IN RE N.J.A.C 6A:8
STANDARDS AND ASSESSMENT

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-000768-16T4

CIVIL ACTION

APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

The Legislature enacted the Proficiency Standards and Assessments Act ("the Act") in 1979 to establish criteria for a New Jersey high school diploma, including the requirement for students to pass an eleventh-grade State graduation exam with rights to retesting opportunities and an alternative assessment. In 2016, the New Jersey State Board of Education ("State Board") and the Commissioner of Education ("Commissioner") adopted amendments to the Act's implementing regulations - the State's Standards and Assessment regulations, N.J.A.C. 6A:8 - replacing the longstanding High School Proficiency Assessment ("HSPA") with tests from the Partnership for Assessment of Readiness for College and Careers ("PARCC"). The amendments also replace the Alternative High School Assessment ("AHSA") with an array of "substitute" tests such as the SAT and ACT and a "portfolio appeal" process.

The amendments to N.J.A.C. 6A:8 suffer a fatal flaw: they plainly contradict the statute they are intended to implement. The Act explicitly requires schools to administer to all students an eleventh-grade graduation test of English Language Arts ("ELA") and Mathematics, yet the amended regulations designate the PARCC ELA 10 - a

tenth-grade test, and the PARCC Algebra I - which can be given in any grade, as the State graduation exam. The Act also requires retesting opportunities on the State graduation exam and access to an alternative assessment for those who do not pass it, but the amended regulations fail to provide these retesting opportunities and prevent some students from accessing the alternative assessments.

Further, the designation in the amendments to N.J.A.C. 6A:8 of the SAT, ACT and other fee-based exams as substitute tests to obtain a diploma violates New Jersey's Constitution and its Law Against Discrimination ("LAD"). The Supreme Court has interpreted the Education Clause of the State Constitution to require a free public education for all students and an assessment system aligned with the state Core Curriculum Content Standards ("CCCS"). The New Jersey Department of Education ("DOE") has acknowledged that the substitute tests in the amended regulations are not aligned to the CCCS. And fee-based exams have no place in a system of testing required for graduation from New Jersey public schools. In addition to generally undermining the right to (and benefits of) a free public education, the system the State has now created to obtain a high school diploma impermissibly favors rich students over poor

students.

The use of fee-based substitute tests also discriminates against groups of students based on race and national origin. Low-income students, who are more likely to be members of racial minority groups and English language learners ("ELL"), will have fewer options and opportunities to fulfill the testing requirement. Thus, use of these fee-based tests will have a disparate negative impact constituting discrimination proscribed by the LAD.

It is well established that rulemaking cannot exceed the authority granted to the agency by the Legislature in the enabling statute. Agency rules must also conform to fundamental rights guaranteed by the constitution and cannot discriminate against vulnerable and protected groups. The amended regulations in N.J.A.C. 6A:8 are plainly inconsistent with the Act, and run afoul of the Education Clause and the LAD. The amendments, therefore, are invalid.

PROCEDURAL HISTORY

This is an appeal of amendments to the regulations at N.J.A.C. 6A:8 governing Standards and Assessment in New Jersey public schools, specifically challenging the amended regulations governing high school graduation requirements.

Pa1. The amended regulations were adopted by the State Board and former Commissioner David Hespe on September 6, 2016. Pa1.

In "Discussion Paper" memoranda to the State Board dated January 11, Pa41, and February 10, 2016, Pa43, the Commissioner proposed amendments to the State's regulations governing the requirement that students pass a graduation assessment as part of the criteria for a State-endorsed high school diploma. On February 10, 2016, Stan Karp, Director of Secondary Reform at Education Law Center ("ELC"), delivered testimony on behalf of ELC and the American Civil Liberties Union of New Jersey ("ACLU-NJ") opposing the amended regulations. Pa29, Pa46.

At its April 6, 2016 meeting, the State Board voted to officially propose the amendments to N.J.A.C. 6A:8, publishing its notice of proposal in the May 16, 2016 New Jersey Register. 48 N.J.R. 736(a), Pa97. ELC delivered additional testimony to the State Board on May 4 and June 1, 2016. Pa2, Pa38. On July 15, 2016, ELC and ACLU-NJ submitted written comments to the State Board, again opposing the proposed changes to the regulations governing the graduation assessment requirement on grounds including their legal deficiencies. Pa3, Pa38, Pa104.

After a 60-day public notice and comment period, the State Board voted on August 3, 2016, to adopt the amendments. Pa1. The amended regulations were officially promulgated and became effective upon publication in the New Jersey Register on September 6, 2016. 48 N.J.R. 1790(b), Pa1.

