

H.A.-T., ON BEHALF OF MINOR CHILD, T.T. :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE TOWNSHIP : DECISION
 OF EAST BRUNSWICK, MIDDLESEX COUNTY;
 VICTOR VALESKI; EVELYN OGDEN;
 AND MARK SUTOR, :
 RESPONDENTS. :
 _____ :

SYNOPSIS

In the Spring of 2016, petitioner filed an appeal seeking to have her son’s PARCC (Partnership for Assessment of Readiness for College and Career) scores voided, after the respondent Board refused her request to void the scores. The Board asserted that participation in the PARCC assessment is both a requirement in the State of New Jersey, and a graduation requirement in East Brunswick schools. The Board filed a motion for summary decision.

The ALJ found, *inter alia*, that: in April and May of 2016, T.T. participated in the PARCC assessment; after completing five of six segments, the petitioner contacted the superintendent of schools and instructed that she no longer wanted her son to participate in the assessment; the superintendent thereafter secured the authorization of T.T.’s father to have T.T. complete the PARCC assessment; petitioner subsequently requested that T.T.’s PARCC scores be voided; the Board’s attorney represented to petitioner that the Board would seek authorization from the NJ Department of Education (Department) to void T.T.’s scores, and if the Department authorized such action, the Board would in fact void the scores; in a letter dated May 18, 2016, the Board requested written guidance from the Department on whether a completed PARCC assessment could be voided; the Department responded by letter dated May 19, 2016, stating that the Board has the authority to void a PARCC assessment after it has been completed and that the such a decision should be governed by the Board’s policies and procedures; despite this guidance from the Department, the Board refused to void T.T.’s PARCC scores, asserting that the PARCC assessment is a State requirement and also a graduation requirement in East Brunswick. The ALJ concluded that the decision of the Board to refuse H.A.-T.’s request to void her son’s PARCC assessment – after specifically seeking and receiving guidance from the Department which clarified that a Board does have the authority to void PARCC scores – was arbitrary, capricious and unreasonable. Accordingly, the ALJ determined that the petitioner, not the respondent, is entitled to prevail in this case as a matter of law.

Upon review, the Commissioner concurred with the ALJ that the refusal of the Board to void T.T.’s PARCC scores was arbitrary, capricious and unreasonable. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

OAL DKT. NO. EDU 11407-16
AGENCY DKT. NO. 184-7/16

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PETITIONER, :
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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C. 1:1-18.4* by the Board. Petitioner did not file a reply thereto.

The Board takes exception to the Administrative Law Judge's (ALJ) finding that because the Department had not yet amended its regulations to reflect that it was now administering the Partnership for Assessment of Readiness for College and Career (PARCC) test rather than the New Jersey Assessment of Skills and Knowledge (NJASK) or High School Proficiency Assessment (HSPA), the Board was arbitrary, capricious and unreasonable in refusing to void T.T.'s scores because there was no requirement that students must take the PARCC test. Although the regulations still referenced the HSPA, it was clear through guidance and memoranda issued by the Commissioner that the State had transitioned to the PARCC test and that districts were required to administer the assessment.

The Board also takes exception to the ALJ's conclusion that the procedures in place for when a parent refuses to allow his or her child to take the PARCC and the existence of alternative means for a student to demonstrate graduation proficiency contradict the requirement that all students participate in Statewide assessments. The Board emphasizes that the Department does not condone a student's ability to opt out of the PARCC, but rather provides instruction for how to handle the situation when it

arises. Further, the existence of alternative means to demonstrate high school proficiency does not nullify the requirement that students take the PARCC.

Finally, the Board disagrees with the ALJ's finding that Director Jeffrey Hauger of the Office of Assessments for the Department of Education authorized the Board to void T.T.'s PARCC scores. The Board argues that Director Hauger did not give blanket authorization to the Board to void the scores, but instead indicated that a decision to do so must be in accordance with the Board's policies and procedures. The Board pointed out that Board Policy 5460 requires that it consider a student's performance on the State assessments in making determinations for the student's education program or eligibility to graduate, and therefore it would have violated its own policy had it voided T.T.'s scores.

Upon review, the Commissioner concurs with the ALJ that the refusal of the Board to void T.T.'s PARCC scores is arbitrary, capricious, and unreasonable. The Board attorney, Matthew Giacobbe, Esq., told petitioner that the District would seek authorization from the State to void the PARCC scores. Thereafter, Mr. Giacobbe submitted a letter to the Department indicating:

... As you may be aware, Mr. [T] objected that his son had to take the PARCC Assessment under the pretense that it was required for graduation and therefore desires to have his son's Assessment voided in its entirety. It is the District's understanding that it is unable and/or not authorized to void a PARCC Assessment once the test has been completed. Accordingly, the District respectfully requests written guidance from the New Jersey Department of Education concerning how to address Mr. [T]'s request to void a completed PARCC Assessment.

