



April 6, 2018

VIA REGULAR AND ELECTRONIC MAIL

Diane Shoener, Director

State Board Office, New Jersey Department of Education

100 River View Plaza, PO Box 500

Trenton, NJ 08625-0500

E-mail: [chapter8@doe.state.nj.us](mailto:chapter8@doe.state.nj.us)

Also submitted electronically: <http://www.state.nj.us/education/code/proposed/>

Re: Comments on Proposed Readoption of *N.J.A.C. 6A:8*, Proposal Number PRN 2018-015  
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 readoption of New Jersey’s Standards and Assessment regulations, *N.J.A.C. 6A:8*. Specifically, these comments address the proposed readoption of the rules currently governing high school graduation assessment requirements, which were instituted via amendments to Chapter 8 in September 2016. As explained below, the current Standards and Assessment regulations violate state law. ELC and ACLU-NJ oppose the proposed regulations because they fail to remedy those violations.

The Standards and Assessment regulations designate the Partnership for Assessment of Readiness for College and Careers (“PARCC”) ELA 10 and Algebra I tests as the primary state

graduation assessment requirement, in place of the previously used High School Proficiency Assessment (“HSPA”). *N.J.A.C. 6A:8-5.1(a)(6)*. The rules also establish alternatives to fulfill the graduation assessment requirement, in place of the previously used Alternative High School Assessment (“AHSA”). 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)*. For the class of 2020, the alternatives are the same, but in order to access them students must “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)*. 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, it 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)*.

The State Board has proposed readoption of *N.J.A.C. 6A:8* with only one new amendment: a change in the grade level at which the elementary science exam is administered. The rest of Chapter 8, including the graduation assessment rules, is proposed for readoption without any changes. ELC and ACLU-NJ expressed concerns about these regulations in previous oral and written testimony to the State Board of Education (“State Board”) before they were promulgated two years ago, and currently represent several parent and civil rights organizations in a lawsuit challenging the 2016 amendments that is pending in the New Jersey Superior Court, Appellate Division. The comments herein are submitted to summarize key legal and policy problems associated with readopting the graduation assessment regulations in *N.J.A.C. 6A:8*. Rather than readopting these deeply flawed regulations, the State Board should refer the issues back to the New Jersey Department of Education (“NJDOE”) to develop new

rules that meet statutory and constitutional requirements and represent sound policy for New Jersey's high school students.

The graduation assessment regulations at *N.J.A.C. 6A:8* violate state statutory and constitutional mandates. First, the regulations flatly contradict the statute governing high school graduation requirements that they purport to implement. Second, they infringe the rights guaranteed by the New Jersey Constitution's Education Clause. Finally, the inclusion of fee-based alternative assessments violates the New Jersey Law Against Discrimination.

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

The most obvious discrepancy between the Graduation Statute and the graduation regulations is that the regulations do not conform to the statutory requirement of an eleventh grade graduation assessment. In 1988, consistent with its authority, the Legislature amended the Graduation Statute to move the graduation exam from ninth to eleventh grade. P.L. 1979, ch. 241, sec.6, § 3, 1998 N.J. Laws 168. The statute explicitly requires that the state graduation proficiency test "be administered to all 11th grade pupils." *N.J.S.A. 18A:7C-6*. But the 2016 amendments to the regulations at *N.J.A.C. 6A:8* changed the statewide graduation assessment from the HSPA to the PARCC ELA 10 and Algebra I tests. *N.J.A.C. 6A:8-5.1(a)(6)*. 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 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. This 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*.

In addition to contradicting the plain language of the Graduation Statute, the regulations contradict the stated intent of the Legislature. In the wake of the State Board’s adoption of the 2016 amendments to *N.J.A.C. 6A:8*, both the Assembly and Senate publicly affirmed the mandate for an eleventh grade graduation exam. The Assembly’s concurrent resolution, passed in 2017 by a vote of 69-3, 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 resolution concludes that because the amendments violate the eleventh grade requirement and other statutory mandates, they “are not consistent with legislative intent.” *Id.* In an April 20, 2017, letter to the State Board President and Acting Commissioner of Education, Senate President Stephen Sweeney and Senate Education Committee Chair Teresa Ruiz similarly stated that the PARCC ELA 10 and Algebra I exams violate the Graduation Statute’s eleventh grade graduation exam requirement, concluding that the regulation “is inconsistent with and violates the intent of the Legislature.”

Second, the regulations contradict the Graduation Statute’s requirement of a single, comprehensive graduation assessment. Support for this interpretation is found in several statutory provisions, such as the requirement of “a Statewide assessment test in reading, writing *and* computational skills,” *N.J.S.A. 18A:7C-1* (emphases added), and the mandate that graduation requirements include “[s]atisfactory performance on *the* Statewide assessment test,”

*N.J.S.A.* 18A:7C-2 (emphasis added). The PARCC tests designated as the 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.

Third, the regulations violate the Graduation Statute’s requirement that students have multiple opportunities to pass the statewide graduation exam. 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. The previous version of the graduation regulations implemented this requirement by specifying that districts must provide students who did not pass HSPA “with the opportunity to demonstrate such competence through both repeated administrations of the HSPA and the AHSA.” *N.J.A.C.* 6A:8-5.1(f). In the 2016 amendments to section 5.1(f), which applies to the classes of 2016 through 2020, the requirement of “repeated administrations” was stricken. There is a retesting provision in the rule governing the classes of 2021 and beyond. However, such retesting would contradict the stated design and purpose of the PARCC tests as end-of-course assessments meant to be taken in correspondence with the designated course. Additionally, retesting in both eleventh and twelfth grades as required by the Graduation Statute would be impossible for students who take Algebra I for the first time as seniors.