Appellants Latino Action Network ("LAN"), Latino Coalition of New Jersey ("LCNJ"), Paterson Education Fund ("PEF"), and ELC filed their Notice of Appeal, Pa14, and Civil Case Information Statement, Pa16, on October 21, 2016. Respondents filed a Civil Case Information Statement on or about November 7, 2016. Pa18. On or about November 15, 2016, Appellants filed an amended Notice of Appeal, Pa20, and Civil Case Information Statement, Pa23, seeking to add the NAACP New Jersey State Conference ("NJ NAACP") as an additional appellant. On November 28, 2016, Appellants filed a Motion to Amend the Appeal by Adding Appellant NJ NAACP, which the court granted by Order dated December 12, 2016. Pa40. On or about December 8, 2016, Respondents filed a Statement of Items Comprising the Record on Appeal. Pa26.

The Court thereafter issued a briefing schedule for the appeal. Appellants' brief is filed in accordance with

that schedule.

STATEMENT OF FACTS

A. Proficiency Standards and Assessments Act

In 1979, the New Jersey Legislature enacted the Act, N.J.S.A. 18A:7C-1, et seq., which was previously known as the High School Graduation Standards Act. The Act sets forth the criteria for receiving a State-endorsed high school diploma, including the requirement to pass a graduation exam, and the rights guaranteed to students as they attempt to fulfill that requirement.

The Act requires the Commissioner, with the approval of the State Board, 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. Each local board of education must "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 Act was amended to require that the State test for graduation be administered in the eleventh grade rather than the ninth grade, beginning in the 1993-94 school year. P.L. 1979, ch. 241, sec. 6, § 3, 1988 N.J.

Laws 168. Specifically, the Act requires that the State graduation proficiency test "be administered to all 11th grade pupils." N.J.S.A. 18A:7C-6.

The Act also mandates that students receive retesting opportunities, stating that in addition to administering the graduation proficiency test to all eleventh grade students, it must be given "to any 11th or 12th grade pupil who has previously failed to demonstrate mastery of State graduation proficiency standards on said test." Id. The Act further provides that any student who does not pass the State graduation exam by the end of eleventh grade "shall be eligible" for an alternate assessment, defined as "a comprehensive assessment of said proficiencies utilizing techniques and instruments other than standardized tests." N.J.S.A. 18A:7C-3.

B. Prior Graduation Regulations

Since the Act was passed in 1979, the State has utilized, during successive time periods, several different high school graduation testing regimes. Prior to the amendments on appeal in this case, the Standards and Assessment regulations at N.J.A.C. 6A:8 set forth a straightforward graduation testing system to fulfill the Act's requirements, consisting of a primary graduation exam

administered in eleventh grade with retesting opportunities and a universally accessible alternative exam.

The State graduation proficiency test in use prior to the current assessment regime was the HSPA. In 1996, the State Board had adopted the CCCS to provide school districts with standards for student achievement in content areas including ELA and Mathematics, i.e., the tested areas on the State graduation exam pursuant to the Act. The Standards and Assessment regulations required the HSPA exam to be "used to determine student achievement of the knowledge and skills specified by the CCCS." N.J.A.C. 6A:8-1.3 (prior), Pa76. As required by the Act, the regulations provided that this test of ELA and Mathematics was administered in the eleventh grade, with retesting opportunities continuing into the twelfth grade if necessary. N.J.A.C. 6A:8-4.1(d)(4) (prior), Pa85; N.J.A.C. 6A:8-5.1(f) (prior), Pa92.

In fulfillment of the Act's requirement of an alternate assessment that is not a standardized test, the prior version of the Standards and Assessment regulations also designated the AHSA as an alternate measure of "high school competency" of the CCCS standards in ELA and Mathematics. N.J.A.C. 6A:8-1.3 (prior), Pa73. The

regulations required that districts "administer following the 11th grade the AHSA to all students who have not demonstrated proficiency on one or more sections of the HSPA." N.J.A.C. 6A:8-4.1(d)(4) (prior), Pa85.

Further, in accordance with the Act's mandate that students receive retesting opportunities, the prior version of the Standards and Assessment regulations guaranteed students multiple opportunities during the eleventh and twelfth grades to take the State exams used to fulfill the graduation assessment requirement. N.J.A.C. 6A:8-5.1(f) (prior) (requiring districts to "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"), Pa92.[1]

C. Amended Graduation Regulations

In 2014 and 2015, DOE officials issued several memoranda to school districts imposing new graduation

[1] These multiple administrations are reflected in previous DOE assessment calendars, showing that HSPA and AHSA were each given several times per year. See, e.g., Memorandum from Bari Erlichson, Assistant Comm'r/Chief Performance Officer, N.J. Dept. of Ed. to Chief Sch. Adm'rs et al., "Update, Statewide Assessment Calendar for 2014-2015 School Year," Sept. 9, 2014, available at https://homeroom5.doe.state.nj.us/broadcasts/2014/SEP/09/11864/statewide%20assessment%20calendar%20update.pdf.

testing requirements for students in the classes of 2016 and beyond. In place of the HSPA and AHSA, these memos set forth a range of new assessments students could use to fulfill the graduation requirement, including the PARCC tests, "substitute" tests such as the SAT and ACT, and a "portfolio appeal" process.[2]

The PARCC tests are end-of-course assessments, tied to specific academic courses, including ELA exams in grades 9, 10 and 11, and Mathematics exams in Algebra I, Algebra II and Geometry. The "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. As defined, they include commercially produced college entrance exams such as the SAT and ACT, which students must pay a fee to take unless they obtain a fee waiver. The portfolio appeal is a process by which schools evaluate a compilation of graded student work to determine if the student has met the proficiency standards.