(Febres Certification, December 2, 2016, Exhibit A).

In response, Director Hauger wrote:

... Please be advised that the Board has the authority to void a PARCC assessment after it has been completed by a student. The determination as to whether the Board will take such action is a local issue and the decision should be governed by the Board's policies and procedures.

(Febres Certification, December 2, 2016, Exhibit B).

The Board does not have a policy prohibiting it from voiding a PARCC score; while Board Policy 5460 references student assessments and their role in assessing student progress, it does not prohibit the Board from voiding a score. The Board reached out to the Department for guidance as it was

unsure whether it had the authority to void a score after a student had completed the assessment. Given that the Board specifically sought authorization from the Department to void the scores, received that authorization, and does not have any policy or procedure prohibiting it doing so, the Board acted in an arbitrary, capricious, and unreasonable manner in refusing to void T.T.'s PARCC scores. The Commissioner does not find the Board's exceptions to be persuasive. Board Policy 5460 did not prohibit it from voiding a score, and therefore the Board would not have violated its own policy.

Accordingly – to the extent that it found the Board was arbitrary, capricious and unreasonable in refusing to void T.T.'s PARCC scores after the Department had expressly given it the authority to do so – the Initial Decision of the OAL is adopted as the final decision in this matter.¹

IT IS SO ORDERED.²

COMMISSIONER OF EDUCATION

Date of Decision: August 14, 2017

Date of Mailing: August 14, 2017

¹ The Initial Decision noted that respondents Valeski, Sutor and Ogden were improperly pled. The Commissioner agrees with the ALJ that these respondents should be dismissed.

² This decision may be appealed to the Appellate Division of the Superior Court pursuant to *P.L. 2008, c. 36 (N.J.S.A 18A:6-9.1)*.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 11407-16

AGENCY DKT. NO. 184-7/16

H.A.-T., ON BEHALF OF MINOR CHILD, T.T.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP

OF EAST BRUNSWICK, MIDDLESEX

COUNTY; VICTOR VALESKI; EVELYN

OGDEN; AND MARK SUTOR,

Respondents.

H.A.-T., pro se

Frances L. Febres, Esq., for respondents (Cleary Giacobbe Alfieri Jacobs,
attorneys)

Record Closed: June 30, 2017

Decided: June 30, 2017

BEFORE **BARRY E. MOSCOWITZ, ALJ:**

STATEMENT OF THE CASE

In the spring of 2016, the East Brunswick Board of Education (Board) refused to void T.T.'s PARCC³ scores. The Board asserted that participation in the PARCC assessment is both a State requirement and a graduation requirement in East Brunswick. Did the Board act arbitrarily, capriciously, or unreasonably? Yes. Participation in the PARCC assessment was not and is still not a State requirement or a graduation requirement in East Brunswick under any State law or Board policy.

PROCEDURAL HISTORY

On May 6, 2016, petitioner, on behalf of her son, T.T., filed a petition with the Department of Education to have her son's PARCC scores voided. On May 13, 2016, the Bureau of Controversies and Disputes (Bureau) advised petitioner of the legal requirements for filing such an appeal, and on June 8, 2016, petitioner refiled her appeal with the Bureau. On June 9, 2016, the Bureau again advised petitioner of the legal requirements for filing such an appeal, and on June 20, 2016, petitioner refiled her appeal. On June 21, 2016, the Bureau yet again advised petitioner of the legal requirements for filing such an appeal, and on July 8, 2016, petitioner finally perfected her appeal.

On July 29, 2016, the Bureau transmitted the case to the Office of Administrative Law as a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the Office of Administrative Law, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On December 6, 2016, respondents moved for summary decision; on January 19, 2017, petitioner opposed the motion; on May 24, 2017, I held a telephone conference to discuss the motion; and on June 30, 2017, I closed the record.

³ Partnership for Assessment of Readiness for College and Career.

FINDINGS OF FACT

Based upon the Certification of Victor Valeski, the Certification of Mark Sutor, and the Certification of Frances Febres, and in viewing those certifications in the light most favorable to the East Brunswick Board of Education and not petitioner, that is, as if petitioner had cross-moved for summary decision, I **FIND** the following as **FACT**:

During the 2015–16 school year, T.T. was a ninth-grade student at Churchill Junior High School in the East Brunswick School District in East Brunswick, New Jersey.

