



July 15, 2016

VIA REGULAR AND ELECTRONIC MAIL

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Re: Comments on Proposed Amendments to *N.J.A.C.* 6A:8, Proposal Number PRN 2016-072
Submitted by Education Law Center and American Civil Liberties Union of New Jersey

Education Law Center ("ELC") advocates to ensure educational opportunity for New Jersey's public school children under state and federal law. The American Civil Liberties Union of New Jersey ("ACLU-NJ") strongly supports and defends the constitutional rights of students, including the right to obtain a thorough and efficient public education without being subject to discrimination and without regard to economic status. On their behalf, we submit these comments on the proposed amendments to New Jersey's Standards and Assessment regulations, *N.J.A.C.* 6A:8. ELC and ACLU-NJ have expressed concerns about the new policies in previous oral testimony before the State Board of Education ("State Board"), and submit these written comments to detail the range of policy and legal problems raised by the proposed regulations.

The amended Standards and Assessment regulations proposed by the New Jersey Department of Education ("NJDOE") designate the PARCC ELA 10 and Algebra I tests as the

primary graduation assessment requirement, in place of the previously used High School Proficiency Assessment (“HSPA”). *N.J.A.C. 6A:8-5.1(a)(6)* (proposed). The proposed rules also make other pathways available as alternatives to fulfill the graduation assessment requirement, in place of the previously used Alternative High School Assessment (“AHSA”), and these vary by graduating class year. For the classes of 2016 through 2019, students who do not take or do not pass the PARCC ELA 10 and/or Algebra I can fulfill the requirement through passing other PARCC exams, one of the substitute competency tests (SAT, ACT, etc.), or satisfying the portfolio appeals process. *N.J.A.C. 6A:8-5.1(f)(1)* (proposed). For the class of 2020, the alternatives are the same, except that students must “take all applicable high school end-of-course PARCC assessments for all courses in which they are enrolled” in order to access the other alternatives. *N.J.A.C. 6A:8-5.1(f)(2)* (proposed). For the class of 2021 and beyond, the only alternative to passing PARCC ELA 10 and Algebra I is the portfolio appeal; as with the class of 2020, the alternative is only available if a student has taken all PARCC exams for which he or she is eligible. *N.J.A.C. 6A:8-5.1(g)* (proposed).¹

ELC and ACLU-NJ’s continued concerns about the proposed Standards and Assessment regulations described above reflect overlapping legal and policy issues. NJDOE has already imposed new graduation requirements on the class of 2016, which led to a legal challenge by New Jersey parents and students represented by ELC and ACLU-NJ. In the settlement agreement signed by NJDOE and ELC on May 6, 2016, NJDOE acknowledged that it “did not adopt the new graduation standards pursuant to the Administrative Procedure Act.” That

¹ NJDOE provides further explanation of the proposed regulations in a memo accompanying the proposal, Memorandum from Commissioner David C. Hespe to Members, State Board of Education on “N.J.A.C. 6A:8, Standards and Assessment,” Apr. 6, 2016 (hereinafter “Department Memo”), and in a document summarizing public comments and NJDOE’s responses, State Board of Education, Administrative Code Comment/Response Form, Standards and Assessments, Apr. 6, 2016 (hereinafter “Comment/Response Form”).

decision violated the rights and disrupted the plans of thousands of seniors in the class of 2016 over the past year and, for some, that disruption continues into the current summer months.

Now—even before NJDOE has any evidence or data on the full impact of these policies—it seeks to codify these rules for future classes. ELC and ACLU-NJ submit that these proposals are legally and educationally unsound. The State Board should not adopt the proposed rules; instead, it should refer the issues back to NJDOE with instructions to ensure that there is statutory authority for any future changes and that any proposed regulations avoid the following legal and policy concerns.

I. POLICY CONCERNS

The two PARCC exams the State Board seeks to designate as future graduation requirements, ELA 10 and Algebra I, do not satisfy New Jersey’s Proficiency Standards and Assessments Act, *N.J.S.A.* 18A:7C-1 *et seq.* (hereinafter “Graduation Statute”), which requires a comprehensive test in math and language arts administered to all eleventh grade students. The statute further requires a “state graduation proficiency test” that assesses “levels of proficiency in reading, writing and computational skills to be demonstrated as a minimum requirement for high school graduation” and that “measure[s] those basic skills all students must possess to function politically, economically and socially in a democratic society.” *N.J.S.A.* 18A:7C-1, 6, 6.1.