In 2016, DOE began the process - post hoc - of

[2] See, e.g., Memorandum from Commissioner Hespe, N.J. Dept. of Ed. to Dist. Superintendents et al., "Graduation Requirements Class of 2016, 2017 and 2018," Sept. 30, 2014, available at http://www.nj.gov/education/assessment/grad/093014Grad.pdf.

formally adopting amendments to its regulations at N.J.A.C. 6A:8, in order to codify the new graduation testing regime it had already imposed on districts.[3] In Discussion Paper memoranda to the State Board in January and February 2016, then-Commissioner Hespe stated that N.J.A.C. 6A:8, "which implements the [CCCS] and the Statewide assessment system, is being revised due to the adoption of the [PARCC] assessments." Pa41, Pa43. The memoranda explained that DOE "propose[d] amendments throughout the chapter to transition away from the comprehensive [HSPA] to end-of-course assessments in English language arts (ELA) 10 and Algebra I as the Statewide assessment graduation requirement." Pa41, Pa43. They also explained that during the transition to PARCC exams, students would be permitted to fulfill the graduation assessment requirement through other means, including substitute tests and the portfolio appeal. Pa42, Pa44. At its April 6, 2016 meeting, the State Board voted to officially propose the amendments,

[3] When DOE first imposed the new graduation requirements, it did so without adopting new regulations as required by the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. In 2016, DOE settled litigation brought by students and parents in the Office of Administrative Law ("OAL") challenging DOE's imposition of the new requirements without following the legally required rulemaking procedure. The settlement agreement is available at http://www.edlawcenter.org/assets/files/pdfs/Newsblasts/T.B.%20Settlement%20Agreement.pdf.

which were published in the New Jersey Register. 48 N.J.R. 736(a), Pa97.

In place of the eleventh-grade HSPA exam, the amended Standards and Assessment regulations designate the PARCC ELA 10 and Algebra I tests as the primary graduation assessment. N.J.A.C. 6A:8-5.1(a)(6). The amended regulations also designate alternatives students can use to fulfill the graduation assessment requirement, with the options varying 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 the portfolio appeal process. N.J.A.C. 6A:8-5.1(f)(1). 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). 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).

On July 15, 2016, ELC and ACLU-NJ submitted written comments to the State Board, opposing the proposed changes to the regulations governing the graduation assessment requirement on both legal and policy grounds. Pa3, Pa38, Pa104. The legal grounds on which ELC and ACLU-NJ objected to the amendments included their violation of the Act, the Education Clause of the New Jersey Constitution, and the LAD. Pa104.

After the 60-day public notice and comment period ended, the State Board voted to adopt the amended regulations on August 3, 2016. Pa1. The regulations were officially promulgated and became effective upon publication in the New Jersey Register on September 6, 2016. 48 N.J.R. 1790(b), Pa1. Appellants filed the instant appeal to challenge the adoption of the amended regulations at N.J.A.C. 6A:8 as violating the Act, the State Constitution and the LAD.

STANDARD OF REVIEW

Agency regulations are presumed by the courts to be valid and reasonable, and the burden is on the challenging party to overcome that presumption. Bergen Pines Hosp. v. N.J. Dept. of Human Serv., 96 N.J. 456, 477 (1984). But

notwithstanding the deference accorded when reviewing administrative action based on the agency's "specialized expertise," N.J. Ass'n of Sch. Adm'rs v. Cerf, 428 N.J. Super. 588, 596 (App. Div. 2012), courts are "'in no way bound by an agency's interpretation of a statute or its determination of a strictly legal issue,'" Utley v. Bd. of Review, Dep't of Labor, 194 N.J. 534, 551 (2008) (quoting Mayflower Sec. Co. v. Bureau of Sec. 64 N.J. 85, 93 (1973)).

Although the judiciary's power to review administrative agency actions is limited, it is appropriate for courts to intervene when "an agency action is clearly inconsistent with its statutory mission or with other State policy." George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 27 (1994). A properly adopted regulation should be set aside when "it is proved to be arbitrary or capricious or if it plainly transgresses the statute it purports to effectuate, or if it alters the terms of the statute or frustrates the policy embodied in it." In re Repeal of N.J.A.C. 6:28, 204 N.J. Super. 158, 160-61 (App. Div. 1985) (internal citations omitted). Situations in which the courts must hold that agency action is arbitrary or unreasonable include those in which "the agency's action

violates express or implied legislative policies" or "offends the State or Federal Constitution." George Harms Constr. Co., 137 N.J. at 27.

