or imposed upon, high school students and school districts." Verified Pet. ¶ A; see also Pet'r. Br. at 3. In other words, Petitioners seek a determination that the Act and existing assessment regulations remain the law governing graduation, and that imposing alternate policies upon high school students is unlawful. *See* Verified Pet., Demand for Relief (including request for declaratory ruling and other "equitable and just" relief). Such determination is essential to provide immediate relief to thousands of

[9] Even if DOE could accurately assert when and if its proposal will eventually be adopted, current students will languish under an illegal system in the interim. For this reason, Petitioners additional requested relief, which the DOE ignores—a declaratory ruling that new graduation policies cannot be imposed to deny diplomas to current students—is still essential to protect current students from ongoing violations of their legal rights, especially for seniors expecting to graduate in just a few months.

students facing denial of a high school diploma for failure to meet the illegally imposed new policies.[10]

DOE's makes two arguments as to why Petitioners' requested relief is improper. Both are without merit. First, Respondent claims that this Court cannot order the Commissioner of Education ("Commissioner") to direct the State Board to propose and adopt regulations. This argument is frivolous, as Petitioners do not seek an order that the State Board promulgate regulations. Rather, they seek a declaration that DOE cannot impose new graduation rules that have not been duly adopted through the APA process. Of course, the State Board can continue to pursue rulemaking that may lead to the codification of DOE's graduation policies. However, the State Board's commencement of rulemaking in no way prevents or otherwise prohibits the entry of appropriate relief with regard to those students, including Petitioners, who are being subjected to rules which have not been duly authorized and are thus entirely *ultra vires*.

Second, DOE contends that Petitioners claim for relief must fail because they did not proceed by way of a petition for rulemaking before the agency. *N.J.A.C.* 6A:6-4.1 provides that "[a]n interested person may petition the State Board to adopt a new rule or amend or repeal an existing rule set forth in Title 6A." As explained above, Petitioners do not seek an order requiring agency rulemaking. DOE, not Petitioners, changed the *status quo* by imposing new graduation policies without adherence to the APA to effect that change. DOE's contention also makes no sense given that the State Board has begun the rulemaking process. DOE cites no

[10] For that reason, the requested relief is not "moot," as suggested by DOE. Indeed, a case is moot when a court's decision "can have no practical effect on the existing controversy." *Redd v. Bowman*, 223 N.J. 87, 104 (2015) (internal quotation omitted). As explained *supra*, DOE has not adopted revised regulations aligned with its new graduation requirements. The continuing imposition of these requirements is a clear violation of law, necessitating a ruling that DOE cannot use these policies to deny students a diploma. Respondent is thus flatly incorrect that initiating the rulemaking process means "there is not further relief that can be granted." Resp. Br. at 19.

authority to suggest that Petitioners should have commenced a parallel rulemaking process, and no such authority exists.[11] In any event, as discussed above, if DOE wanted to apply its new graduation policies to high school students, it was required to await commencement and completion of the rulemaking process by the State Board. Simply put, Petitioners are under no obligation to effect this change by filing a petition for rulemaking as it is the DOE itself that unilaterally changed the rules.[12]

C. DOE Has Recognized, through its College and Career Ready Task Force, that the Relief Sought by Petitioners is Necessary and Appropriate

In October 2011, DOE formed the College and Career Ready Task Force, which was tasked with ensuring that New Jersey had appropriate high school graduation requirements and assessments to comport with the knowledge and skills students should master for college and career readiness. Karp Cert. at ¶ 11. In April 2012, Governor Chris Christie released the "Final Report of the New Jersey Department of Education College and Career Readiness Task Force" ("the Report") and endorsed its recommendations. Karp Cert. at ¶ 13.

The Report recommended a three-phase transition from current graduation exams including HSPA to graduation requirements based on performance on end-of-course assessments. Karp Cert. Exh. B. at 46. The first phase would "depend on the continued administration of the HSPA during the development of the new end-of-course assessments." *Id.*

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[11] Contrary to DOE's assertion, Petitioners do not seek to circumvent the Petition for Rulemaking or any other required steps in the rulemaking process to "achieve immediate adoption of new graduation regulations." Resp. Br. at 15. Rather, Petitioners argue that DOE's ongoing violation of the Act and the assessment regulations compels immediate judicial relief.

