



January 13, 2015

David C. Hespe, Commissioner  
NJ Department of Education  
P.O. Box 500  
Trenton, NJ 08625-0500

Re: Proposed Graduation Policy/Administrative Procedure Act

Dear Commissioner Hespe:

Our organizations write to bring to your attention the need for the Department of Education (DOE) to comply with the rulemaking provisions of the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 et seq., if the Department intends to implement newly proposed substantive policy changes to New Jersey's current regulatory standards for high school graduation.

As you know, current DOE regulations identify the High School Proficiency Assessment (HSPA) and the Alternative High School Assessment (AHSA) as "major components" of the "Statewide Assessment System." N.J.A.C. 6A:8-4.1(c). These rules also specify that to receive a "State-endorsed diploma," students must "demonstrate proficiency in all sections of the HSPA or the AHSA process applicable to the class graduating in the year they meet all other graduation requirements." N.J.A.C. 6A:8-5.1(a)(6).

In 2012, the DOE announced the development of plans to phase-out the HSPA and AHSA with the 2015 graduating class as part of the transition to a new state assessment system. DOE Memorandum, "High School Assessment Transition to the Common Core State Standards," September 10, 2012. In 2013, the DOE proposed re-adoption of the current regulations requiring students to demonstrate proficiency on the HSPA and AHSA for graduation. 45 N.J.R. 1323(a) (June 3, 2013). In comments on the proposed rules, Education Law Center urged the

State Board of Education (SBOE) to "defer final adoption" because the DOE "has not yet outlined the graduation policies that will govern use" of the new assessments, "an issue that will have to be addressed well before" the February 2018 sunset date on the proposed regulations. ELC Testimony to SBOE, March 6, 2013. In response, the DOE stated that:

...the comments regarding PARCC assessments...do not affect the graduation requirements addressed in the amendments. If modifications to the regulations are necessary in the future to address assessment updates and the resulting impact on graduation requirements, the Department will revisit the regulations at that time.

45 N.J.R. 2545 (December 16, 2013).

As we explain, the DOE, through memoranda to school districts, has proposed significant "updates" to New Jersey's assessment policy that will alter the graduation requirements codified in the existing regulation. Accordingly, the DOE must now revisit those rules under the APA.

The memoranda issued by the DOE over the past several months propose implementation of new "graduation requirements for the class of 2016, 2017, and 2018" to replace the HSPA and AHSA. The memoranda describe these requirements as part of "New Jersey's transition from the High School Proficiency Assessment (HSPA) to the Partnership for the Assessment of Readiness for College and Careers (PARCC) End-of-Course assessments." DOE Memorandum, UPDATED: Graduation Requirements for the Classes of 2016, 2017, and 2018, December 2, 2014. The memoranda also inform districts that, for the 2016 through 2018 classes, students will be required to demonstrate proficiency in English Language Arts and Mathematics to obtain a high school diploma as follows: 1) by achieving a "cut score" on the new PARCC exams; 2) meeting or exceeding the "concordant cut scores on third-party college readiness assessments" or "substitute assessments" designated by the DOE;<sup>1</sup> or 3) satisfying "the

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<sup>1</sup> The "college readiness" and "substitute assessments" designated by the DOE to date are: SAT, ACT, ACT Aspire, Accuplacer Write Placer, Accuplacer Elementary Algebra, PSAT, and the Armed Services Vocational Aptitude Battery-Armed Forces Qualification Test. DOE Memorandum, UPDATED: Graduation Requirements for the classes of 2016, 2017, and 2018, December 2, 2014

criteria" of a DOE "portfolio appeal process." DOE Memorandum, Graduation Requirements for the classes of 2016, 2017, and 2018, September 30, 2014; DOE Memorandum, UPDATED: Graduation Requirements for the classes of 2016, 2017, and 2018, December 2, 2014.

Thus, for the classes of 2016-18, the DOE has informed districts, through sub-regulatory memoranda, that the HSPA and AHSA will be replaced with the new PARCC assessments and several commercial college entrance tests, along with a new "portfolio appeals process."

These changes in New Jersey's assessment and graduation policy, as set forth in the DOE memoranda, possess the well-established hallmarks of actions that require agency rulemaking under the APA. The changes will have statewide coverage, apply generally and uniformly to similarly situated students, operate prospectively, prescribe new legal standards and directives, are not clearly inferable from existing state statutes, and reflect a material and significant change from the previous agency position on graduation testing. See e.g., Metromedia, Inc. v. Dir. of Taxation, 97 N.J. 313, 331-32 (1984). Moreover, the changes alter the existing provisions of N.J.A.C. 6A:8-5, which designate the HSPA and AHSA as the assessments required for students to demonstrate proficiency for high school graduation. Implementation of the proposed changes, therefore, necessitates rulemaking under the APA.