LEGAL ARGUMENT

I. THE AMENDMENTS TO N.J.A.C. 6A:8 CONTRADICT THE EXPLICIT PROVISIONS OF THE ACT AND ARE, THEREFORE, INVALID (Pa1)

The regulations at issue conflict with the plain language of the Act requiring a comprehensive eleventh-grade graduation exam with opportunities for retesting and access to an alternative assessment. The amendments to the high school graduation testing requirements in N.J.A.C. 6A:8 replace the single comprehensive eleventh-grade test with two separate tests – the PARCC ELA 10 to be taken in tenth grade and the PARCC Algebra I which can be taken in any grade. In addition, the new regulations do not provide the Act's mandated opportunities to retake these tests, and they impede students' access to alternate assessments.

When "interpreting an enabling statute," a court must "determine and give effect to the Legislature's intent." N.J. Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535, 549 (2012) (internal citations omitted). To do so, "courts look first to the plain language of the statute" and, "[i]f it is clear, the court's task is complete." Id. The

regulations at issue conflict with the express provisions of the Act requiring a comprehensive, eleventh-grade graduation assessment with retesting opportunities and access to an alternative assessment. Therefore, the amended implementing regulations at N.J.A.C. 6A:8 violate the plain language and intent of the Legislature and must be invalidated.

A. The Amended Regulations Conflict with the Act's Requirement of an Eleventh Grade Test

It is well established that the presumption of validity of an agency rule is overcome by "demonstrating an inconsistency between the regulation and the statute it implements." Cerf, 428 N.J. Super. at 596. The Act requires an eleventh-grade graduation test. N.J.S.A. 18A:7C-6. The amended regulations eliminated that test and replaced it with two separate tests: one test given only in the tenth grade and another that may or may not be given in any grade. These amendments explicitly contradict the plain requirement of the Act and are therefore invalid.

Specifically, the Act requires the Commissioner and State Board 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 include "[s]atisfactory performance on the Statewide assessment test" in its graduation standards, N.J.S.A. 18A:7C-2. In 1988, the Act was amended to require that the graduation exam be administered in the eleventh grade rather than the ninth grade beginning in 1993-94, demonstrating that the Legislature has deliberately mandated a specifically eleventh-grade graduation exam. P.L. 1979, ch. 241, sec. 6, § 3, 1988 N.J. Laws 168 (described as "establishing an eleventh grade test for high school graduation" through amendment of the 1979 statute). The Act explicitly requires 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").

Without question, the amended regulations change the statewide graduation assessment from the eleventh-grade HSPA to the PARCC ELA 10 and Algebra I tests. N.J.A.C. 6A:8-5.1(a)(6) (requiring "all students demonstrate proficiency in the high school end-of-course PARCC

assessments in ELA 10 and Algebra I"). The memos that accompanied the proposed regulations confirm that DOE "propose[d] amendments throughout the chapter to transition away from the comprehensive" HSPA exam to the PARCC ELA 10 and Algebra I end-of-course exams "as the Statewide assessment graduation requirement." Pa41, Pa43, Pa60 (emphasis added); see also Pa62, 63, 67, 68 (stating multiple times that the PARCC end-of-course assessments replace the single eleventh-grade HSPA exam).

It is plainly evident that the new statewide graduation assessment, codified in the amendments, is not an eleventh-grade exam as required by the Act. The PARCC ELA 10 is 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. The Commissioner has explained that "the end-of-course PARCC assessments are administered at any time when the student completes the related content, regardless of the grade." Pa61 (emphasis

added).[4]

Moreover, the substitute tests designated as alternatives (SAT, ACT, etc.) are clearly not eleventh-grade tests. Students are not guaranteed access to any of these tests in eleventh grade as required by the Act. Further, the portfolio process is only available in twelfth grade.[5] However, even if any of the alternatives were

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[4] DOE data shows that students taking the PARCC Algebra I exam span grades 6-12, with the great majority taking the exam in the eighth and ninth grades. N.J. Dept. Of Ed., "PARCC Spring State Summary Report, Algebra I SY 2014-2015," available at *http://www.state.nj.us/education/schools/achievement/15/parcc/AlgebraI.pdf*; N.J. Dept. of Ed., "PARCC Spring State Summary Report, Algebra I SY 2015-2016," available at *http://www.state.nj.us/education/schools/achievement/16/parcc/spring/AlgebraI.pdf*.