[12] Similarly, Respondent asserts that Petitioners should have filed a Petition for Declaratory Relief pursuant to *N.J.A.C.* 6A:3. This discretionary procedure is available for "interested person(s)" to obtain a clarification of law from the Commissioner. *N.J.A.C.* 6A:3-2.1(a). Thus, it is clearly inappropriate to address Petitioners' claims, which require an adjudication of whether DOE's imposition of its new graduation policies violates existing law, and judicial relief to remediate this violation.

The third phase would "provide for the full implementation of a system of end-of-course assessments and new graduation requirements, in which a minimum proficiency (i.e., passing) score will be established for each end-of-course assessment, and which students will be required to meet in a certain number of end-of-course assessments to be eligible for graduation." *Id.* at 47. Between these two phases, the requirements were to be as follows:

> Students will be required to take the newly developed end-of-course assessments, and the scores will be recorded on their transcripts. Aggregate student results will also be posted on the New Jersey School Report Card. *However, the state Department of Education will not establish a minimum proficiency (i.e., passing) score as a graduation requirement during this phase. Instead, graduation will be dependent on satisfactory completion of the required courses, as established by local boards of education, with accountability coming from a more robust transcript.*
>
> *Id.* (emphasis added).

The Governor also announced that the graduating classes of 2016, 2017, and 2018 would "pilot" the new PARCC assessments but "graduate based on a robust transcript while the state adapts to the new assessments." Karp Cert. at ¶ 13.[13]

Instead of following the phase-in outlined in the Report, DOE has compressed the second and third phases described above. It has set "college-ready proficiency (i.e. passing) scores" after a single administration of the PARCC exams in 2014-2015 instead of the minimum two consecutive administrations as outlined in the Task Force recommendations. Karp Cert. Exh. B. at 50. It has prematurely set a "minimum proficiency score" for use in making graduation

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[13] In 2013, then-Commissioner of Education Christopher Cerf presented the Task Force recommendations to New Jersey superintendents with a slide stating that "[f]or the initial years of PARCC testing, any student currently in high school will not be required to 'pass' the assessments as a requirement for graduation." Christopher Cerf, New Jersey Commissioner of Education, "Superintendent Convocation," Slide 24 (Sept. 19, 2013), *available at* http://www.njspotlight.com/stories/13/09/19/reluctant-acceptance-of-christie-cerf-policies-sets-tone-for-annual-gathering-of-school-chiefs/. The Commissioner's presentation stated that DOE would "undertake a long and thoughtful process to phase in these new assessments as graduation requirements." *Id.*

determinations. And it has discontinued HSPA and AHSA and substituted the PARCC exams as the only state-developed, free graduation exam available to all public school students to satisfy state graduation requirements.

Petitioners requested relief is entirely consistent with the recommendations contained in the Report from its own Task Force: an immediate order directing the agency to cease its illegal action. Indeed, DOE itself has previously acknowledged the necessity of delaying implementation of the new graduation regime it is now imposing on students in violation of law. Thus, this Court should grant Petitioners' request for a ruling that DOE's illegal new graduation policy cannot be imposed to deny diplomas to current high school students. Such relief is proper and essential to remediate the ongoing violation of students' rights, most urgently those of high school seniors whose right to a State-endorsed diploma is imminently threatened.

CONCLUSION

For the reasons stated above and in their original brief in support of the Motion for Summary Decision, Petitioners request that this Court: (1) grant Petitioners' Motion and direct DOE to cease imposing its illegal graduation requirements on current high school students; and (2) deny Respondent DOE's Cross-Motion for Summary Decision.

Respectfully submitted,

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Dated: February 29, 2016

Cc: Angela L. Velez, Deputy Attorney General

Appendix A

2012 WL 1080867
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

EDUCATION LAW CENTER, on Behalf of ABBOTT VS BURKE PLAINTIFF SCHOOL CHILDREN, Appellant,
v.
NEW JERSEY DEPARTMENT OF EDUCATION and New Jersey Schools Development Authority, Respondents.

Submitted March 14, 2012.
Decided April 3, 2012.