Fourth, the regulations violate the Graduation Statute by conditioning access to alternative assessments on participation in PARCC exams. In a provision regarding students who have not met the graduation exam requirement by the end of eleventh grade, 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 regulations applicable to the classes of 2020 and beyond state that 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). Such a condition has no basis in the Graduation Statute and directly contradicts its language granting students the right to access an alternative assessment.

The regulations at *N.J.A.C.* 6A:8 also violate the New Jersey Constitution’s Education Clause due to their inclusion of “substitute competency tests” as a graduation pathway for students through the class of 2020. Substitute competency tests are defined 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.

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. The assessment system considered an essential component of a constitutionally adequate education by the Supreme Court in its 1997 *Abbott v. Burke* ruling, 149 *N.J.* 145, 152, 162 (“*Abbott IV*”) was explicitly “based on the [content] standards,” *id.* at 162. In contrast, the State Board has openly acknowledged that the substitute competency tests enshrined in the graduation regulations are not aligned with the state content standards: “*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.” State Board of Education Comment/Response Form (Apr. 6, 2016), at 13-14 (emphasis added). Because an assessment system aligned with state standards is an element of the right to a thorough and efficient education, instituting pathways to graduation through exams not aligned to state standards 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, such as the SAT and ACT, 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”). 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.

Finally, the use of fee-based substitute competency tests such as the SAT and ACT violates the New Jersey Law Against Discrimination (“LAD”) because it will have a disparate impact on racial minority and English language Learner (“ELL”) students. The LAD proscribes discrimination based on race, color, national origin, and other protected characteristics in “place[s] of public accommodation,” *N.J.S.A.* 10:5-4, which 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 such discrimination whether it takes place “directly or indirectly.” *N.J.S.A.* 10:5-12(f)(1). Thus,

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*, 306 N.J. Super. 280, 289 (App. Div. 1997).

The graduation regulations 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 students are more likely to be Black, Hispanic, and ELLs. For example, in 2016-17, 33% of Black students in the State of New Jersey were in districts with free and reduced lunch (“FRL”) rates of 75% or higher, 37% of Hispanic students were in districts with FRL rates of 75% or higher, and 49% of ELL students were in districts with FRL rates of 75% or higher. In contrast, only 2% of white students were 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, creating a disparate negative impact of the graduation rules.

Because the current regulations contradict the clear mandates in the Graduation Statute for a comprehensive eleventh grade exam with retesting opportunities and access to an alternative assessment, they exceed the implementing authority of the State Board. The regulations also violate the Education Clause of the New Jersey Constitution and the LAD. Therefore, the State Board should decline to readopt these regulations.

In addition to these serious legal violations, the graduation regulations proposed for readoption by the State Board raise alarming policy concerns. We now have several years of NJDOE data documenting why continued implementation of these rules would be disastrous for New Jersey students, schools and families. New Jersey public schools have the second-highest high school graduation rate in the nation, surpassing 90% for the first time in 2016. Graduation



rates have improved every year since 2011. Even more encouraging, gaps between subgroups have narrowed. But the graduation policies the State Board is proposing to readopt would sharply reverse this progress.

Under the proposed rules, students in the class of 2021—current freshmen— must pass the PARCC ELA10 and Algebra I exams to receive a New Jersey high school diploma. After three years of PARCC testing, 2017 passing rates on these tests were 46% and 42% respectively. Less than half the nearly 100,000 students who graduate each year are on track to satisfy the PARCC testing requirements for a diploma. At the same time, the rules eliminate the alternative test options, like the SAT, PSAT, and ACT, used by the majority of seniors to earn their diplomas since the new rules were introduced.

The NJDOE’s graduation pathway data collection for 2017 showed that only 27% of the senior class graduated by passing PARCC exams. Over 60%—more than 60,000 students— used alternative options that the proposed regulations eliminate and which will not be available for current freshmen, the class of 2021. Unless these rules are changed, the graduation prospects of tens of thousands of high school students will be at risk, especially current freshmen and classes to follow. The state’s graduation rate will drop dramatically, and districts will be under pressure to process tens of thousands of “portfolio appeals,” a cumbersome and costly process that was never designed to be a major graduation pathway for students who do not pass state tests. At-risk students, ELLs, students of color, and our high-need districts will bear the disparate impact of these proposed rules.

Given the grave legal and policy concerns posed by the current rules, we urge the State Board to reject the proposal to readopt the regulations at *N.J.A.C. 6A:8*. Instead, the State Board should work with Acting Commissioner Repollet, the Legislature, parents, and the education

community to revise the State's graduation policies in ways that are consistent with the law and provide better support and 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,



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](mailto:skarp@edlawcenter.org)



Jessica Levin, Esq.  
Staff Attorney  
Education Law Center  
60 Park Place, Suite 300  
Newark, NJ 07102  
973-624-1815, x15  
[jlevin@edlawcenter.org](mailto:jlevin@edlawcenter.org)



Edward Barocas, Esq.  
Legal Director  
American Civil Liberties Union of New Jersey  
Post Office Box 32159  
Newark, NJ 07102  
(973) 642-2084  
(973) 642-6523 (fax)  
[ebarocas@aclu-nj.org](mailto:ebarocas@aclu-nj.org)