NJDOE has provided no evidence to support its assertion that “[t]he end-of-course assessments in ELA 10 and Algebra I were selected as the appropriate assessments for students to demonstrate graduation proficiency as the tests appear to align best with the expectations of the knowledge and skills for graduation established in State statute.” Department Memo at 2. Neither test is given to all eleventh graders and NJDOE has not shown that the PARCC ELA 10

and Algebra I tests measure the minimum graduation proficiencies specified in the Graduation Statute.

In fact, NJDOE's proposals attempt to bypass the Legislature and circumvent the statute by significantly changing the standard for high school graduation in New Jersey without legislative review and authorization. NJDOE has been quite explicit about its plans to use the PARCC assessments to implement a standard of "college and career readiness" for high school graduation. However valid that may be as an education policy goal, it is a sharp departure from the standard authorized by the Graduation Statute as reflected in all previous state assessments since the statute was passed in 1979. Given the potential impact of this new standard, ELC and ACLU-NJ strongly recommend the State Board direct NJDOE to seek legislative review and such revisions of the statute as may be appropriate, rather than have the State Board adopt such a dramatic and unauthorized change solely through rulemaking.

The potential impact of NJDOE's proposals is reflected in the dramatic difference in passing rates on the new PARCC tests compared to the HSPA, which they would replace as graduation exams. The last time the HSPA was administered in 2014, passing rates were 93% for ELA and 79% for math. By comparison, the passing rates on the first administration in 2015 of the PARCC ELA 10 and Algebra I exams were 37% and 36%. Only 27,000 of 72,000 students passed ELA 10 and 33,000 of 92,000 students passed Algebra I. Moreover, under PARCC, the gap in ELA passing rates between economically disadvantaged and non-disadvantaged students grew from 10 points to 22 points. Whatever the relative merits of these tests, it is clear the new PARCC assessments represent a different standard than New Jersey's previous graduation exams and go beyond what the Graduation Statute has authorized as "a minimum requirement for high school graduation." *N.J.S.A.* 18A:7C-1.

Even if the passing rates on the PARCC tests were to double by 2021—an extremely optimistic projection—there would still be nearly 20,000 students failing ELA 10 and 26,000 students failing Algebra I. The students at risk of not receiving a diploma would overwhelmingly be low-income students of color, English language learners (“ELLs”) and special education students in high needs districts.

NJDOE’s own PARCC reports include a chart that perfectly sums up the central flaw in its exit testing proposals. A chart of the Algebra I results emphasizes the “mismatches” between test scores on the PARCC exams and course grades. It shows that “roughly 18% of freshman met or exceeded expectations in PARCC Algebra I yet 75% received Cs or better in their course.” New Jersey State Board of Education, PARCC: Next Steps, Nov. 4, 2015, slide #3, available at <http://www.state.nj.us/education/sboe/meetings/2015/November/public/SBOE%20PARCC%20Next%20Steps.pdf>.

If the real purpose of state testing is to identify and address educational needs, NJDOE should ask schools and districts to use this data to address such discrepancies by focusing on questions such as: does the test measure material that hasn’t been taught, how can instruction or course design be improved, is the test a valid match for the curriculum? These could be useful analyses. Instead NJDOE is proposing policies that fail to address the source of the disparities it highlights, but will penalize students who pass their courses but fail state tests. This makes no educational sense. In fact, while the use of PARCC scores has been curtailed for school accountability and educator evaluation purposes, the pending proposals make high school seniors the first to face high stakes consequences for these new, unproven tests.

It is also relevant to remember that while federal mandates require annual testing once in high school grades, there is no federal requirement to tie those tests to diplomas. Only one third

of all states will use high school exit tests this year, and several have used the transition to new assessment systems to eliminate them. New Jersey should do the same.²

ELC and ACLU-NJ also have multiple concerns about the “transitional policies” NJDOE has put in place even prior to the adoption of new regulations. For example, NJDOE has never adequately explained the basis for the various (and shifting) cut scores on more than a dozen different exams, or what the common standard is between a score of 750 on the PARCC ELA 10 exam and a 31 on the ASVAB military placement test—both of which qualify as graduation standards under NJDOE’s scheme.

NJDOE’s use of English-only, fee-based commercial college entrance tests as high school exit exams raises other concerns. Scores on the SAT and ACT closely correlate to socio-economic status. In 2014, about two-thirds of the seniors in the State’s poorest districts took the SAT or ACT. Their average SAT scores did not reach NJDOE’s proposed cut scores for graduation. About 6000 students had scores near or below the cutoff, while another 4000 didn’t take the tests at all. In the ten largest low-income districts in New Jersey, SAT participation rates were about 70% and average scores were below NJDOE’s diploma cutoff. Under NJDOE’s proposed regulations, these students will be at risk of not graduating, even if they successfully complete all credit, attendance and other local and state requirements.