On appeal from the Schools Development Authority, Department of Education.

Attorneys and Law Firms

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Jeffrey S. Chiesa, Attorney General, attorney for respondents (Lewis A. Scheindlin, Assistant Attorney General, of counsel; Christopher T. Huber, Deputy Attorney General, on the brief).

Before Judges AXELRAD, SAPP-PETERSON and OSTRER.

Opinion

PER CURIAM.

*1 Plaintiff Education Law Center seeks an order from this court compelling the New Jersey Schools Development Authority (SDA) to adopt by a date certain regulations governing the delegation of school facilities projects to eligible SDA school districts[1] as required by *L.* 2007, *c.* 137, § 24, *codified at* *N.J.S.A.* 18A:7G-13(e)(2) (Section 24). Section 24 required the SDA to adopt the regulations by August 6, 2008. As SDA has provided no justification for further delay, we grant the requested relief. Although plaintiff sought a similar order compelling action by the Department of Education (DOE), which was also required to adopt regulations, *N.J.S.A.* 18A:7g-13(e)(1), plaintiff's request was, the parties concede, rendered moot by DOE's adoption of regulations on April 4, 2011. 43 *N.J.R.* 830(a) (April 4, 2011); *N.J.A.C.* 6A:26-19.

I.

This action has its roots in the State's efforts to remedy inadequacies in educational facilities in poor school districts. The Educational Facilities Financing and Construction Act (EFCFA), enacted in 2000, *L.* 2000, *c.* 72, provided for the financing and construction of school facilities. *N.J.S.A.* 18A:7G-1 to-48. The EFCFA was responsive to the Supreme Court's decision in *Abbott v. Burke*, 153 *N.J.* 480, 519-25 (1998) directing the State to implement a school construction program in thirty-one Abbott school districts. *See also Abbott v. Burke*, 164 *N.J.* 84 (2000) (affirming State responsibility to fund facilities remediation and construction in Abbott districts).

In the wake of criticism of the management of the school construction program under the EFCFA, then-Governor Jon Corzine established an Interagency Working Group on School Construction (Working Group) to develop recommendations for reform. Exec. Order No. 3, 38 *N.J.R.* 1263(b) (Feb. 7, 2006). The Working Group issued three extensive reports proposing comprehensive changes in the school construction program. *See Report to the Governor by the Interagency Working Group for School Construction,* (March 15, 2006); *Second Report to the Governor by the Interagency Working Group for School Construction,* (May 17, 2006); *Third Report to the Governor by the Interagency Working Group for School Construction,* (Sept. 14, 2006) *at* http://www.njsda.gov/RP/Interagency_Working_ Group.html (last visited March 26, 2012). Among the Working Group's numerous recommendations was the proposal to delegate management of school construction projects to capable local school districts:

> EFCFA should also be amended to allow qualified school districts to assume full responsibility for the design and construction of school facility projects. Concomitantly, the legislation should provide for the development and adoption of criteria to evaluate a district's capability to manage all or part of a project involving a major rehabilitation or the construction of a new school.

> Moreover, the legislation should encompass a new initiative to assist districts, as needed, to enhance their capacity to manage such projects.
>
> *2 [*Third Report to the Governor by the Interagency Working Group for School Construction* (Sept. 14, 2006), 14, *at* http:// www.njsda.gov/RP/ Interagency_Working_Group.html (last visited March 26, 2012).]

The Working Group was convinced that delegating management authority to capable local districts would increase efficiencies and promote successful completion of school construction projects. *Id*. at 5, 13–14.

In response to the Working Group's recommendations, the Legislature passed comprehensive legislation that the Governor then signed into law on August 6, 2007 as *L.* 2007, *c.* 137(Act). *See N.J.S.A.* 52:18A–235(g), (h) (recognizing recommendations of Working Group and stating intent to adopt them). Along with creating a new State agency to manage the school construction program and adopting numerous other changes in the EFCFA, the 2007 law authorized SDA to delegate capital maintenance projects to an SDA district and, subject to regulations, authorize the management of other projects. *N.J.S.A.* 18A:7G–13(a). "The development authority may also authorize [an SDA] district to undertake the design, acquisition, construction and all other appropriate actions necessary to complete any other school facilities project in accordance with the procedures established pursuant to subsection e of this section." *Ibid.*