In addition to the fact that the math test designated as the graduation requirement, PARCC Algebra I, will not be administered in the 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 Math exam to take in eleventh grade. See Memorandum from Commissioner David Hespe to Dist. Superintendents et al., "Graduation Requirements Class of 2016, 2017 and 2018," Sept. 30, 2014, available at http://www.nj.gov/education/assessment/grad/093014Grad.pdf (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).

[5] See Memorandum from Laura Morana, Acting Chief Academic Officer & Donald Mitchell, Chief Performance Officer, N.J. Dept. of Ed. to Chief Sch. Adm'rs and Charter Sch. and Renaissance Sch. Project Leads, "Portfolio Appeals Process for Students Who Have Not Met Their Assessment Graduation Requirement," Dec. 13, 2016, available at https://homeroom5.doe.state.nj.us/broadcasts/2016/DEC/13/15

guaranteed to be provided in eleventh grade - and they clearly are not - this would not cure the fundamental conflict with the Act, given the Act's requirement that the primary State graduation assessment (here, the ELA 10 and Algebra I PARCC tests) be given in eleventh grade.

Failure to adhere to the Act's requirement not only contradicts the Legislature's clear command, but has real world consequences. For ELL students in particular, each year of schooling allows for increased proficiency in the English language. The PARCC Algebra I test is only translated into one language - Spanish, and there are currently no translations of PARCC ELA tests. Thus, denying ELL students their statutory right to take the graduation exam in eleventh grade and, instead, testing them at an earlier stage in the educational process, will likely serve to increase their failure rates.

In sum, the amended regulations designate a new state graduation assessment consisting of two separate tests that are explicitly not an eleventh-grade exam. Thus, the amendments are facially inconsistent with the Act's

668/Portfolio%20Appeals%20Process%20for%20Students%20Who%20Have%20Not%20Met%20Their%20Assessment%20Graduation%20Requirement.pdf.

requirement that the state graduation proficiency test "be administered to all 11th grade pupils." N.J.S.A. 18A:7C-6. The amended regulations are ultra vires to the Act and therefore invalid.

B. The Amended Regulations Impose Multiple End-of-Course Tests, Violating the Act's Mandate of One Comprehensive Graduation Exam

The amended regulations designate not one, but two separate assessments given at the end of the relevant courses, as the new State graduation assessment. This designation is inconsistent with the Act's requirement that districts administer a single, comprehensive graduation assessment to all students.

The Act calls for "a Statewide assessment test in reading, writing and computational skills." N.J.S.A. 18A:7C-1 (emphases added). It further mandates that graduation requirements include "[s]atisfactory performance on the Statewide assessment test." N.J.S.A. 18A:7C-2 (emphasis added). See also N.J.S.A. 18A:7C-6 (providing that "the State graduation proficiency test shall be administered to all 11th grade pupils") (emphasis added)). In this instance, the Legislature expressly intended that the graduation test would be a single, comprehensive exam. See State v. Marchiani, 336 N.J. Super. 541, 546 (App. Div.

2001) (affirming that "[i]n construing a statute," the court's "first obligation is to consider the statute's plain meaning").

The amended regulations clearly run counter to the Act's plain requirement of a single, comprehensive graduation exam. The PARCC exams designated as the primary graduation assessment requirement – ELA 10 and Algebra 1 – are two separate tests. They are each given at the end of the relevant course - rather than the Act's prescribed grade eleven - with administration of one PARCC exam having no connection to the administration of another. These new exams do not have to be administered in the same grade, let alone be taken as one comprehensive assessment, as the Act requires. The DOE concedes this point, stating that the purpose of the proposed amendments is to "transition away from the comprehensive [HSPA] to [PARCC] end-of-course assessments." Pa41, Pa43, Pa60 (emphasis added).

In sum, the Act's plain language requiring one comprehensive eleventh-grade exam cannot in any way be squared with administration of multiple tests in different sittings, different times and different grades. Because they mandate students be given multiple end-of-course tests instead of a comprehensive graduation exam, the amended

regulations contravene the Act and are thus invalid.

C. The Amended Regulations Deny Students the Right to Retesting Opportunities Guaranteed by the Act

The amended regulations omit any retesting opportunity through the class of 2020, and thereafter offer a hollow promise of retesting opportunities that cannot be effectuated for some students. This is clearly inconsistent with the plain language of the Act, which requires that all students have multiple opportunities to pass the designated statewide graduation assessment. The amendments are therefore invalid.

The Act expressly mandates that the designated State graduation assessment "be administered to all 11th grade pupils" and also "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 (emphasis added). Thus, the plain language of the Act requires multiple retesting opportunities in the eleventh and twelfth grades specifically on the primary designated graduation assessment.

