

IN RE N.J.A.C 6A:8  
STANDARDS AND ASSESSMENT

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION

DOCKET NO. A-000768-16T4

CIVIL ACTION

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APPELLANTS' REPLY BRIEF

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## PRELIMINARY STATEMENT

Respondents have jettisoned New Jersey's decades-old regime of administering a single graduation exam in English language arts ("ELA") and mathematics in the eleventh grade as required by the Proficiency Standards and Assessments Act ("the Act"). In the face of the Act's precise and clear language, its longstanding agency implementation, and the evidence of legislative intent, Respondents argue the Act is "sufficiently ambiguous" to justify their stark and unprecedented changes. Without question, it is not.

Respondents make clear that switching to multiple end-of-course PARCC tests is their preferred policy. But this choice is not Respondents' to make. It is left solely to the Legislature. Respondents' belief that the amendments represent better public policy is no excuse for imposing rules that directly contradict the Act.

Respondents also fail to address the constitutional defect in imposing substitute graduation tests not aligned with state curriculum standards. They likewise cannot justify the use of fee-based substitute tests that result in unequal treatment and discrimination. Our Constitution and Law Against Discrimination simply do not permit a two-tiered system of educational opportunity.

## LEGAL ARGUMENT

### I. THE AMENDED REGULATIONS ARE INVALID BECAUSE THEY CONTRADICT THE PLAIN LANGUAGE OF THE ACT

Respondents attempt to justify imposing PARCC end-of-course exams as New Jersey's graduation assessment in the amendments to N.J.A.C. 6A:8 by asserting the Act is "sufficiently ambiguous that it may be susceptible to more than one plausible interpretation." Respondents' Brief ("Db") at 21 (quoting Wilson v. City of Jersey City, 209 N.J. 558, 572 (2012)). The Act's language, however, is far from ambiguous. It is precise and not susceptible to multiple interpretations. For decades, the Department of Education ("DOE") has implemented the Act in accordance with its plain terms and legislative intent. Because the amendments directly contradict the Act, they are invalid.

#### A. The Amended Regulations Fail to Implement a Graduation Exam for All Eleventh Grade Pupils

First, the Act's plain language supports only one interpretation: a graduation exam that must be administered to all students in eleventh grade. This Court and the Supreme Court have made abundantly clear that, when interpreting a statute, "[i]f the plain language leads to a clear and unambiguous result, then [the court's] interpretive process is over." Richardson v. Bd. of

Trustees, Police & Firemen's Ret. Sys., 192 N.J. 189, 195 (2007); see also, e.g., State of New Jersey v. S.R., 175 N.J. 23, 31 (2002); State of New Jersey v. McKeon, 385 N.J. Super. 559, 567-68 (App. Div. 2006); Db21 (conceding that courts examine extrinsic evidence of legislative intent only when the statute's language is "sufficiently ambiguous").

This Court need not look beyond the Act's language to conclude that the amended regulations contradict its clear meaning. The Act mandates that the Statewide graduation assessment be administered to "all 11<sup>th</sup> grade pupils and to any 11<sup>th</sup> or 12<sup>th</sup> grade pupil who has previously failed" it. N.J.S.A. 18A:7C-6. The Act also expressly refers to the "graduation proficiency test to be administered to all 11th grade pupils." N.J.S.A. 18A:7C-6.1. Nothing could be more straightforward and unambiguous. Despite Respondents' assertions to the contrary, the phrase "11th grade pupils" cannot be interpreted in any way other than exactly what it says: an assessment administered to students in the eleventh grade.<sup>1</sup>

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<sup>1</sup> Respondents suggest that "grade" indicates a level of knowledge rather than a specific point in time, citing the dictionary definition of "grade" as "rank, quality, proficiency, intensity, or value." Db25. While the word "grade" in other contexts may have multiple meanings,

Second, there is no support for Respondents' claim that the switch to end-of-course PARCC tests is justified because the State Board of Education "understood" the Act to require a graduation exam "which tests if students have reached an eleventh grade proficiency level - whenever that level is reached." Db22. Respondents proffer no evidence in the Act's language, history or record of agency implementation to support an "understanding" of the Act as allowing anything other than an eleventh grade assessment. Because Respondents construct their rationale for the end-of-course PARCC exams out of whole cloth, this Court is "in no way bound by the agency's interpretation of [the] statute." Utley v. Bd. of Review, Dep't of Labor, 194 N.J. 534, 551 (2008) (internal quotation omitted).