² The consensus on this issue is growing among both longtime critics of standardized testing and strong supporters of the new common core assessments. See, for example:

New America: The Case Against Exit Exams

<https://www.newamerica.org/education-policy/policy-papers/the-case-against-exit-exams/>

The 74: The Exit Exam Paradox

<https://www.the74million.org/article/the-exit-exam-paradox-did-states-raise-standards-so-high-they-then-had-to-lower-the-bar-to-graduate>

FairTest: Time to Abolish HS Graduation Tests

<http://www.fairtest.org/sites/default/files/TimeToAbolishHSGraduationTests.pdf>

NJDOE’s “transitional policies,” which the proposed regulations would keep in place through 2020, also rely on tests, like the Accuplacer and ASVAB, that are not aligned with state curriculum standards and have not been designed or validated to measure student mastery of those same standards.

The Graduation Statute further mandates that seniors who “previously failed to demonstrate mastery of State graduation proficiency standards” be given retesting opportunities in twelfth grade. *N.J.S.A. 18A:7C-6*. While the proposed amendments mention “multiple opportunities to take the assessments,” *N.J.A.C. 6A:8-5.1(g)* (proposed), it is not clear when or how these opportunities would be provided for end-of-course PARCC exams tied to specific courses that students may no longer be enrolled in during senior year. The Algebra I exam is currently administered across a wide range of grades, from 6-12, making it a particularly poor choice as a graduation test.

The proposed regulations also provide significantly more opportunities for English-speaking students than for ELLs. Although NJDOE has added the Accuplacer ESL to its list of “substitute assessments,” none of the language arts assessments—including the Accuplacer ESL—are available in native languages. While some of the PARCC math tests are available in Spanish, all the PARCC language arts tests are English only. By contrast, the AHSA, which NJDOE has eliminated, was available in four state-provided translations and districts could supplement those with additional native language translations.

Because the State has eliminated the AHSA, the “portfolio appeals” process has taken on added significance. This year the portfolio process, which was the subject of a detailed settlement agreement between ELC and NJDOE, is being used to determine the graduation prospects of more than 10,000 students.

While ELC and ACLU-NJ believe the portfolio option should be retained and improved, this year's experience argues against making it the sole alternative to PARCC as the proposed regulations would do beginning in 2021. NJDOE's guidance on the use of portfolios this year was inconsistent, confusing, and disruptive and imposed new heavy burdens on districts, especially those with large populations of high needs students.

ELC and ACLU-NJ believe NJDOE should develop a more reliable portfolio option as a pathway to high school graduation in place of standardized exit tests and recommend NJDOE adopt the process used successfully by the New York Performance Standard Consortia Schools. *See* Performance Standards Consortium, *Educating for the 21st Century: Data Report on the New York Performance Standards Consortium*, available at http://performanceassessment.org/articles/DataReport_NY_PSC.pdf.

However, narrowing the available graduation pathways to only the PARCC exams and the portfolio review, as NJDOE proposes, would eliminate nearly all the options used to graduate by a majority of the class of 2016. This is another reason the State Board should defer adoption of the proposed regulations until reliable data is available on the graduation pathways used by the 50,000-60,000 seniors in the class of 2016 who did not take or did not pass PARCC. That data, which will not be available until at least the fall, will provide the first full picture of the impact of NJDOE's new policies on graduation and dropout rates. At present, neither the State Board nor NJDOE has any credible evidence about the impact of the graduation requirements they are proposing to adopt.

The new graduation rules have already led to an increase in testing at the very time NJDOE says it is committed to eliminating overlapping layers of assessment. This year, tens of thousands of seniors who did not pass PARCC faced repeated administrations of Accuplacer or

ASVAB or multiple attempts at PSATs, SATs and ACTs, all in addition to NJDOE's implementation of six new end-of-course PARCC exams in grades 9-12.

II. LEGAL VIOLATIONS

In addition to raising serious policy concerns, adoption of the proposed amendments to *N.J.A.C. 6A:8* would violate applicable law in several ways. First, the proposed regulations contradict the New Jersey Graduation Statute they are meant to implement, demonstrating a continued attempt by NJDOE to act outside its authority in instituting new graduation requirements. Second, the amendments infringe the rights guaranteed by the New Jersey Constitution's Education Clause, as interpreted by the State's highest court. Finally, the inclusion of fee-based alternative assessments raises concerns of disparate impact discrimination under Title VI of the Civil Rights Act of 1964 and the New Jersey Law Against Discrimination.

A. Violations of New Jersey Graduation Statute

There are several ways in which the proposed regulations are inconsistent with the statute they purport to implement: the Proficiency Standards and Assessments Act, *N.J.S.A. 18A:7C-1 et seq.*, previously known as the High School Graduation Standards Act ("Graduation Statute"). The State Board should decline to adopt regulations that go beyond its authority as the implementing agency and directly contradict the mandates of the State Legislature.