The older version of the graduation regulations implemented this statutory 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) (prior) (emphasis added), Pa92. Yet the requirement for repeated administrations of the primary assessment exam has now been wholly eliminated. In the amended section 5.1(f), which applies to the classes of 2016 through 2020, the requirement of "repeated administrations" has been stricken from the text. Pa92. Instead, the amended regulations specify that districts shall provide students who have not demonstrated proficiency on the PARCC ELA 10 and Algebra I "the opportunity to demonstrate such competence through one of the alternative means," listed as the substitute competency tests, other PARCC assessments, or the portfolio appeal. N.J.A.C. 6A:8-5.1(f).

Thus, for classes through 2020, there is no provision in the amended regulations for retesting of the designated State graduation assessment, namely the PARCC ELA 10 and Algebra I end-of-course tests. The substitute competency tests identified in the amendments, such as the SAT and ACT, do not satisfy the Act's required opportunity for retesting on the designated assessment, nor does the opportunity to take other PARCC tests.

For the classes of 2021 and thereafter, the amendments

do not specify how the retesting opportunities required by the Act will be effectuated, but retesting on the designated PARCC tests cannot be implemented in practice. The amendments applying to the class of 2021 and beyond allude, without any specificity, to multiple opportunities to take "the assessments." N.J.A.C. 6A:8-5.1(g) (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" by the end of twelfth grade "and after multiple opportunities to take the assessments"). The amendments, however, ignore the fact that PARCC exams are end-of-course assessments, "designed to be taken as students are taught the course's content," Pa60, and administered when the relevant course is completed. Thus, while it may be technically possible to re-administer these tests, such practice would expressly contradict their stated design and purpose as articulated by the DOE. Moreover, in order to comply with the Act, there would need to be retesting opportunities in both the eleventh and twelfth grades. N.J.S.A. 18A:7C-6. If a student takes Algebra I for the first time as a senior, for example, this would be impossible. Thus, either the State crafted a policy that cannot work in practice or the phrase "after

multiple opportunities to take the assessments" refers to taking the alternate exams (i.e. SAT, ACT, or other PARCC tests) which, as described above, do not meet the Act's requirements.

Because the amended regulations deprive students of the retesting opportunities guaranteed by the Act, they must be invalidated.

D. The Amended Regulations Prevent Access to an Alternative Assessment as Required by the Act

For the classes of 2020 and beyond, the amended regulations make access to alternative assessments conditional on participation in all PARCC exams attached to a student's courses. This clearly contradicts the Act's requirement that any student who has met the non-testing graduation requirements but failed to pass the designated State graduation exam must be given the opportunity to pass an alternative assessment that is not a standardized test.

For students who have not met the graduation exam standards by the end of eleventh grade, the Act 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 Commissioner's memoranda regarding the amended regulations describe both the substitute competency tests and the portfolio appeal as replacing AHSA. See, e.g., Pa62. However, after the class of 2019, the amended regulations make access to these alternative pathways conditional on participation in PARCC, a condition that has no basis in the Act and flatly contradicts its mandate that students have the right to an alternative assessment.[6]

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). Thus, access to the Act's required option of an alternative assessment is conditional on prior participation in other exams. Furthermore, the new regulations not only condition access to the alternative options on participation in the designated primary graduation exam(s), PARCC ELA 10 and Algebra I; access is also conditioned on participation in

[6] As many students each year do not participate in one or more PARCC exams for a variety of reasons, this provision threatens to exclude numerous students from accessing any assessment alternatives, and therefore from graduating.

all PARCC exams for which the student is enrolled in courses.

This condition contravenes the clear expression of the Legislature in the Act, which does not make access to the alternative exam conditional on participation in any other test. In fact, the Act explicitly mandates that "[a]ny 12th grade student" who has not yet passed the exam requirement "shall be eligible" for the alternative exam. N.J.S.A. 18A:7C-3 (emphasis added).

The amended regulations conditioning access to alternative assessments on students' participation in PARCC exams not only frustrate the clear purpose of the Act's provision on alternative assessment but, by blocking students from demonstrating graduation proficiency, they contradict the plain language granting access to any student who has satisfied attendance and curriculum requirements. Because the amended regulations frustrate the enabling Act's guarantee of an alternative graduation assessment, they must be invalidated.

In sum, the State Board and Commissioner have exceeded their authority to implement the Act by enacting rules that expressly contradict and undermine the Act's plain language and intent. The amended regulations directly contradict

the Act's mandate that a single graduation exam be administered to all students in the eleventh grade, with retesting opportunities for all students and access to an alternative assessment not based on any other exam. Thus, the amended regulations are "inconsistent with the statute [they] purport[] to interpret," Schundler, 211 N.J. at 549 (internal quotation marks omitted), and are therefore invalid.