Rulemaking in this instance furthers the APA's core objective: affording stakeholders - parents, teachers, district administrators, advocates, lawmakers and others who are directly impacted by, and concerned with, the DOE's proposed changes in graduation policy - notice and the opportunity for input on the specific standards and criteria the DOE will employ to implement the proposed policy. Further, rulemaking also affords the DOE the opportunity to clarify several important issues raised, but not specifically addressed, in the proposals set forth in the DOE memoranda. Among the issues in need of clarification are the following:

- 1) Use of PARCC: The DOE is proposing to set "cut scores" for the PARCC exams to make "graduation determinations in the Fall of 2015." DOE Memorandum, Graduation Requirements for the classes of 2016, 2017, and 2018, September 30, 2014. The DOE has also indicated that "passing the PARCC assessment" will not be "a requirement for graduation for the classes of 2016, 2017, and 2018." DOE Memorandum, Transitioning to PARCC Frequently Asked Questions, October 2, 2014. Rulemaking is necessary to clarify how and when the

graduation standard will be set for the PARCC assessments and whether taking the PARCC exams is a prerequisite for students to utilize the other DOE-designated criteria for determining eligibility for graduation.

2) Accommodations for English Language Learners: Under current regulations, districts "may administer the AHSA" to English language learners (ELL) "in their native language, when available, and/or English." N.J.A.C. 4.1(d)(1)(i). The DOE 2014-15 Administration Manual for AHSA provides that if an ELL student "requires a language other than the state developed translations (Spanish, Gujarati, Haitian-Creole and Portuguese)," districts "may translate" the English AHSA "into that language." See DOE Alternative High School Assessment Final Administration Manual 2014-2015 School Year. Under the DOE proposed policy, AHSA will be eliminated and the new PARCC assessments in English Language Arts "will be available in English only." DOE Memorandum, Clarification Document Regarding Partnership for Assessment of Readiness for College and Careers (PARCC) End-of-Course Mathematics and English Language Arts Assessments, October 21, 2014. DOE data indicate that, over the past decade, more than half of the high school ELL student population typically did not pass the HSPA and relied heavily on the AHSA to satisfy state graduation standards. Given the phase-out of the AHSA, rulemaking must address how the DOE will provide equal accommodations and opportunities for ELL students under the new graduation standards.

3) Use of Commercial College Entrance Exams: The DOE is proposing to utilize commercially-produced, fee-based college entrance tests, such as the SAT and ACT, as a high school graduation standard. The DOE, through rulemaking, must establish the criteria for utilizing these assessments to determine proficiency in New Jersey's mathematics and language arts curriculum standards, and how at-risk, low income students will be accommodated to access these commercial tests, which are not administered without cost, but require a fee payment by the test taker.

4) The Portfolio Appeals Process: Under statute, an alternative assessment of proficiency for graduation is required, "utilizing techniques and instruments other than standardized tests" for seniors who have not passed the designated state graduation exam. N.J.S.A. 18A:7C-3. The AHSA has fulfilled that requirement, used annually by between 10,000 to 15,000 students for graduation. With the elimination of the AHSA, it is likely that a significant number of students will have to rely on the DOE's proposed "portfolio

appeals process" as an alternative.<sup>2</sup> The DOE has provided, to date, almost no information as to how and when the new appeals process will be implemented by local educators. It is imperative, therefore, that the DOE propose standards and criteria for this process, including timelines, standards and procedures for accessing the appeals process, along with criteria for determining proficiency through that process.

For these reasons, we request that the DOE immediately take steps to publish appropriate rules as necessary to implement all facets of the proposed graduation policy, including clarifying the issues set forth above, for public review and comment, consistent with the requirements for agency rulemaking under the APA. See N.J.S.A. 52:14B-4; N.J.A.C. 6A:6.

We stand ready to work with your Office to ensure proper compliance with the APA and other state laws in the implementation of graduation requirements that provide all students, particularly those at-risk and with special needs, a fair, meaningful and equitable opportunity to obtain a New Jersey high school diploma. Thank you for your attention to this matter.

Sincerely,



David Sciarra, Esq.  
Executive Director  
Education Law Center  
[dsciarra@edlawcenter.org](mailto:dsciarra@edlawcenter.org)  
60 Park Pl Suite 300  
Newark, NJ 07102  
973-624-1815



Ed Barocas, Esq.  
Legal Director  
ACLU-NJ  
[ebarocas@aclu-nj.org](mailto:ebarocas@aclu-nj.org)  
P.O. Box 32159  
Newark, NJ 07102  
973-642-2084

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<sup>2</sup> The DOE has also acknowledged that 30 to 40% of the current junior class - the graduating class of 2016 - "are not expected to take a PARCC End-of-Course assessment in mathematics, but must still demonstrate competency in mathematics in order to receive a state-endorsed diploma." DOE Memorandum, Graduation Requirements for the classes of 2016, 2017, and 2018, September 30, 2014. This represents more than 30,000 students, many of whom may also need to utilize the portfolio appeals process to demonstrate proficiency in mathematics.