1. Statutory Requirement of Eleventh Grade Test

The most blatant discrepancy between the Graduation Statute and the proposed graduation regulations is that the proposed regulations do not conform to the statutory requirement of an eleventh grade graduation assessment. Rather, the proposed regulations specify the PARCC ELA 10 and Algebra I tests as the new graduation exam.

The Graduation Statute requires the Commissioner of Education to develop standards for high school graduation including “a Statewide assessment test in reading, writing and computational skills to be administered to all secondary school pupils,” *N.J.S.A.* 18A:7C-1, and requires each district to “establish standards for graduation from its secondary schools” including “[s]atisfactory performance on the Statewide assessment test.” *N.J.S.A.* 18A:7C-2. In 1988, the Graduation Statute was amended to require that the graduation exam be administered in the eleventh grade beginning in the 1993-94 school year, demonstrating that the Legislature has deliberately mandated a specifically eleventh-grade graduation exam. The Graduation Statute now requires that the state graduation proficiency test “be administered to all 11th grade pupils and to any 11th or 12th grade pupil who has previously failed to demonstrate mastery of State graduation proficiency standards on said test.” *N.J.S.A.* 18A:7C-6; *see also* *N.J.S.A.* 18A:7C-6.1 (addressing “development of the graduation proficiency test to be administered to all 11th grade pupils pursuant to section 6”).

The proposed amendments to *N.J.A.C.* 6A:8 change the statewide graduation assessment from the HSPA to the PARCC ELA 10 and Algebra I tests. Section 5.1 of the proposed regulations, entitled “Graduation requirements” and listing the requisites for a state-endorsed diploma, includes “[t]he requirement that all students demonstrate proficiency in the high school end-of-course PARCC assessments in ELA 10 and Algebra I, or through the alternative means set forth at *N.J.A.C.* 6A:8-5.1(f) through (i).” *N.J.A.C.* 6A:8-5.1(a)(6) (proposed). (The alternative means are other PARCC exams, substitute competency tests, and the portfolio appeal, with different alternatives available to different graduating classes.) The Department Memo accompanying the proposed regulations confirms that “[t]he Department proposes amendments throughout the chapter to transition away from the comprehensive High School Proficiency

Assessment (HSPA) to end-of-course assessments in English language arts (ELA) 10 and Algebra I as the Statewide assessment graduation requirement.” Department Memo at 1; *see also id.* at 3, 4, 8, 9 (stating multiple times that the PARCC assessments replace the HSPA).

The new statewide graduation assessment (more accurately, two separate PARCC tests) is not an eleventh grade exam as required by statute. The PARCC ELA 10 is plainly not given in the eleventh grade—it is administered in tenth grade and explicitly tied to a tenth grade (sophomore level) course. The PARCC Algebra I test is also not an eleventh grade exam, as it is administered at the end of the year that a student takes the Algebra I course, which could be in any grade. *See* Department Memo at 2 (explaining that “the end-of-course PARCC assessments are administered at any time when the student completes the related content, regardless of the grade”). In addition to the fact that the math test designated as the graduation requirement, PARCC Algebra I, will not be administered in eleventh grade to any students who have not taken the corresponding course by that time, there could be thousands of eleventh grade students without *any* PARCC exam to take in eleventh grade. *See* Memorandum from Commissioner David Hespe, Graduation Requirements Class of 2016, 2017 and 2018, Sept. 30, 2014 (acknowledging that “approximately 30-40%” of eleventh grade students were enrolled in a math class for which there was no corresponding PARCC exam, let alone the Algebra I test).

The “alternative means” of fulfilling the graduation assessment requirement, set forth in section 5.1(f) through (i) and discussed further below, consist of substitute competency tests such as the SAT and ACT (available as graduation options through 2020), as well as the portfolio appeals process. The substitute competency tests are not specifically eleventh grade tests—at the least, it is clear that students are not guaranteed access to any of these tests in eleventh grade—and the portfolio process takes place in twelfth grade. Even if any of the alternatives were

guaranteed to be provided in eleventh grade, it is the designated state graduation assessment, the PARCC ELA 10/Algebra I, that the Graduation Statute requires be given in eleventh grade.

The fact that the proposed amendments call for a new state graduation assessment (in reality, two tests) that is explicitly not an eleventh grade exam is a facial violation of the statutory requirement that the state graduation proficiency test “be administered to all 11th grade pupils.” *N.J.S.A. 18A:7C-6*.