II. THE INCLUSION OF SUBSTITUTE COMPETENCY TESTS AS A GRADUATION ASSESSMENT OPTION UNDER THE AMEMDED N.J.A.C. 6A:8 VIOLATES THE EDUCATION CLAUSE OF THE NEW JERSEY CONSTITUTION (Pa1)

Under the amendments to N.J.A.C. 6A:8, "substitute competency tests" can be used as an alternative graduation pathway by students through the class of 2020. N.J.A.C. 6A:8-5.1(f)(1) (students in classes of 2016-2019 who do not take or pass the PARCC ELA 10 and/or Algebra I can fulfill the requirement through passing other PARCC exams, one of the substitute competency tests, or the portfolio appeal) & 5.1(f)(2) (same for students in class of 2020, with access to alternative assessments conditioned on participation in PARCC exams). The amended 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. Many of these substitute tests, such as the SAT and ACT, require fees. As explained below, the use of substitute competency tests violates the constitutional requirements that State assessments of student proficiency, including those demonstrating the requirements for a diploma, must be aligned to the State's content standards, and that public education, including the opportunity to earn a high school diploma, must be free to all students.

It is well established that New Jersey courts may adjudicate the constitutionality of administrative rulemaking and that unconstitutional regulations are invalid. See George Harms Constr. Co., 137 N.J. at 27. See also, e.g., In re Sixth Month Extension of N.J.A.C. 5:91-9 et seq., 372 N.J. Super. 61, 91 (App. Div. 2004) (affirming that one of the essential questions the court must ask in "measur[ing] the validity" of agency regulations is "whether the agency's decision offends the State or Federal Constitution" and adjudicating claims that fair housing regulations violated the state constitution).

First, the substitute competency tests are not aligned with the State's curriculum content standards, which have been recognized as an essential element of a thorough and

efficient education under the Education Article of the New Jersey Constitution. N.J. Const. art. VIII, § 4, ¶ 1. (stating 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"). In Abbott v. Burke, the Supreme Court evaluated the constitutionality of the Comprehensive Educational Improvement and Financing Act ("CEIFA") 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 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.

Thus, the assessment system upheld as facially constitutional in Abbott IV was explicitly "based on the

[content] standards," i.e. the CCCS in ELA and Mathematics. Id. In sharp contrast, the State Board concedes that the substitute competency tests included in the amended regulations are not aligned with the CCCS. As the State Board explained in responding to public comments on the amendments:

> 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.

Pa11, Pa57-58 (emphasis added). Assessments that are aligned with CCCS state standards are an essential component of a constitutional education for New Jersey public school students. See Abbott IV, 149 N.J. at 152. The amendments to N.J.A.C. 6A:8, by designating exams for determining graduation eligibility that are not aligned to the CCCS, render those regulations unconstitutional and invalid.[7]

Second, the Education Clause also mandates a public

[7] There is no basis for DOE's assertion that this constitutional violation is ameliorated because it will endure "only during the transitional period," Pa11, Pa57-58, which runs for several years through the graduating class of 2020.

education that is open and free to all students. N.J. Const. art. VIII, § 4, ¶ 1 (mandating a "thorough and efficient system of free public schools"). Indeed, this bedrock principle has long been recognized by the Supreme Court. See Robinson v. Cahill, 62 N.J. 473, 508, on reargument, 63 N.J. 196 (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 . . . that public education for children shall be Free").

As an essential component of a constitutional, thorough and efficient education, access to any part of the assessment system cannot be based on the payment of fees. Imposing fees provides wealthier students more avenues to fulfill the graduation assessment requirement than poor students.[8] Such an outcome turns the very notion of access to a free public education on its head. There is simply no

[8] The State's assertion that poor students are not prejudiced because there exist fee waivers and non-fee-based substitute tests, Pa11, Pa57-58, does not ameliorate the problems with allowing students to pay for testing opportunities. Because fee waivers are not unlimited, and only some of the substitute tests are free, poor students will still have fewer chances to take fee-based exams and access to a narrower range of exams, and thus more limited opportunities to fulfill the graduation testing requirement.

basis in the constitution for imposing a cost on students to access any assessments that serve as graduation standards, and the provisions regarding the substitute assessments must therefore be declared invalid.

Indeed, by imposing costs and thus making it easier for students of wealthy families than students of poor families to obtain a diploma, the State is also carrying out its constitutional mandate in a manner that is fundamentally unfair. See Robinson v. Cahill, 69 N.J. 133, 147 (1975) (affirming that the "right of children to a thorough and efficient system of education is a fundamental right guaranteed by the Constitution"). The State has control over the criteria and process for obtaining a diploma. In exercising its control, the State "cannot favor rich over poor. . . . While the State may not have the ability to eliminate poverty, it cannot use that condition as the basis for imposing further disadvantages." S. Burlington Cnty. NAACP v. Mt. Laurel, 92 N.J. 158, 209 (1983).[9] As described more thoroughly in Point III, infra,

[9] The Court in Mt. Laurel addressed zoning regulations. It held that, because the State (and, by designation, municipalities) controlled access to land through zoning laws, regulations that do not "provide the requisite opportunity for a fair share of the region's need for low and moderate income housing" are fundamentally unfair. Id. As the Court explained, the holding was a "corollary of the

by incorporating fee-based tests into the process for obtaining a diploma, and thus providing more opportunities to graduate for students from wealthy families, the State is "imposing further disadvantages" on students from poor families.