Consistent with that power to delegate, the statute required both the DOE and SDA to adopt regulations pursuant to which DOE would determine whether a district was "eligible" to manage, and SDA would determine whether a district had the "capacity" to manage a school construction project:

> (1) Within one year of the effective date of P.L.2007, c. 137 (C .52:18A–235 et al.), the commissioner, in consultation with the development authority, shall adopt pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B–1 et seq.), rules and regulations by which the commissioner shall determine whether an SDA district is eligible to be considered by the development authority to manage a school facilities project or projects. In making the determination, the commissioner shall consider the district's fiscal integrity and operations, the district's performance in each of the five key components of school district effectiveness under the New Jersey Quality Single Accountability Continuum (NJQSAC) in accordance with section 10 of P.L.1975, c. 212 (C.18A:7A–10), and other relevant factors.
>
> (2) Within one year of the effective date of P.L.2007, c. 137 (C .52:18A–235 et al.), the development authority, in consultation with the commissioner, shall adopt pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B–1 et seq.), rules and regulations by which the development authority shall determine the capacity of an SDA district, deemed eligible by the commissioner pursuant to paragraph (1) of this subsection, to manage a school facilities project or projects identified by the development authority. In making the determination, the development authority shall consider the experience of the SDA district, the size, complexity, and cost of the project, time constraints, and other relevant factors.
>
> *3 [*N.J.S.A.* 18A:7G–13(e).]

As the Act, approved August 6, 2007, became effective immediately, *L.* 2007, *c.* 137, § 62, the deadline for promulgating the required regulations was August 6, 2008. However, the Administration failed to propose or promulgate regulations pursuant to the law adopted to implement its own Working Group's recommendations.

Shortly after the new Administration took office, plaintiff's executive director David G. Sciarra, alerted the Governor's Office and the Attorney General by letters on January 28, and February 23, 2010 of the past delay in adopting regulations and plaintiff's interest in ensuring that SDA and DOE comply with the statutory mandate. On April 15, 2010, Assistant Attorney General Nancy Kaplen responded to the February 23, 2010 letter to the Attorney General, stating the Attorney General had asked the Division of Law to work with DOE and SDA "so that appropriate regulations can be proposed as expeditiously as possible." Plaintiff replied on April 23, 2010 requesting a timeframe for the promulgation of the rules. On May 5, 2010, the Attorney General's office declined to offer a "definitive schedule" for the adoption of the regulations in view of other competing priorities.

On July 1, 2010 plaintiff filed the instant appeal and a motion for summary disposition, seeking an order compelling DOE and SDA to adopt regulations. We denied the motion for summary disposition on September 22, 2010. We then granted two motions by SDA and DOE to stay the appellate proceedings. By order entered November 16, 2010, we stayed the appeal to February 15, 2011, and by order entered April

25, 2011, we stayed the appeal until July 18, 2011, and provided that no further extensions would be granted.

While the appeal was pending, SDA took substantial steps toward adopting regulations but none have yet been promulgated. SDA initially published proposed new rules on October 18, 2010. 42 *N.J.R.* 2380. The rule proposal included seven subchapters. The first subchapter, consisting of seven sections, covered the purposes and applicability of the rules, defined terms, addressed a district's responsibilities under a grant agreement with SDA, described events of default and non-compliance, described remedies for events of default and non-compliance, and provided for termination of grant agreements. Proposed *N.J.A.C.* 19:34B–1.1 to–1.8. Noncompliance and events of default included: a district's failure to perform under the contract, a determination that the grant was obtained fraudulently, a failure to commence or complete the project in a reasonable time, and the district's use of funds for purposes not approved by SDA. Proposed *N.J.A.C.* 19:34B–1.4. SDA's remedies in the event of noncompliance or default included withholding grant disbursements, suspending the grant agreement, and terminating the agreement. Proposed *N.J.A.C.* 19:34B–1.5. The grant agreement could also be terminated upon the mutual agreement of the parties or if SDA determined termination served the project's best interests. Proposed *N.J.A.C.* 19:34B–1.6, 1.7.