2. Statutory Requirement of One Comprehensive Graduation Exam

The Graduation Statute requires a single, comprehensive graduation assessment. Support for this interpretation is found in several descriptions of and references to the exam. The statute calls for “a Statewide assessment test in reading, writing *and* computational skills.” *N.J.S.A. 18A:7C-1* (emphases added). It mandates that graduation requirements include “[s]atisfactory performance on *the* Statewide assessment test.” *N.J.S.A. 18A:7C-2* (emphasis added). And it provides that “*the* State graduation proficiency test shall be administered to all 11th grade pupils.” *N.J.S.A. 18A:7C-6* (emphasis added).

The PARCC-centered graduation policy in the proposed regulations runs counter to the requirement of a single, comprehensive graduation exam. The PARCC tests designated as the new graduation assessment requirement—ELA 10 and Algebra 1—are two separate tests. They are each given at the end of the relevant course, with administration of one PARCC exam having no connection to the administration of another. They do not even have to be given in the same grade, let alone in the same sitting as one comprehensive assessment. The Department Memo regarding the proposed amendments reinforces this point, stating that the purpose of the proposed amendments is to “transition *away from the comprehensive* High School Proficiency

Assessment (HSPA) to [PARCC] end-of-course assessments.” Department Memo at 1 (emphasis added).

3. Statutory Requirement of Retesting Opportunities

The Graduation Statute requires that students have multiple opportunities to pass the statewide graduation assessment. The statute mandates that the “State graduation proficiency Test shall be administered to all 11th grade pupils and to any 11th or 12th grade pupil who has previously failed to demonstrate mastery of State graduation proficiency standards on said test.” *N.J.S.A.* 18A:7C-6. Thus, the plain language of the statute requires retesting opportunities in the eleventh and twelfth grades.

The older version of the graduation regulations implemented this statutory requirement by specifying that districts must “provide students who have not demonstrated proficiency on one or more sections of the HSPA following the 11th grade with the opportunity to demonstrate such competence through both repeated administrations of the HSPA and the AHSA process.” *N.J.A.C.* 6A:8-5.1(f). In the amended version of section 5.1(f), which would apply to the classes of 2016 through 2020, the requirement of “repeated administrations” has been stricken from the text. Instead, the proposed regulations specify that districts shall provide students who have not demonstrated proficiency on the PARCC ELA 10 and Algebra I “with the opportunity to demonstrate such competence through one of the alternative means set forth below”; these alternative means are listed as the substitute competency tests, other PARCC assessments, or the portfolio appeal. *N.J.A.C.* 6A:8-5.1(f) (proposed).

Thus, for classes through 2020, there is no provision for retesting of the exams specified as the new graduation assessment requirement: the PARCC ELA 10 and Algebra I tests. NJDOE may view the substitute competency tests as providing the required retesting opportunities. But

there is likewise no provision for retesting on these alternate means of fulfilling the graduation exam requirement. Although an exam such as the SAT can be taken multiple times, compliance with the statute would require automatic re-administration to any eleventh or twelfth grader, which the regulations do not provide and practical considerations (such as fee barriers) preclude. But in any case, the statute requires retesting opportunities of the designated state graduation proficiency test, which the proposed regulations specify as PARCC ELA 10/Algebra I.

There is a retesting provision in the proposed regulations for the classes of 2021 and beyond, but it is unclear how it would be implemented in practice. Proposed section 5.1(g), which applies “beginning with the graduating class of 2021,” states that students may use the portfolio option if they “do not achieve a passing score on both the ELA 10 and Algebra I end-of-course PARCC assessments pursuant to N.J.A.C. 6A:8-5.1(a)6, by the conclusion of their senior year and after multiple opportunities to take the assessments.” But the PARCC exams are end-of-course assessments, “designed to be taken as students are taught the course’s content,” Department Memo at 1, and administered when the relevant course is completed. It may be technically possible to readminister such tests, but that would contradict their stated design. Moreover, in order to comply with the Graduation Statute, there would need to be retesting opportunities in both the eleventh and twelfth grades. If a student takes Algebra I for the first time as a senior, for example, this would be impossible. Proposed section 5.1(g) does not provide retesting opportunities on the ELA 10 and Algebra I tests that would comply with the statute.

For classes through 2020, there is no provision in the regulations to implement the statutory retesting requirement. For the classes of 2021 and beyond, the regulations state simply that there will be retesting opportunities, but do not specify how they will meet the statutory

requirement. For at least some students, the grade-specific retesting opportunities required by statute are not possible under the graduation testing regime laid out in the proposed regulations.