Moreover, Respondents' explanation that "the State Board designated the PARCC ELA 10 and Algebra I exams as the appropriate assessments for measuring mastery of the proficiencies expected of eleventh-grade students," Db23, is belied by the State's curriculum standards themselves. The math standards are not organized by grade level, but rather by "conceptual categories" including Algebra, and Respondents present no reason, within the specific framework of New Jersey's K-12 education system, to construe the unambiguous phrase "11th grade pupil" as anything other than a pupil in the eleventh grade.



"do not mandate the sequence of high school courses." N.J. Student Learning Standards for Mathematics (2016), <http://www.state.nj.us/education/cccs/2016/math/standards.pdf>, at 59, 89. Put simply, the math standards do not designate a set of skills that can be identified as eleventh grade proficiencies. Even if they did, mastery of such skills would not be properly assessed by an Algebra I test designed to evaluate only one of the six conceptual categories comprising the high school math standards.

The ELA curriculum standards are organized by grades 9-10 and 11-12, and "[s]tudents advancing through the grades are expected to meet each year's grade-specific standards." N.J. Student Learning Standards for ELA (2016), <http://www.state.nj.us/education/cccs/2016/ela/> ("Ninth and Tenth Grades" and "Eleventh and Twelfth Grades, at 1). Thus, even if the Act's requirement could be construed to mean an "11th grade proficiency level" - rather than an eleventh grade exam - the appropriate corresponding test would not be ELA 10. For Respondents to declare that "11<sup>th</sup> grade pupils" means "11<sup>th</sup> grade proficiency" and, at the same time, that the appropriate graduation assessment is a test administered in tenth grade and measuring tenth grade curriculum standards, is so

implausible that it should be rejected outright. In re Suspension of Teaching Certificate of Van Pelt, 414 N.J. Super. 440, 446 (App. Div. 2010) (holding that an agency's interpretation of a statute "will be reversed where it is plainly unreasonable" (internal quotations omitted)).

Third, even if the Court resorts to examining evidence of legislative intent, such evidence confirms an express mandate for an eleventh grade test. The Legislature made clear its intent to require the graduation assessment in a specific grade when it amended the Act in 1988 to move the exam's administration from ninth to eleventh grade. P.L. 1979, ch. 241, sec. 6, § 3, 1988 N.J. Laws 168. The Legislature then demonstrated its satisfaction with the agency's interpretation of this provision by, for now over twenty years, taking no action to interfere with the eleventh grade administration of the exam. TAC Assocs. v. N.J. Dep't of Env'tl. Prot., 202 N.J. 533, 545 (2010) (citing the Legislature's longstanding refusal to intervene as "acquiescence in" and "acceptance" of an agency's statutory interpretation).<sup>2</sup>

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<sup>2</sup> Respondents assert that the Legislature's 2015 addition defining a "state assessment" as one "administered to all students in a specific grade level or subject area," N.J.S.A. 18A:7C-6.4 & 6.5, supports the switch to end-of-course PARCC exams. Db25-26. Yet this definition

Fourth, any lingering doubt as to the Act's intent has been removed by the Legislature's response to the imposition of PARCC ELA 10 and Algebra I as the graduation assessments. In the wake of Respondents' adoption of the amendments, both the Assembly and Senate publicly affirmed the mandate for an eleventh grade graduation exam. The Assembly's concurrent resolution states:

The new Statewide graduation assessment is not an 11th grade exam as required by statute. The PARCC ELA 10 is administered in 10th grade and explicitly tied to a 10th grade course, and the PARCC Algebra I test is also not an 11th grade exam, as it is administered at the end of the year that a student takes the Algebra I course, which could be any grade.

ACR No. 215, 217th Leg. (2017) (emphasis added). The Assembly concludes that because the amendments violate the eleventh grade requirement and other statutory mandates, they "are not consistent with legislative intent." Id.

