

**Testimony Of Education Law Center on
Additional Proposed Amendments upon Adoption**

N.J.A.C. 6A:8-1.3, 3.1, 4.1, 4.3, 5.1, and 5.2

July 28, 2021

Education Law Center (ELC) advocates for educational opportunity for New Jersey public school children under state and federal law. On their behalf, we submit these comments on the New Jersey Department of Education’s (NJDOE) “additional proposed amendments upon adoption” to *N.J.A.C. 6A:8* regarding the Statewide assessment system and State high school graduation assessment requirements. Specifically, these comments address the proposed rules governing high school graduation assessment requirements.

For more than five years, the State Board of Education (State Board) has struggled to adopt graduation rules consistent with New Jersey statutes.

In 2016, the NJDOE imposed new graduation rules on the class of 2016, which, in response to a legal challenge from students and families represented by ELC, it later [acknowledged](#) were improperly adopted.

Later that same year, the State Board adopted rules that advocates, including ELC and the American Civil Liberties Union of New Jersey (ACLU-NJ), repeatedly cautioned were in violation of the state graduation statute, the Proficiency Standards and Assessments Act (*N.J.S.A. 18A:7C-1 to -16*). In December 2018, that position was substantiated when the New Jersey Superior Court, Appellate Division [struck down](#) the rules for violating the “plain language” of the graduation statute. The legal challenge to those regulations was brought by the Latino Action Network, the Latino Coalition of New Jersey, the Paterson Education Fund, the NAACP New Jersey State Conference, and ELC, represented by ELC and the ACLU-NJ.

Following the court’s decision, [a consent agreement](#) provided students through the class of 2022 with multiple pathways to satisfy the assessment requirement mandated by the graduation statute. The agreement also gave the NJDOE additional time to adopt new rules for the classes of 2023 and beyond. Our testimony addresses the State Board’s latest proposal to adopt such rules.

We urge the State Board to reject the proposal for the following reasons:

1. The proposal would impose new graduation rules on students who are already in their junior year of high school. This, in itself, violates the State's long-established standard for "due notice" of such changes. For many years, the state's assessment regulations have required that:

District boards of education shall provide each student *entering high school* and his or her parents or legal guardians with a copy of the district board of education's requirements for a State-endorsed diploma and the programs available to assist students in attaining a State-endorsed diploma, in accordance with N.J.S.A. 18A:7C-5.

N.J.A.C. 6A:8-5.1(e) (emphasis added).

Students in the class of 2023 will be entering their junior year this September after arguably the two most disruptive school years in the state's history. They did not receive notice of their graduation requirements upon entering high school because the State Board failed to adopt new rules in a timely fashion after the previous ones were struck down. They also did not receive such notice during their freshman and sophomore years in high school. To impose new graduation rules and requirements this late in their high school careers—including imposition of a new state test that has not undergone field testing or standard setting—is neither fair to the students and their families nor sound educational policy.

2. The proposed rules would place new restrictions on access to multiple pathways to satisfy the graduation assessment requirement. Under the consent agreement covering classes through 2022, students have had unrestricted access to both the menu of "substitute competency tests" approved by the State Board and the statutorily required, non-standardized, alternative assessment called the portfolio appeal process. This is in addition to the primary pathway of state testing that, in normal school years, provides multiple opportunities to satisfy the graduation assessment requirement during students' high school careers.

However, as Acting Commissioner Allen-McMillan's May 5, 2021, memo says, "Under the Department's revised rulemaking, the classes of 2023, 2024, and 2025...will be required to take the State graduation proficiency test before accessing the substitute competency tests or portfolio appeals process." In other words, students will have to take and fail the newly mandated 11th-grade state test before "accessing" the designated alternatives. Moreover, any student who "opts out" and does not take the state test will not be able to graduate.

This rule will affect tens of thousands of New Jersey high school students. In 2018-2019, the most recent year that the graduation assessment requirement was enforced, about 30% of the graduating class, more than 30,000 students, used alternate pathways to meet graduation requirement for both ELA & Math.

Another 20% of the class, more than 20,000 additional students, used alternate pathways for either ELA or Math. [[Presentation](#) to State Board “2018-19 School Performance Reports and NJSLA-Science Spring 2019 Results” p.12 New Jersey State Board of Education Meeting March 4, 2020]

If the passing rate on the new “comprehensive” graduation test—which the NJDOE says will be “more rigorous than the current graduation assessment standard”—is comparable to current passing rates on the New Jersey Student Learning Assessments, the above data indicate that more than half the class of 2023 will need to complete multiple rounds of assessments to satisfy the graduation testing requirement. Importantly, instead of a four-year window to satisfy the requirement, as recent classes have had, the class of 2023 will have only a single year between the time they receive their scores on the new 11th-grade test and the time they are scheduled to graduate.

Furthermore, because state testing was entirely cancelled due to pandemic conditions during the 2019-2020 and 2020-21 school years, students in the class of 2023 have already missed multiple opportunities to satisfy the proposed graduation requirement. These missed opportunities include state exams that weren’t given, such as the English I, English II and Algebra exams, which are typically given during a student’s freshman and sophomore years, and alternatives like the PSAT10 reading or math tests that were largely unavailable to students on remote instruction.