***4** Proposed subchapter 2 required an interested district to request a determination that the district possessed the capacity to manage a school facilities project. Proposed *N.J.A.C.* 19:34B–2.2. A district was required to include in its application information about the qualifications of the district's key personnel; the district's experience managing improvement projects and routine maintenance; a description of the routine maintenance required at the school and district level; and the experience of the district in managing and planning procurement, contract management, and budgeting over the past five years. *Ibid.*

The regulations also described the factors the SDA would consider in assessing the district's capacity to manage a school facilities project. Proposed *N.J.A.C.* 19:34B–2.3. The factors outlined included the district's capacity to administer fundamental district responsibilities regarding capital facilities; the qualification of key district personnel; the district's performance of routine maintenance; and the district's rating on the DOE's Quality Single Accountability Continuum District Performance Review for Facilities Operations. *Ibid.* The proposed rules also provided for training if the district were not deemed able to manage the delegable project. Proposed *N.J.A.C.* 19:34B–2.4(d)(3). Training programs would be available in at least the following areas: financial, accounting, and budgeting; planning; procurement and/or prequalification; evaluation of architectural plans; construction management; documentation of best practices; and governance and compliance. *Ibid.*

If found to have the capacity to manage, then a district would be authorized to apply for actual delegation of delegable portions of a project, subject to satisfaction of additional requirements set forth in the rules. Proposed *N.J.A.C.* 19:34B–2.4. The rules established a right to request reconsideration and appeal from a negative decision regarding capacity, or a denial of delegation. Proposed *N.J.A.C.* 19:34B–2.5.

Subchapter 3 included provisions on the execution of grant agreements. Proposed *N.J.A.C.* 19:34B–3.1 to–3.4. Subchapter 4 governed assignment of contracts. Proposed *N.J.A.C.* 19:34B–4.1 to–4.2. Subchapter 5 addressed disbursements and adjustments of the grant. Proposed *N.J.A.C.* 19:34B–5.1 to 5.4. Subchapter 6 covered procurement and award of contracts by districts. Proposed *N.J.A.C.* 19:34B–6.1 to–6.6. Lastly, subchapter 7 addressed district management of the delegated portion of a school facilities project. Proposed *N.J.A.C.* 19:34B–7.1 to–7.5. The public comment period on SDA's initial rule proposal closed December 17, 2010.

DOE's regulations, which were much less extensive than SDA's proposed regulations, were adopted April 4, 2011. 43 *N.J.R.* 830(a) (April 4, 2011). The DOE rules describe the required components of a district's application to be considered eligible to manage its own facilities projects and the benchmark indicators on the District Performance Review that must be met for a district to be eligible for consideration. *N.J.A.C.* 6A:26–19.3. The DOE rules also require the commissioner to notify school districts of the results of DOE's eligibility determination, allow a district to request a review of a negative eligibility finding once the district meets the benchmark indicators, and allows the commissioner to rescind a district's eligibility if the district no longer meets the requirements. *N.J.A.C.* 6A:26–19.4.

***5** In support of its March 2011 motion to further stay the appeal, the deputy attorney general then handling the case

certified, "The Schools Development Authority anticipates that its regulations pursuant to N.J.S.A. 18A:7G-13(e) will be published for adoption in the New Jersey Register dated July 18, 2011." However, that did not occur. Instead, SDA determined that comments to its initial proposed rule-making warranted significant changes in its proposed rules, which required re-notice and re-publication. Consequently, on September 6, 2011, SDA published "proposed substantial changes upon adoption to proposed new rules section 13.e delegation of school facilities projects." 43 *N.J.R.* 2288(a). In its re-publication, SDA proposed changes—some minor and some significant—to seven proposed sections of its proposed rules. *See* Re-proposed *N.J.A.C.* 19:34B–1.5, 2.3, 2.4, 2.5, 3.3, 3.4, 6.5 and 6.6.

With regard to non-compliance or events of default under a grant agreement, the re-proposed rules specified that a district that was required to take corrective action would have at least thirty days to do so. Re-proposed *N.J.A.C.* 19:34B–1.5(a)(1). The new proposal also inserted deadlines and time periods governing SDA's provision of notices to districts, including notices to terminate a grant agreement. Re-proposed *N.J.A.C.* 19:34B–1.5(a)(2). The provision on requests for reconsideration and appeal was amplified to provide for informal hearings, and formal hearings before the Office of Administrative Law. Re-proposed *N.J.A.C.* 19:34B–2.5.

