

April 6, 2021

Dr. Angelica Allen-McMillan, Acting Commissioner
New Jersey Department of Education
100 Riverview Plaza
Trenton, New Jersey 08625

Kathy Goldenberg, President
State Board of Education
200 Riverview Plaza
Trenton, New Jersey 08625

Re: Latest Proposed Amendments to Graduation Assessment Regulations, N.J.A.C. 6A:8

Dear Acting Commissioner Allen-McMillan and State Board President Goldenberg:

Education Law Center appreciates recent steps by the New Jersey Department of Education (NJDOE) toward enacting long-awaited rules to inform students and families of the high school graduation assessment requirements that will apply to the classes of 2023 and beyond. However, we write to alert NJDOE that a change of critical import contained in the latest version of the proposed regulations, announced yesterday and slated for an adoption vote by the State Board of Education (SBOE) tomorrow, constitutes a “substantial change” that requires public consideration and comment prior to adoption.

On April 5, 2021, NJDOE released, as part of the SBOE’s monthly meeting agenda, a document dated April 7, 2021 detailing proposed amendments to the Standards and Assessment regulations at *N.J.A.C. 6A:8*, to be considered at “adoption level” by the SBOE at its April 7, 2021 meeting.¹ The document states that, beyond the proposed substantial changes made on October 21, 2019 to the original set of amendments proposed on October 3, 2018, “[a]dditional changes for clarity also are being proposed at adoption” (p.1). One of these additional changes would amend *N.J.A.C. 6A:8-5.1(a)(6)*, regarding alternative graduation assessments, making changes to the version contained in the October 21, 2019 proposal. The October 21, 2019 version of Section 5.1(a)(6) provided that students could access the “portfolio appeals” alternative to the State graduation exam without being required to first sit for the exam. However, the version of that provision contained in the April 7, 2021 NJDOE document requires students to first sit for the graduation exam in order to access the portfolio option.

The absence of a sitting requirement to access the portfolio option was a significant feature of the proposed regulations presented to the SBOE on October 21, 2019. It was significant enough to be explicitly referenced by NJDOE officials and discussed by SBOE

¹The document released by NJDOE on April 5, 2021 is available here:
<https://nj.gov/education/sboe/meetings/agenda/2021/April/public/5c%20Item%20C%20Standards%20and%20Assessment.pdf>.

members at the meeting. For example, a PowerPoint presentation by NJDOE to the SBOE on October 21, 2019, regarding the Proposed Notice of Substantial Changes from the October 3, 2018 proposal, stated that under the October 21, 2019 version of the proposed amendments, “[t]here will not be a sitting requirements [sic] to access the portfolio appeals process.”² In contrast, the “Agency-Initiated Changes” section of the comment and response portion of NJDOE’s April 7, 2021 document states that “students will be required to take the State graduation proficiency test before accessing the substitute competency tests or portfolio appeals process” (p.117).

NJDOE’s April 7, 2021 document specifies that the proposed regulations it contains are at “adoption level.” This means they are beyond the period for public notice and comment that is required by the Administrative Procedure Act, *N.J.S.A. 52:14 B-1 et seq.*, as part of the process for promulgation of agency regulations.³ However, New Jersey law requires an agency to provide proper notice and opportunity for public comment when it proposes “substantial changes” to previously proposed regulations. *See N.J.A.C. 1:30-6.3.* NJDOE’s failure to do so in this instance robs the public of the opportunity to be heard on the impacts of this significant proposed change in graduation assessment requirements and deprives NJDOE of valuable feedback from stakeholders before voting to adopt the amended rule.

The last-minute addition of a sitting requirement to access the portfolio is a substantial change that will affect thousands of students. The portfolio assessment is available to seniors who have not satisfied the graduation testing requirement by other means. Thousands of students have relied on access to the non-standardized-test alternative assessment required by New Jersey statute in order to satisfy the graduation assessment requirements in English Language Arts (ELA) and/or Math. The number of students relying on the portfolio option or its predecessors has ranged from a few thousand students annually to as many as 12,000 students in a single year, including a majority of English Learner students.⁴ Thus, a regulation that restricts or narrows student access to the alternative assessment, such as the one proposed in the April 7, 2021 version of proposed amendments to *N.J.A.C. 6A:8-5.1(a)(6)*, will have a significant impact. Under no reasonable interpretation can this be viewed as a change that, as characterized by the April 7, 2021 document, is “non-substantial” and merely provides “clarity” (pp. 1-2).

² The PowerPoint presentation is available here: <https://www.state.nj.us/education/sboe/meetings/agenda/2019/October21SpecialMeeting/2c%20Standards%20and%20Assessment%20Power%20Point.pdf>. The referenced statement appears on page 5.

³ This page of the NJDOE website provides an overview of the process for adopting regulations: <https://www.nj.gov/education/code/process/>. Adoption level is listed as Step 11 of 12.

⁴ In 2019, according to DOE data, 5.6% of all graduates used the portfolio to satisfy the Proficiency Standards and Assessments Act’s ELA testing requirement, and 7.2% used it for the Math testing requirement. Thus, approximately 5,400 students used the portfolio assessment for ELA and almost 7,000 students for Math.

We urge the Department to consider the impact of this newest proposed amendment to *N.J.A.C. 6A:8-5.1(a)(6)*, and to follow proper procedures for public notice and comment if it wishes to propose a new version of the regulation that is substantially changed since the last version presented in 2019.

Sincerely,

A handwritten signature in black ink, appearing to read "David Sciarra".

David G. Sciarra, Esq.
Executive Director

Via Electronic Mail Only

cc: Caroline Jones, Acting Section Chief, Deputy Attorney General
Diane Shoener, Director, State Board Office