The pending proposal not only fails to restore these lost opportunities, it places new restrictions on remaining ones.

In any event, the proposed restrictions on the use of alternatives to satisfy the requirement appear designed mainly to pressure students into taking the new 11th-grade exam, rather than serving any larger educational purpose or student or family interest.

3. The “sitting” requirement for accessing the portfolio appeal pathway is especially questionable and is another reason the proposal should be withdrawn. The graduation statute explicitly provides that “[a]ny 12th grade student...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*. This eligibility is not conditioned on taking other assessments.

In striking down the previous assessment rules, the Appellate Division also acknowledged that “the plain language of *N.J.S.A. 18A:7C-3* establishes that any twelfth-grade student who has not passed the graduation proficiency exam but who has satisfied all other ‘credit, curriculum and attendance requirements shall be eligible for’ the alternative assessment.

Furthermore, the NJDOE has clearly changed its position on this issue without adequate explanation. The NJDOE's [presentation](#) of the proposal to the State Board at a special meeting on October 21, 2019, stated quite clearly on p. 5: "There will not be a sitting requirement to access the portfolio appeals process." [\[Standards and Assessments: Proposed Notice of Substantial Changes, October 21, 2019 New Jersey Department of Education\]](#)

During [discussion](#) of the proposal, State Board member Andrew Mulvihill specifically asked then-Assistant Commissioner Linda Eno and the NJDOE team presenting the plan why there was no sitting requirement proposed for the portfolio. Assistant Commissioner Eno responded by citing the statute's requirement that seniors who had not yet passed the state proficiency test be given a non-standardized alternative assessment. To clarify the issue for the audience, State Board President Kathy Goldenberg read directly from the statute and then pointed to the NJDOE chart projected on the screen, declaring, "So that is what we are referring to here [pointing to the chart] in this line, there will not be a sitting requirement to access the portfolio appeals process..." State Board member Ronald Butcher further reviewed the history of the State Board's policy and stated, "I think it's been critical in our discussions that the public does understand, as Kathy just indicated, the legislation says you don't have to sit for the exam to go through the portfolio assessment..." [See [video](#) of 10/21/19 State Board meeting. The relevant discussion begins at about 25 minutes.]

Yet, at the May 5, 2021 State Board meeting, the NJDOE added "agency-initiated changes" to the proposed rules that "upon adoption will clarify that students must take the State graduation proficiency test before accessing the corresponding substitute competency test and/or the portfolio appeals process." Rather than a "clarification," this is a substantial change to the proposal, one that will affect thousands of students and that, on its face, appears to be at odds with the language of the statute.

As noted above, tens of thousands of students each year rely on alternative assessments to earn their diplomas. English learners, who have been particularly impacted by the pandemic, disproportionately utilize the portfolio option. Restricting access to these alternatives could have a significant, negative impact on the state's graduation rate. This is another reason the proposal should be withdrawn.

4. The proposal would require the NJDOE to expend significant staff and financial resources to create a new 11th-grade test. This will stretch the capacity of a Department, which, according to a recent ELC analysis, "has lost a staggering 24 percent of its total workforce overall" since 2014, and is "ill-equipped to tackle the complex challenge of reopening public schools in September after an extended period of remote instruction in response to the coronavirus pandemic."

This new test will be added to a crowded assessment calendar for the 2021-2022 school year that already includes a new round of mandatory “Start Strong” assessments soon after schools reopen in September and the resumption of the New Jersey Student Learning Assessments in the spring.

While federal law mandates annual testing in English language arts and math for students in grades 3-8 and once during the high school grades, there is no federal mandate for graduation testing. New Jersey’s complicated graduation testing rules are a state requirement that stems from the fact that New Jersey remains one of the few states that links high school diplomas to a passing score on a standardized test. Although Governor Phil Murphy campaigned on a promise to eliminate such testing, the 40-year-old law that requires a high school exit test remains on the books.

The research on this issue is clear. Exit testing for high school diplomas is a failed policy that doesn’t help students who pass and hurts students who don’t. Data shows that it increases dropout rates and incarceration rates without improving college participation, college completion levels, or economic prospects for graduates.” [See [The Case Against Exit Exams](#), Anne Hyslop, New America Education Policy Brief, 2014]

It is time to break the pattern of adopting flawed regulations to implement a flawed policy. ELC recommends that, at a minimum, the graduation testing requirement be suspended for the class of 2023 due to lost opportunities to satisfy it during the pandemic and the NJDOE’s delay in adopting new rules and vetting a new high-stakes 11th-grade graduation test. Beyond the minimum, this is also an opportunity to review and replace the 40-year-old New Jersey statute that mandates diploma testing. In recent years more than a dozen states have repealed their exit testing policies. New Jersey should do the same.

Respectfully submitted,

Stan Karp
Director, Secondary Reform Project
Education Law Center
60 Park Place, Suite 300
Newark, NJ 07102
973-624-1815, x28
973-624-7339 (fax)
skarp@edlawcenter.org