Further, on April 20, 2017, the Senate President and Chair of the Senate Education Committee advised Respondents that the Act's required graduation assessment

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expressly permits State assessments to be administered to students based on their specific grade in school, independent of the subject matter or proficiencies tested. The definition is wholly consistent with the Act's mandate, unchanged since 1988, requiring the graduation exam be given to all eleventh grade pupils.

"must be administered to all students in the 11th grade."<sup>3</sup> The Senate leaders also expressed their position that the PARCC ELA 10 and Algebra I exams - "administered in the 10<sup>th</sup> grade" and "at the end of whichever year the student completes the course" - violate the Act's eleventh grade graduation exam requirement, concluding that the amended regulation "is inconsistent with and violates the intent of the Legislature." Id.

Finally, lacking any legal basis for imposing the PARCC end-of-course exams under the Act, Respondents assert that the agency's policy preferences justify the new rules. See, e.g., Db22 (new assessments facilitate remediation);<sup>4</sup> Db23 (Study Commission and stakeholders

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<sup>3</sup> The April 20, 2017, letter from Senators Sweeney and Ruiz is available at <http://www.politico.com/states/f/?id=0000015b-92ac-de92-a17b-9efc65fb0001>.

<sup>4</sup> Respondents contend that the PARCC end-of-course exams further the Act's objective of providing remediation to struggling students. Db22, 26-27. But this objective does not countenance disregarding the Act's specific mandate to test all eleventh grade pupils for graduation proficiency, as "specific words and phrases control[] or limit[] more general words and phrases" in statutory interpretation. Lewis v. Bd. of Trustees, Pub. Employees' Ret. Sys., 366 N.J. Super. 411, 416 (App. Div. 2004). Further, while Respondents may desire "flexibility," Db20, 28, the agency's discretion in rulemaking is cabined by the specific authority accorded by the Act. If Respondents believe policies outside the Act's parameters will advance the interests of students, they must seek amendatory legislation. See In re Adoption of N.J.A.C. 5:96, 215 N.J. 578, 619 n.17 (2013) (policy

reviewed merits of PARCC exams). But it is abundantly clear that agency rulemaking is bounded by the four corners of the enabling statute and no policy objective, however well-intentioned, can justify exceeding its plain language and legislative intent. See Fedor v. Nissan of N. Am., Inc., 432 N.J. Super. 303, 325 (App. Div. 2013) (holding that absent statutory authorization a court cannot base its rulings on "general policy arguments" and those arguments "need be directed to the Legislature"). Moreover, while courts generally defer to an agency's "specialized expertise" in rulemaking, N.J. Ass'n of Sch. Adm'rs v. Cerf, 428 N.J. Super. 588, 596 (App. Div. 2012) (quotation omitted), such deference does not apply to "an agency's construction of a statute" because such "strictly legal determinations" are a judicial function. Patel v. N.J. Motor Vehicle Comm'n, 200 N.J. 413, 420 (2009). Respondents' policy judgments do not permit the adoption of rules that ignore and override express mandates of the Act.

B. The Amended Regulations Fail to Implement One Comprehensive Graduation Exam

Respondents claim that despite the Act's requirement of one comprehensive graduation exam - defined as a "test

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arguments regarding regulations should be "advanced in the legislative arena").

in reading, writing, and computational skills," N.J.S.A. 18A:7C-1 - they have the authority to break up the exam into two end-of-course tests, the PARCC ELA 10 and Algebra I, and can administer those tests years apart. Db27-28. Testing the different content areas with separate exams whenever students complete the corresponding courses is far beyond the Act's explicit mandate for a single comprehensive test covering these subjects. Once again, Respondents ignore the plain language and decades of settled interpretation of the Act.<sup>5</sup>

At bottom, Respondents' position that they can administer separate tests at varying grade levels rests entirely on their assertion that they have made a more beneficial policy choice. Db28. As explained at Section I.A, supra, any authority Respondents may have to make policy decisions through implementing rules is circumscribed by the Act's plain language. If Respondents consider separate end-of-course tests to be their

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<sup>5</sup> The HSPA was given to first-time takers "over a three-day period." DOE, "Your Guide to the HSPA" (Mar. 2014), [http://www.state.nj.us/education/assessment/hs/hspa\\_guide\\_english.pdf](http://www.state.nj.us/education/assessment/hs/hspa_guide_english.pdf), at 2. Contrary to Respondents' assertion, Db27-28, offering re-testing opportunities on sub-portions of the HSPA does not equate to initial administration of separate PARCC ELA 10 and Algebra I tests that can be taken three or more years apart.

preferred policy, "[t]hese arguments need be directed to the Legislature." Fedor, 432 N.J. Super. at 325.