The re-proposed rules also addressed commenters' concerns that SDA's review and pre-approval of certain contractors might prevent a district from acting within sixty days of receipt of bids as required by public bidding law. Re-proposed *N.J.A.C.* 19:34B–3.3; *see* N.J.S.A. 18A:18A-36. The new rules "clarif[ied] the nature of the approvals required, and [ ] reflect the possibility that the district will be required to request an extension of the 60-day period for contract award...." 43 *N.J.R.* 2290.

The proposed changes also clarified the respective responsibilities of SDA and a district pertaining to retention of site remediation professionals. In summary, the re-proposed rulemaking clarified:

> [D]espite the Authority's engagement of a Licensed Site Remediation Professional to monitor the performance of remediation activities during the construction process, the school district, as owner of the remediated property, continues to bear responsibility for engagement of an environmental consultant ... to perform or supervise any long-term environmental obligations, such as groundwater testing or monitoring, required to comply with environmental laws and standards.
>
> [43 *N.J.R.* 2290.]

Written comments to the re-proposed regulations were due by November 5, 2011.43 *N.J.R.* 2288(a). As of our writing, SDA has not published any further action.

***6** Plaintiff filed its initial brief on September 30, 2010 and presented the following points on appeal:

> THE DOE AND SDA ARE IN VIOLATION OF N.J.S.A. 18A:7G-13(e) AND SHOULD BE ORDERED SUMMARILY TO COMPLY WITH THE STATUTE'S CLEAR MANDATE
>
> 1. This Court Has Exclusive Jurisdiction To Review the DOE's and SDA's Inaction.
>
> 2. ELC Has Standing To Challenge The Inaction of the DOE and SDA.
>
> 3. The DOE and SDA Have Violated the Clear, Legislatively–Defined Deadlines in *N.J.S.A.* 18A:17G–13(e) to Adopt Rules and Regulations.

SDA filed its opposition brief on July 18, 2011. Plaintiff's reply brief was filed on July 29, 2011. Thus, the parties' briefing predates publication of SDA's re-proposed rules on September 6, 2011.

II.

We have exclusive jurisdiction to review a state administrative agency's inaction. *See In re Mar. 22, 2002 Motion to Dismiss and Intervene in the Petition of Howell Twp.*, 371 N.J.Super. 167, 187 (App.Div.), *certif. denied*, 182 N.J. 140–41 (2004) (*"Howell Twp."*); *In re Failure by the Dep't of Banking and Ins. to Transmit a Proposed Dental Fee Schedule*, 336 N.J.Super. 253, 261 (App.Div.), *certif. denied*, 168 N.J. 292 (2001); (*"In re Failure "*); *Hosp. Ctr. at Orange v. Guhl*, 331 N.J.Super. 322, 329 (App.Div.2000); *The Equitable Life Mortg. and Realty Investors v. N.J. Div. of Taxation*, 151 N.J.Super. 232, 238 (App.Div.1977) (*"Equitable Life "*); *R.* 2:2–3(a)(2) (The Appellate Division has jurisdiction to "review final decisions or actions of any state administrative agency or officer...."). [2] The principle applies both to adjudicative inaction, *see, e.g., Hospital*

Center at Orange, supra, (appeal to compel agency to decide hospitals' appeals from administrative rate determinations), and rule-making inaction, *see, e.g., In re Failure, supra,* (appeal to compel agency to revise dental fee schedule embodied in regulation), and *Equitable Life, supra,* 151 *N.J.Super.* at 238 (review of agency rulemaking exclusively rests with appellate court).