III. THE USE OF FEE-BASED SUBSTITUTE TESTS AS A GRADUATION ASSESSMENT OPTION UNDER THE AMENDED N.J.A.C. 6A:8 WILL DISPARATELY IMPACT PROTECTED STUDENTS IN VIOLATION OF THE LAW AGAINST DISCRIMINATION (Pa1)

As noted above, the substitute competency tests students can use to fulfill the graduation exam requirement under the amended regulations include fee-based tests such as the SAT and ACT. N.J.A.C. 6A:8-1.3. Designating these exams as a pathway to graduation will have a disparate negative impact on New Jersey's racial minority and English Language Learner ("ELL") students in violation of the Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 et seq.

The LAD proscribes discrimination based on race, color, national origin,[10] and other protected

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constitutional obligation to zone only in furtherance of the general welfare." Id.

[10] DOE recognizes that services for ELLs are an essential component of "provid[ing] all students with equal and bias-free access" to school programs and resources regardless of race, creed, color, national origin, and other protected characteristics. See N.J.A.C. 6A:7-1.7 (including as a component of this mission the annual use of an English language proficiency measure "for determining the special

characteristics in sectors including "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). Thus, in addition to disparate treatment, claims of disparate impact on protected groups are cognizable under the LAD. See, e.g., Esposito v. Twp. of Edison, 306 N.J. Super. 280, 289 (App. Div. 1997) ("We have no doubt that disparate impact meets the discriminatory proscriptions of the LAD."); Associates Home Equity Servs., Inc. v. Troup, 343 N.J. Super. 254, 269 (App. Div. 2001).

The fee-based substitute competency tests in the amended 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 fee-based substitute competency tests, and these students are

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needs of English language learners and their progress in learning English").

more likely to be Black, Hispanic, and 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.[11] The use of fee-based substitute assessments will result in fewer opportunities for racial minority and ELL students to earn a diploma as compared to their white and English-speaking peers. Thus, the new graduation regulations will have a disparate negative impact on racial minority and ELL students, narrowing access to a diploma and restricting their prospects for future career and post-secondary education. See Abbott IV, 149 N.J. at 166 (holding that a "constitutionally adequate education" must enable public school students "to compete effectively in the economy and to contribute and to participate as citizens and members of their communities"); N.J.A.C. 6A:8-1.1(a) (stating that the purpose of the public education system is to "prepare students

[11] See N.J. Dept. of Ed., DOE Data: Fall Survey Collections, available at http://www.state.nj.us/education/data/enr/ (using 2014-15 data).

for college and career, success in life, and work" in the modern economy).

DOE has cited fee waivers and the inclusion of non-fee-based exams to deny that the substitute tests "could have a socioeconomic or racial bias." Pa11, Pa58. But this response ignores the fundamental principle that all methods of obtaining a diploma must be open to all students. Fee waivers are not unlimited, and the fact that only some tests are fee-based means 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, DOE's response does not obviate the central concern about the fee-based test option: even if low-income students have some opportunity to take substitute assessments, wealthier students will have more opportunities to take these exams, and thus to graduate.[12]

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[12] DOE has asserted that the use of substitute tests is necessary to facilitate the transition to PARCC. Pa42, Pa44, Pa61. However, this justification cannot survive the burden shifting analysis applied in a disparate impact claim under the LAD, see, e.g., Esposito, 306 N.J. Super. at 289-90 (stating that New Jersey courts follow the federal model in adjudicating disparate impact claims), which provides that the contested policy may stand only if there was no "equally effective alternative with less discriminatory effects," S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot., 145 F. Supp. 2d 446, 483

Because the inclusion of fee-based substitute tests as a graduation exam alternative in the amendments to N.J.A.C. 6A:8 violates the LAD and contravenes its "overarching goal" of eradicating discrimination in the State of New Jersey, Fuchilla v. Layman, 109 N.J. 319, 334 (1988), the amendments permitting use of these tests must be invalidated.

CONCLUSION

For the reasons set forth above, Appellants request that this Court invalidate the 2016 amendments to N.J.A.C. 6A:8 because they violate the Proficiency Standards and Assessments Act, which is the enabling statute for the Standards and Assessment regulations, as well as the State Constitution and the Law Against Discrimination.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION-NJ

EDUCATION LAW CENTER

Jessica Levin

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(D.N.J. 2001), opinion modified and supplemented, 145 F. Supp. 2d 505 (D.N.J. 2001), rev'd sub nom., 274 F.3d 771 (3d Cir. 2001) (internal quotations omitted).