4. Statutory Requirement of Access to an Alternative Assessment

In a provision outlining remedial instruction for students who have not met the state exam requirement by the end of junior year, the Graduation Statute requires that “[a]ny 12th grade student who does not meet said requirements but who has met all the credit, curriculum and attendance requirements shall be eligible for a comprehensive assessment of said proficiencies utilizing techniques and instruments other than standardized tests.” *N.J.S.A.* 18A:7C-3. The AHSA previously functioned as this alternative assessment.

The Department Memo on the proposed amendments to *N.J.A.C.* 6A:8 describes both the substitute competency tests and the portfolio appeal as replacing AHSA. There are serious questions as to whether the substitute competency tests qualify to fill this role, as they are standardized tests. But another troubling inconsistency between the proposed regulations and the statutory provision requiring an alternative assessment is that the regulations make access to the alternative pathways conditional on participation in PARCC. This provision would exclude many students from accessing any assessment alternatives, and therefore from graduation.

The classes of 2016 through 2019 have access to PARCC, substitute competency tests, and the portfolio appeal as parallel avenues to graduation if they do not take or do not pass the PARCC ELA 10 and Algebra I tests. *N.J.A.C.* 6A:8-5.1(f)(1) (proposed). But for the classes of 2020, 2021 and beyond, the regulations premise access to non-PARCC options on participation in PARCC exams (i.e., not “opting out”). For classes after 2019, access to the alternatives to PARCC ELA 10 and Algebra I is only available to students who “take all applicable high school end-of-course PARCC assessments for all courses in which they are enrolled.” *N.J.A.C.* 6A:8-

5.1(f)(2) & 5.1(g) (proposed). Thus, access to the statutorily required option of an alternative exam is conditional on prior participation in other exams.

The Graduation Statute does not make access to the alternative exam conditional on participation in the primary exam, and has not previously been interpreted that way in regulation. Under the previous graduation regime, students who either did not take or did not pass the HSPA were not denied access to AHSA by regulation. Furthermore, the proposed regulations do not condition access to the alternative options only on the designated primary graduation exam(s)—PARCC ELA10 and Algebra I—rather, access is conditioned on participation in all PARCC exams for which the student is enrolled in courses. Such a condition is not supported by the statutory language and would directly contradict its purpose by blocking students from demonstrating graduation proficiency.

NJDOE’s role as an executive agency is to implement the Graduation Statute through regulations, and the breadth of the agency’s discretion to do so is limited by the statute. The fact that the proposed Standards and Assessment regulations do not conform with the Graduation Statute in a number of basic respects demonstrates that NJDOE continues to attempt to impose graduation policies by fiat and outside its scope of authority.

B. Violations of the New Jersey Constitution’s Education Clause

Under the proposed amendments to *N.J.A.C.* 6A:8, “substitute competency tests” can be used as a graduation pathway by students through the class of 2019. The proposed regulations define substitute competency tests as “an alternative set of third-party assessments approved by the Commissioner, including, but not limited to the SAT, PSAT, ACT, ACT-Aspire, ASVAB-AFQT, or Accuplacer.” *N.J.A.C.* 6A:8-1.3 (proposed). This alternative was included in the regulations because of low PARCC passage rates, which endanger the graduation prospects of

many students. *See N.J.A.C. 6A:8-5.1(f)* (proposed) (requiring that, in order to “ensure adequate transition to the new Statewide assessment system, district boards of education shall provide students who have not demonstrated proficiency on the high school end-of-course PARCC assessments in ELA 10 and Algebra I with the opportunity to demonstrate such competence through one of the alternative means set forth” in the regulations, including the substitute competence tests). However, the use of substitute competency tests poses several legal concerns.

Inclusion of substitute competency tests as a means to fulfill the graduation assessment requirement contravenes the Education Clause of the New Jersey Constitution. That clause states that “[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.” N.J. Const. art. VIII, § 4, para 1. Use of substitute competency tests violates the requirements that the state assessment system be aligned with curriculum content standards and that a thorough and efficient education be freely available to all students.

First, the substitute competency tests are not aligned with the State’s curriculum content standards, which have been judicially recognized as an essential element of a thorough and efficient education. In an early decision in the *Abbott v. Burke* case, the New Jersey Supreme Court evaluated the constitutionality of the Comprehensive Educational Improvement and Financing Act and concluded that “the educational content standards prescribed by the new act are an essential component of a thorough and efficient education.” 149 N.J. 145, 152 (1997) (“*Abbott IV*”). Further, the Supreme Court held that the “assessment program” which included HSPT11 (the forerunner of HSPA), was “essential to the success of the standards-based approach effectuated by” the law, because it was “designed to measure student progress toward

achievement of the substantive standards and to provide educators and administrators with the information necessary to take corrective action in those areas where students are failing to achieve at the prescribed levels.” *Id.* at 162.