From April 19, through May 16, 2016, the East Brunswick Board of Education administered the PARCC assessment to its ninth-grade students. During that time, each building administrator was responsible for issuing his or her own PARCC-related notifications. Since Churchill Junior High School and East Brunswick High School are separate buildings and entities, the parents of students at Churchill Junior High School received different PARCC-related notifications than parents of students at East Brunswick High School.

On December 1, 2015, and on December 8, 2015, Mark Sutor, the principal of Churchill Junior High School, notified parents of students at Churchill Junior High School, by telephone and through email, about a PARCC-assessment presentation that was scheduled to take place at a Parent-Teacher Association (PTA) meeting on December 10, 2015.

At that PTA meeting and presentation on December 10, 2015, the Board explained to those in attendance that students could complete an assessment portfolio to satisfy graduation requirements in the event they did not pass the PARCC assessment.

In addition, on March 28, 2016, Sutor notified parents of students at Churchill Junior High School, again by telephone and email, about the PARCC assessment and referenced a letter that Victor Valeski, the superintendent of schools, had issued about

the PARCC assessment. Sutor also referenced a frequently asked questions (FAQ) sheet about the PARCC assessment that had been emailed to parents and had been uploaded on the school website. In that FAQ sheet, the Board asked, “Is PARCC a required assessment?” and then answered, “All students in the tested grades or courses are required to take PARCC.”

The full answer, however, is contradictory. In the first paragraph of that answer, the Board states that all students are required to take the PARCC assessment, and that all students must take the PARCC assessment to graduate, but in the last paragraph of that answer, the Board states that it cannot force a student to take the test. The question and answer is reproduced below in relevant part:

Is PARCC a required assessment?

PARCC is the State of New Jersey’s legally required assessment for all students in grades 3 to 11, and for specific courses at the high school level in order to establish graduation eligibility. All students in the tested grades or courses are required to take PARCC.

....

... PARCC testing is not optional and there is no “opt-out provision.” We cannot force a student to take the test A student directed by his or her parent to not take the PARCC will be placed in a separate room from his/her classmates taking the assessment and will occupy their time reading.

[Certification of Marc Sutor dated December 1, 2016, at Ex. C.]

The Board also noted in the FAQ sheet that opportunities other than the PARCC assessment exist for students to meet graduation requirements:

State Eligibility for Graduation Requirement

PARCC is the official State graduation eligibility assessment

....

In order for the students who did not score at the proficient level on PARCC to graduate, the State Department of Education set minimal achievement scores for several other standardized assessments, including the PSAT, ACT, ASVB, and ACCUPLACER. The intent was to provide additional opportunities for students to meet the standards and be awarded a high school diploma. Students who do not meet the minimal test standards on any of these tests must participate in the rigorous, lengthy and time consuming State Portfolio Assessment Process in their senior year. If they do not pass the Portfolio Assessment, they are ineligible to graduate.

[Certification of Marc Sutor dated December 1, 2016, at Ex. C.]

Between April 19, 2016, and May 16, 2016, T.T. participated in the PARCC assessment, but after T.T. completed approximately five of the six segments, petitioner contacted Valeski and told him that she no longer wanted her son to participate in the assessment. Valeski encouraged petitioner to change her mind and have her son complete the assessment. Petitioner, however, refused. Valeski then spoke to petitioner's husband, who gave his authorization for T.T. to complete the PARCC assessment.

On May 12, 2016, during a Board of Education meeting, petitioner approached Valeski, in the presence of Matthew Giacobbe, Esq., counsel for the Board, and asked them to void T.T.'s PARCC scores.

Giacobbe then answered, in Valeski's presence, that they would seek authorization from the Department of Education to do so, and if the Department of Education authorized them to void T.T.'s PARCC scores, they would in fact do so.

On May 18, 2016, Giacobbe asked the Department of Education whether the Board could void the PARCC scores, and on May 19, 2016, the Department of Education responded that the Board did have the authority to do so, noting that the determination should be governed by Board policy and procedure.

Nevertheless, the Board refused to void T.T.'s PARCC scores, asserting that participation in the PARCC assessment is both a State requirement and a graduation requirement in East Brunswick.

CONCLUSIONS OF LAW

I.

Respondents submit three arguments in support of their motion for summary decision. I will address each in turn. Before I do so, I note that petitioner improperly pled Valeski, Sutor, and Ogden⁴ as parties to this case. Therefore, I will dismiss Valeski, Sutor, and Ogden from this case and will refer to the Board from this point forward as the only respondent in this case.