We recognize that an appeal to compel state agency action may be brought in the Law Division, "but only if the inaction complained of is the nonperformance of mandated ministerial obligations." *Equitable Life, supra,* 151 *N.J.Super.* at 238. *See also Hosp. Ctr. at Orange, supra,* 331 *N.J.Super.* at 329 n. 2 ("There is some authority for the view that the Law Division has jurisdiction to entertain an action to compel a state agency to perform a ministerial duty.") (citing *Pfleger v. State Highway Dep't,* 104 *N.J.Super.* 289 (App.Div.1968) and *Colon v. Tedesco,* 125 *N.J.Super.* 446 (Law Div.1973)). However, the mandated obligation here—to devise rules—involves the exercise of significant discretion. *See Equitable Life, supra,* 151 *N.J.Super.* at 238 ("Agency rulemaking is not a ministerial function but rather a highly discretionary undertaking.").

***7** Although we have jurisdiction to consider an appeal from agency inaction, we exercise our power to compel agency action sparingly, mindful of the general deferential standard of review of agency action, and the separation of powers. "We can overturn only those administrative determinations that are arbitrary, capricious, unreasonable, or violative of expressed or implicit legislative policies." *In re Failure, supra,* 336 *N.J.Super.* at 263. We generally defer to an agency's interpretation of its own statute. *Id.* at 265. We are ill-equipped to micromanage an agency's activities. *Sod Farm Assocs. v. Twp. of Springfield,* 366 *N.J.Super.* 116, 130 n. 10 (App.Div.2004); *In re Failure, supra,* 336 *N.J.Super.* at 262. Thus, we allow an agency wide discretion to decide "how best to approach legislatively assigned administrative tasks." *Ibid.* In so doing, we avoid intruding upon the separate powers of the Executive Branch. *U.S. Trust Co. of New York v. State,* 69 *N.J.* 253, 259 (1976) (denying mandamus to compel Port Authority of New York and New Jersey to adopt mass transit plan in part because it would intrude upon the powers of the Governors and Legislatures to control the Authority's policy-making), *rev'd on other grounds,* 431 *U.S.* 1, 97 *S.Ct.* 1505, 52 *L.Ed.*2d 92 (1977); *In re Failure, supra,* 336 *N.J.Super.* at 261–62 (noting separation of powers concerns).

SDA argues that we should decline to grant plaintiff relief because: (1) the matter is moot, since it has commenced the rulemaking process and (2) it has not arbitrarily failed to enact regulations. We are unpersuaded.

First, the matter is not moot so long as regulations are not promulgated. "An issue is 'moot' when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." *Greenfield v. N.J. Dep't of Corrs.,* 382 *N.J.Super.* 254, 257–58 (App.Div.2006) (citation omitted). "Consequently, if a party 'still suffers from the adverse consequences ... caused by [a] proceeding,' an appeal from an order in that proceeding is not moot." *N.J. Div. of Youth & Family Servs. v. A.P.,* 408 *N.J.Super.* 252, 261–62 (App.Div.2009) (citation omitted), *certif. denied,* 201 *N.J.* 153 (2010). Until SDA actually adopts regulations, the legislative mandate for rule adoption has not been satisfied. Moreover, we presume the failure to finally promulgate rules has prevented the actual delegation of management authority to SDA districts—a policy adopted in the 2007 statute, in which plaintiff has an obvious interest.

Second, we conclude that the agency's significant efforts in proposing and re-proposing rules do not excuse the most recent unexplained delay in complying with the statutory mandate. In its July 2011 brief, SDA argued that delays in adoption were a consequence of the mandates of the Administration Procedures Act (APA), *N.J.S.A.* 52:14B–1 to–4.10. We do not question the agency's determination that its changes to its initial proposal required a second round of comments. *See In re Provision of Basic Generation Servs. for Period Beginning June 1, 2008,* 205 *N.J.* 339, 358 (2011); *N.J.S.A.* 52:14B–4.10; *N.J.A.C.* 1:30–6.3. However, SDA represented that final adoption would soon follow the end of that comment period. "After the sixty (60) day public comment period, it is anticipated that a Notice of Adoption will be submitted for publication in the New Jersey Register." Yet, the comment period ended in November of last year, and no adoption notice has been published.

***8** We have been presented with no justification for this additional delay. Nor is one apparent. We have not been provided with the comments that may have been submitted in response to the September 2011 re-proposal. Therefore, we shall not speculate whether those comments raised new and knotty issues that justify new and time-consuming deliberations. However, we have reviewed the substance of SDA's regulations, the issues the revisions addressed, and conclude that the scope of the changes in the re-proposed

rules, although significant, were limited. Based on the record before us, including the agency's published proposals, there is no apparent basis for continued delay.