The assessment system described in *Abbott IV* was explicitly “based on the [content] standards.” *Id.* In contrast, NJDOE freely admits that the substitute competency tests included in the proposed regulations are not aligned with the content standards and do not fulfill the essential function described by the *Abbott IV* court: “*The Department recognizes the substitute competency tests are not aligned with State standards*; however, the tests are being proposed as alternative pathways to demonstrate graduation proficiency only during the transitional period and to ensure students graduating during the transition to PARCC as a graduation requirement have several options by which to demonstrate graduation proficiency.” Comment/Response Form at 13-14 (emphasis added). If an assessment system aligned with state standards is an element of the right to a thorough and efficient education, as the New Jersey Supreme Court has concluded, then instituting pathways to graduation through exams not aligned to state standards—as the proposed regulations do—is a violation of the Education Clause. The fact that the violation will endure for a limited number of years is immaterial.

Second, fee-based access to some of the substitute assessments violates the Education Clause’s requirement of a free public education. The requirement that a thorough and efficient education be free to all students is clear on the face of the Education Clause. N.J. Const. art. VIII, § 4, para 1 (mandating a “thorough and efficient system of free public schools”). The New Jersey Supreme Court emphasized this principal from the beginning of its jurisprudence on the Education Clause. *See Robinson v. Cahill*, 62 N.J. 473, 508, *on reargument*, 63 N.J. 196, 306 A.2d 65 (1973), and *on reh’g*, 69 N.J. 133 (1975) (explaining that the amendment adding the

Education Article to the state constitution “was intended to embody the principle of the 1871 statute that public education for children shall be Free”).

Because the assessment system is part of a thorough and efficient education, access to any part of the assessment system cannot be based on the payment of fees. It is illegal to offer wealthier students more avenues to fulfill the graduation assessment requirement than poor students. There is no support in the text of the constitution or the court’s interpretations of it to impose a cost on students to access any assessments that serve as graduation standards.

C. Violation of Title VI of the Civil Rights Act of 1964

As noted above, several of the exams included in the proposed definition of substitute competency tests, such as the SAT and ACT, are fee-based. Requiring payment to access these exams will negatively affect low-income students, who are statistically more likely to be racial minority and ELL students. Thus, the inclusion of substitute competency tests as a graduation pathway under the proposed regulations raises legal concerns about disparate impact discrimination.

Title VI of the Civil Rights Act of 1964 provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d. State departments of education, including state boards of education, are recipients of federal financial assistance subject to lawsuits under Title VI. *See Horner v. Kentucky High Sch. Athletic Ass’n*, 43 F.3d 265, 272 (6th Cir. 1994).

In addition to prohibiting intentional discrimination, Title VI also bars recipients of federal assistance from taking action that results in a disparate impact on the grounds of race, color, or national origin. *See Guardians Ass’n. v. Civil Serv. Comm’n*, 463 U.S. 582 (1983).

Although the U.S. Supreme Court has held that there is no private right to bring a disparate impact claim under Title VI, *Alexander v. Sandoval*, 532 U.S. 275 (2001), federal departments and agencies may do so, 42 U.S.C. § 2000d-1; *see also* Memorandum for Heads of Departments and Agencies General Counsels and Civil Rights Directors from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division on Executive Order 13166, Oct. 26, 2001 (interpreting *Sandoval* as leaving intact Title VI's disparate impact regulations). The U.S. Department of Education's Office for Civil Rights is empowered to enforce Title VI, and the agency has promulgated regulations for doing so. *See* 34 C.F.R. 100.

The graduation assessment policy set forth in the proposed amendments to *N.J.A.C. 6A:8* will have a disparate impact on high school students based on race and national origin. Low-income students will have more limited access to the graduation pathway of fee-based substitute competency tests, and these low-income students are disproportionately likely to be from racial and ethnic minority groups and to be ELLs. For example, 42% of black students in the State of New Jersey are in districts with free and reduced lunch ("FRL") rates of 75% or higher, 38% of Hispanic students are in districts with FRL rates of 75% or higher, and 50% of ELL students are in districts with FRL rates of 75% or higher. In contrast, only 2% of white students are in districts with FRL rates of 75% or higher.

Fewer opportunities for racial minority and ELL students to access the assessments they must pass to earn a diploma means fewer of these students will graduate. Thus, the new graduation regulations will have a disparate negative impact on racial minority and ELL students. In response to commenters concerned about this barrier to access, NJDOE points to the existence of fee waivers and the fact that not all of the substitute competency tests are fee-based: "The Department disagrees the substitute competency tests could have a socioeconomic or racial

bias since the tests are fee-based as there are opportunities to seek a waiver from the costs of these exams. The Department also has included several no-cost options on the list of accepted substitute competency tests.” Comment/Response Form at 14. But this response does not obviate the fact that wealthier students will have *more* opportunities to take these exams, and thus to graduate. This is because fee waivers are not unlimited, and the fact that only some of the tests are fee-based still means that students who can pay those fees have greater options (variety of tests) and opportunities (number of times they can sit for a test) to fulfill the graduation assessment requirement. Thus, the inclusion of fee-based substitute competency tests will have a disparate impact on racial and ethnic minority and ELL students.