C. The Amended Regulations Fail to Implement Retesting Opportunities

Respondents do not dispute that the amended regulations, on their face, fail to guarantee the retesting opportunities required by the Act. Db15, 28. The Act expressly requires the graduation assessment be administered "to any 11th or 12th grade pupil who has previously failed to demonstrate mastery . . . on said test." N.J.S.A. 18A:7C-6. But the amendments related to graduating classes through 2020 strike the language in the previous rule requiring "repeated administrations" of the designated graduation exam, Pa92, and, instead, specify that students who fail to demonstrate proficiency on PARCC ELA 10 and Algebra I will only have "the opportunity to demonstrate such competence through one of the alternative means." N.J.A.C. 6A:8-5.1(f).

Unable to identify any retesting provision in the rules, Respondents resort to sub-regulatory materials to support their claim that retesting opportunities exist on the PARCC end-of-course exams. Db28-29 (citing testing schedules and memorandum). But neither Respondents' numerous PARCC guidance memos, nor their assessment

calendars, mention, let alone offer, retesting on these assessments for students unable to pass them upon completion of the corresponding course.

For example, while DOE's 2017-18 assessment calendar provides for three PARCC administrations, they only correspond to first-time test takers and do not designate "re-testing" opportunities for students who did not pass on the first administration.<sup>6</sup> Similarly, DOE's "PARCC Clarification" memos provide guidance about the PARCC testing status of more than a dozen categories of students, yet again make no mention of re-testing opportunities for students who previously failed.<sup>7</sup> Even if Respondents' sub-regulatory guidance could cure the fatal defect of failing to implement the Act's retesting mandate - which it cannot - these materials do not support Respondents' contention that opportunities for retesting will be guaranteed to the thousands of students who need to

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<sup>6</sup> See <http://www.state.nj.us/education/assessment/20172018TestingCalendar.pdf>. HSPA assessment calendars specifically provided retesting windows for seniors who did not pass the previous spring. See, e.g., DOE, Testing Calendar for 2014-2015 School Year, <https://homeroom5.doe.state.nj.us/broadcasts/2014/FEB/25/10929/2014-2015%20Testing%20Memo.pdf>.

<sup>7</sup> See, e.g., DOE, 2016-2017 PARCC Clarification Document, <http://www.state.nj.us/education/assessment/district/120916Clarification.pdf>.



exercise this right.<sup>8</sup>

D. The Amended Regulations Prevent Access to An Alternative Assessment

Respondents assert the amendments' requirement that students beginning with the class of 2020 take all PARCC tests associated with their courses in order to access the alternative graduation assessments is consistent with the Act. Db30-31. This assertion conflicts with the Act's plain language. The Act mandates that "any 12th grade student" who has not met the graduation assessment requirement "but who has met all the credit, curriculum and attendance requirements shall be eligible" for an alternative graduation assessment. N.J.S.A. 18A:7C-3 (emphasis added).

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<sup>8</sup> While the regulations afford students in the classes of 2021 and beyond "multiple opportunities" to take the PARCC exams designated for graduation, N.J.A.C. 6A:8-5.1(g), Respondents fail to show how this right can be effectuated for all students. High school seniors taking Algebra I for the first time will not have retesting opportunities on the corresponding PARCC exam, or retesting in both eleventh and twelfth grades as the Act requires. N.J.S.A. 18A:7C-6. Respondents incorrectly assert that seniors taking Algebra I for the first time would not satisfy the math curriculum requirements and be unable to graduate. Db29-30. The graduation regulations specify "[a]t least 15 credits in mathematics, including algebra I or the content equivalent," N.J.A.C. 6A:8-5.1(a)(1)(ii), but there is no mandated "sequence of high school courses," N.J. Student Learning Standards for Mathematics at 89. A senior taking Algebra I can still fulfill all curriculum requirements but will be denied retesting opportunities under the amended regulation.