Where an agency violates the express policy of its enabling act, as SDA has done here by violating the clear deadline for promulgating a rule, an agency action may be deemed to have acted arbitrarily and capriciously. *Pub. Serv. Elec. & Gas Co. v. N.J. Dep't of Envtl. Prot.*, 101 N.J. 95, 103 (1985) (in determining whether action is arbitrary and capricious, a court may consider "whether the agency action violates the enabling act's express or implied legislative policies"); *In re Failure, supra*, 336 N.J.Super. at 263. When an agency action, or in this case, inaction, is unsupported by substantial credible evidence in the record, or is accompanied by no reasonable explanation—as is the case here—then we may likewise conclude it is arbitrary, capricious, and unreasonable. *Pub. Serv. Elec. & Gas Co., supra*, 101 N.J. at 103 (arbitrary and capricious determination may also look to whether substantial evidence in the record supports the agency's findings upon which it based its action); *Gilliland v. Bd. of Review*, 298 N.J.Super. 349, 354–55 (App.Div.1997) (deeming agency action arbitrary and capricious where no explanation is provided to support it). Consequently, our intervention is justified.

Our decision in *In re Failure, supra,* does not compel a different result. The plaintiff in that case sought relief in the nature of mandamus to compel the Department of Banking and Insurance to issue revised fee schedules to reflect inflation, consistent with a statutory provision requiring such revisions every two years. However, the agency's obligation to issue rulemaking was not nearly as clear as SDA's in this case. We recognized that the starting point for the two-year period in *In re Failure* was debatable. 336 N.J.Super. at 264–65. Moreover, intervening statutory amendments authorized the Department to contract out development of fee schedules. *Id.* at 265. The Department also determined, in what we viewed as a valid exercise of its discretion, to change the underlying basis for its fee schedule, which necessitated significantly more work than simply inflation-adjusting a previous schedule. *Ibid.* Recognizing that the agency was in the midst of revising the schedule, we concluded, "requiring that the Department complete the task or even directing completion by a specific time has the potential of interfering with the orderly workings of the Department." *Id.* at 262–63

***9** No such extenuating circumstances justify SDA's continuing delay in this case. The deadline for action indisputably was August 7, 2008. No intervening legislation has complicated SDA's rulemaking process. Moreover, SDA has not advised us of any fundamental policy deliberations that have impeded the completion of its rulemaking. Rather, we have the representations of the agency's attorneys in July 2011 that adoption was imminent.

Having concluded that it is appropriate to compel SDA to complete its rulemaking task by a date certain, we must consider what deadline to impose. Plaintiff asked us to require adoption of final rules within thirty days of the close of the most recent comment period, which would have been December 5, 2011. SDA has had almost five months to consider comments submitted in response to its publication of re-proposed rules.

If SDA fails to submit a notice of adoption of its rule proposal by April 18, 2012, its rule proposal will expire, as eighteen months will have elapsed since the publication of its original rule proposal on October 18, 2010. *See* N.J.S.A. 52:14B–4.1(e) (stating that a rule proposal, followed by a notice of substantial changes, shall expire eighteen months after the date of publication of the notice of proposal). If the rule proposal expires, then SDA will need to re-commence the rule-making process. However, we shall not dictate to SDA whether to adopt its current proposal, or to begin anew with a different rule. That involves a policy judgment for the agency. *See Howell Twp., supra*, 371 N.J.Super. at 188 (stating the court shall not "compel a specific form of agency action" but may order "a remedy for arbitrary inaction").

Therefore, SDA shall submit a notice of adoption of its current rule proposal by the April 18, 2012 deadline, or it shall publish a new rule proposal within thirty days of the filing date of this opinion, and submit a notice of adoption with respect to that new proposal within thirty days after the close of the new comment period.

All Citations

Not Reported in A.3d, 2012 WL 1080867

Footnotes

1 "SDA district" is defined as "a district that received education opportunity aid or preschool expansion aid in the 2007–2008 school year." *N.J.S.A.* 18A:7G–3.

2 SDA does not challenge plaintiff's standing and we accept it.