The burden shifting analysis in a Title VI disparate impact case generally follows the analysis in a Title VII employment discrimination case. *See, e.g., Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 276 (3d Cir. 2014). Once a *prima facie* case of disparate impact is established by plaintiffs, “the burden shifts to the defendant to come forward with a substantial legitimate justification, or a legitimate, nondiscriminatory reason, for the contested practice.” *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 145 F. Supp. 2d 446, 483 (D.N.J.), *opinion modified and supplemented*, 145 F. Supp. 2d 505 (D.N.J. 2001), *rev’d sub nom. S. Camden Citizens in Action v. New Jersey Dep’t of Env’tl. Prot.*, 274 F.3d 771 (3d Cir. 2001) (internal quotations omitted). “Finally, if the defendant is able to meet its rebuttal burden, the burden shifts back to the plaintiff to establish either that the defendant overlooked an equally effective alternative with less discriminatory effects or that the proffered justification is no more than a pretext for racial discrimination.” *Id.* (internal quotation omitted).

NJDOE may take the position that substitute assessments have been included as a graduation pathway in the proposed amendments to *N.J.A.C.* 6A:8 for the legitimate reason that

the State wishes to provide students with more opportunities to fulfill the graduation assessment requirement and earn a diploma. However, the State overlooked equally (or more) effective alternatives with less discriminatory effects, such as declining to implement a primary graduation exam that so few students were prepared to pass, or simply disallowing as assessment alternatives any substitute tests with fee barriers to access.

D. Violation of New Jersey Law Against Discrimination

The New Jersey Law Against Discrimination (“LAD”) proscribes discrimination based on race, ethnic origin, and other protected characteristics in “place[s] of public accommodation.” *N.J.S.A.* 10:5-4. Places of public accommodation under the LAD include “any . . . high school . . . or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey.” *N.J.S.A.* 10:5-5(*l*).

The LAD prohibits discrimination in places of public accommodation whether such discrimination takes place “directly or indirectly.” *N.J.S.A.* 10:5-12(f)(1). As with Title VI of the Civil Rights Act, in addition to prohibiting disparate treatment, the LAD prohibits actions that have a disparate impact on protected groups. *See, e.g., Esposito v. Twp. of Edison*, 703 A.2d 674, 679 (App. Div. 1997) (“We have no doubt that disparate impact meets the discriminatory proscriptions of the LAD.” (internal citation omitted)); *Associates Home Equity Servs., Inc. v. Troup*, 778 A.2d 529, 537 (App. Div. 2001).

As explained above, the inclusion of fee-based substitute competency tests in the proposed amendments to *N.J.A.C.* 6A:8 disparately impacts minority and ELL students’ opportunity to fulfill the graduation assessment requirement and obtain a state-endorsed diploma. Thus, the proposed regulations would also violate the LAD and contravene its “overarching

goal” of eradicating discrimination in the State of New Jersey. *Fuchilla v. Layman*, 109 N.J. 319, 334 (1988).

III. CONCLUSION

Given the multiple policy and legal concerns raised herein, we urge the State Board to reject the proposed amendments to *N.J.A.C.* 6A:8 and pursue a different path, one that does not invite further legal challenge or continue the polarizing debate about use of PARCC tests for graduation.

Instead of attempting to shoehorn these flawed proposals into a Graduation Statute they plainly contradict, the State Board should ask the Legislature to revisit and revise the statute itself. Currently pending legislation shows the way: S2147/A3849 would allow state testing to proceed for accountability and diagnostic purposes, including meeting ESSA requirements, but would prevent the results from being used to make diploma decisions for individual students. The State Board should endorse the proposed bill and encourage the Legislature to adopt it.

Last February, NJDOE hailed the fourth straight year of increases in the State’s high school graduation rates. The State Board now faces a clear choice to either continue this progress or sharply reverse it, with the greatest impact on our most vulnerable students.

ELC and ACLU-NJ urge NJDOE to withdraw the pending regulatory proposal and to work with the Legislature, parents, the education community and the public to revise the State’s graduation policies in ways that are consistent with the law and provide better support and more opportunities for secondary students across the state.

Thank you for your consideration of these comments. Please do not hesitate to contact us if we can provide additional information.

Respectfully submitted,



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