Respondents argue the new condition imposed by the amendments falls within the purview of the Act because participation in all PARCC exams is a curriculum requirement under N.J.A.C. 6A:8-4.1(c). Db31. However, Section 4.1 specifically governs the "Statewide assessment system," not curriculum requirements, which are explicitly governed by other regulatory provisions, see, e.g., Section 3.1 ("Curriculum and instruction"). The Act clearly does not make access to graduation alternatives conditional on general participation in the State assessment system, as Respondents suggest, and the Act's implementing regulations cannot do so either.<sup>9</sup> In re Adoption of N.J.A.C. 7:26B, 128 N.J. 442, 450 (1992) (judicial deference "does not go so far as to permit" the agency "to give a statute any greater effect than is permitted by the statutory language").

II. THE USE OF SUBSTITUTE COMPETENCY TESTS AS A GRADUATION ASSESSMENT OPTION VIOLATES THE EDUCATION CLAUSE

Respondents attempt to justify use of substitute

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<sup>9</sup> That PARCC tests are not a "curriculum requirement" is further evidenced by the fact, well-documented by DOE, that thousands of students who do not pass the PARCC exams nevertheless receive full curriculum credit for the corresponding course. N.J. State Bd. of Educ., "PARCC: Next Steps" (Nov. 4, 2015), at 3, available at <http://www.nj.gov/education/schools/achievement/15/parcc/NextSteps.pdf>.

competency tests that violate the Education Clause of the New Jersey Constitution by framing them merely as extra graduation pathways that ease transition to the new assessment system. Db33-35. It is well-established, however, that courts will invalidate agency regulations that "offend[] the State or Federal Constitution." In re Six Month Extension of N.J.A.C. 5:91-9 et seq., 372 N.J. Super. 61, 91 (App. Div. 2004). Respondents' designation of substitute standardized tests such as the SAT, ACT, ASVAB-AFQT, and Accuplacer as a graduation assessment option violates the Education Clause in two distinct ways: 1) these tests are not aligned to state standards, as Respondents admit; and 2) some of these tests are fee-based, violating the core principle that the State's public education system be open to all free of charge. Either of these violations is sufficient grounds to invalidate the amended regulations.

Respondents' Brief acknowledges that "the substitute competency examinations are not specifically aligned to the State curriculum standards."<sup>10</sup> Db35. They seek to

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<sup>10</sup> As discussed in Appellant's opening brief, Pb30-32, an assessment system based on the State's curriculum content standards is a key element of the standards-based education upheld as constitutional by the Supreme

excuse the absence of alignment because the tests "serve the statutory purpose of demonstrating college and career readiness." Db34. This contradicts Respondents' repeated assertions that PARCC tests better fulfill the Act's purpose because they measure student achievement of the state standards. E.g., Db22-23. But even if the statutory purpose were satisfied by a regulation permitting use of the substitute tests, it must still conform with the fundamental condition that an essential component of a constitutional thorough and efficient education, N.J. Const., art. VIII, § 4, is an assessment system that evaluates mastery of the State's curriculum standards.

Respondents' assertion that the use of fee-based substitute competency tests does not violate the constitutional mandate of free public education, Db35-36, must also be rejected. The contention that these substitute tests are justified because they ease the transition to the PARCC assessment regime, Db33-35, might be persuasive if the benefits did not inure unequally based on wealth, aiding the transition to PARCC end-of-course exams for wealthier students more than their peers, particularly vulnerable, at-risk students.

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Court. Abbott v. Burke, 149 N.J. 145, 152, 162 (1997) ("Abbott IV").

Respondents argue that using fee-based tests can be condoned because all students have access to the PARCC tests and the portfolio appeal at no cost, and no student is required to take a substitute competency assessment. Db35. This ignores the intolerable reality that students who cannot afford the fee to take a substitute test, or cannot obtain a fee waiver,<sup>11</sup> are afforded fewer options and opportunities to fulfill the graduation assessment requirement and secure the all-important New Jersey high school diploma.<sup>12</sup> The fact that all students have access to a cost-free way to graduate does not justify offering additional opportunities for graduation more accessible to students with financial means. S. Burlington Cnty.

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<sup>11</sup> Respondents again assert that the existence of fee waivers ameliorates this problem, Db36, without addressing the fact that fee waivers are limited and only available to those meeting certain criteria. Poorer students will still have limited access to a smaller range of tests, and be able to afford fewer administrations.

<sup>12</sup> Although "many high school students" take certain substitute tests "in preparation for applying for college," Db33, this does not mean students have equal access to them. For example, DOE data for 2014 shows that combined SAT/ACT participation rates for twelfth graders were 64% in District Factor Group ("DFG") A districts and 70% in B districts compared to 99% in J districts and 94% in I districts. See DOE, N.J. Sch. Performance Reports, 2013-14, <http://www.nj.gov/education/pr/1314/database.html>. DFGs "represent an approximate measure of a community's relative socioeconomic status" as determined by DOE. <http://www.nj.gov/education/finance/rda/dfg.shtml>.

NAACP v. Mt. Laurel, 92 N.J. 158, 209 (1983) (holding that poverty cannot be "the basis for imposing further disadvantages"). Moreover, Respondents erroneously rely on Abbott v. Burke, 119 N.J. 287, 306 (1990) ("Abbott II") for the proposition that as long as the constitutional minimum level of educational opportunity is provided, exceeding that minimum is permissible. Db34. But that decision stands for the principle that "the constitutional mandate is fully satisfied regardless of the fact that some districts may exceed it," id. (emphasis added); it does not condone differential opportunity for poorer and wealthier students within each district. A two-tiered system of educational opportunity, in which there are some free pathways to graduation and many others that cost money, runs afoul of both the language and the spirit of the Education Clause's mandate for a "system of free public schools." N.J. Const., art. VIII, § 4, ¶ 1.

III. THE USE OF FEE-BASED SUBSTITUTE TESTS WILL DISPARATELY IMPACT THE EDUCATIONAL OPPORTUNITIES OF PROTECTED GROUPS OF STUDENTS

The use of fee-based substitute tests will disparately impact New Jersey's Black, Hispanic, and English Language Learner ("ELL") students because they

are more likely than their white counterparts to be from low-income families and therefore have less access to these test options. As Appellants demonstrate in their opening brief, Pb36-38, this disparate negative impact on protected groups violates the Law Against Discrimination. N.J.S.A. 10:5-1 et seq.

Respondents assert that Appellants must provide statistical proof these students are prevented from graduating. Db37-38. Yet Respondents ignore that the right disparately impacted by the use of fee-based tests is the opportunity to obtain a free public education, including a high school diploma. See, e.g., Abbott v. Burke, 153 N.J. 480, 530 (1998) ("Abbott V") (holding that the State is constitutionally obligated to "provide to all students in its public schools an opportunity to achieve a thorough and efficient education"). It is beyond dispute that fees impose a barrier that limits low-income students' access to that opportunity. Indeed, the fee waivers Respondents highlight exist precisely because it is universally recognized that low-income students have less access to fee-based tests. Thus, Appellants need only show that protected groups of students, including racial minority and ELL students, are disproportionately

low-income, bearing the brunt of Respondents' decision to limit access to testing opportunities through the use of fee-based tests. Appellants' statistics demonstrating this fact, Pb37, are uncontested.

As explained at Section II, supra, the existence of a free assessment option does not justify the use of other fee-based options that disparately impact, and therefore discriminate against, Black, Hispanic, and ELL students. Respondents are simply unable to offer any reason why the "transitional" nature of the regulation imposing use of fee-based tests - which applies to five years of graduating classes - makes it any less demanding of compliance with our State's bedrock legal protections against discrimination.

#### CONCLUSION

For the foregoing reasons, Appellants ask this Court to invalidate the amendments to N.J.A.C. 6A:8.

Respectfully submitted,

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Dated: July 14, 2017