First, the Board argues through the certifications it submitted that it could not void the PARCC scores because it had no policy or procedure in place for doing so and petitioner demonstrated no exceptional circumstance for the Board to deviate from its policy and practice that all qualifying students participate in statewide assessments. The Board policy the Board refers to is Board Policy 5460. That policy requires all students, with the exception of students with a disability, or those authorized to participate in alternative assessments, to participate in statewide assessments. Yet this argument overlooks the fact that Giacobbe told petitioners that the Board would void the PARCC scores if the Department of Education gave the Board the authority to do so, which it did. Therefore, I **CONCLUDE** that the decision by the Board to refuse to void the PARCC scores is arbitrary, capricious, and unreasonable under the circumstances.

Second, the Board argues in its brief that all students are required to participate in the PARCC assessment. In support of its argument, respondent relies on N.J.A.C. 6A:8-4.1. This citation, however, is misleading. Today, that regulation states that boards of education shall administer the PARCC assessments, see N.J.A.C. 6A:8-4.1 (2016), but in 2015, when this controversy arose, the regulation stated that boards of

⁴ Evelyn Ogden is the director of testing for the East Brunswick School District.

education shall administer the HSPA,⁵ see N.J.A.C. 6A:8-4.1 (2015). Even though the Department of Education had made it clear in August 2015 in its handout “Year Two of PARCC . . . Parent PARCC Questions Answered” that New Jersey had transitioned from the NJASK⁶ and the HSPA to the PARCC, and even though the Department of Education had made it clear in September 2015 in its memorandum “Student Participation in the Statewide Assessment Program” that State law and regulations required all students to take State assessments, and that all students were still expected to participate in statewide assessment programs, the Department of Education had not yet changed its regulations and no State law yet existed to reflect that policy or authorize this transition from the NJASK and the HSPA to the PARCC. Therefore, I **CONCLUDE** that the decision by the Board to refuse to void the PARCC scores is arbitrary, capricious, and unreasonable under the circumstances.

Third, the Board argues in its brief that participation in the PARCC assessment was a graduation requirement. This too is untrue. In the spring of 2016, the regulation governing graduation requirements in New Jersey required students to demonstrate proficiency in all sections of the HSPA, not the PARCC, and, even then, alternative means existed to meet graduation requirements. See N.J.A.C. 6A:8-1.5(a)(6) (2015). Although this regulation was later changed to substitute the PARCC for the HSPA, alternative means still remained to meet graduation requirements, and the PARCC was not, and is still not, a graduation requirement. See N.J.A.C. 6A:8-5.1(a)(6) (2016). In fact, the FAQ sheet upon which respondent relies states as much. In addition, the current regulation phases in the PARCC over a period of years. See N.J.A.C. 6A:8-5.1(f) (2016). Moreover, the current Board policy for high school graduation upon which East Brunswick relies, Board Policy 5460, still does not include the PARCC assessment as a graduation requirement. Therefore, I **CONCLUDE** that the decision by the Board to refuse to void the PARCC scores is arbitrary, capricious, and unreasonable under the circumstances.

⁵ The High School Proficiency Assessment.

⁶ New Jersey Assessment of Skills and Knowledge.

II.

A party may move for summary decision upon all or any of the substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). Such motions shall be served with briefs. N.J.A.C. 1:1-12.5(b). They may also be served either with or without affidavits. Ibid.

Summary decision may ultimately be rendered if the papers, together with the affidavits, show that no genuine issue of material fact exists, and that the moving party is entitled to prevail as a matter of law. Ibid. This standard for granting motions for summary decision under N.J.A.C. 1:1-12.5 is substantially the same as it is for granting motions for summary judgment under R. 4:46-2. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996). Thus, the competent evidential materials presented must be viewed in the light most favorable to the non-moving party. See Brill v. Guardian Life Ins. Co., 142 N.J. 520, 523 (1995).

In this case, respondent served its motion with a brief and with certifications. Petitioner then opposed the motion, but did not cross-move for summary decision. Nevertheless, in viewing those certifications in the light most favorable to respondent, I **CONCLUDE** that no genuine issue of material fact exists and that petitioner, not respondent, is entitled to prevail as a matter of law, but not against Valeski, Sutor, and Ogden, because they are improper parties to this case, and the claims against them should be dismissed.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the claims against Valeski, Sutor, and Ogden by petitioner are **DISMISSED**; that the motion for summary decision by the Board against petitioner is **DENIED**; and that the cross-motion against the Board as posited by this tribunal is **GRANTED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this case. If the Commissioner of the Department of Education does not adopt, modify, or reject this decision within forty-five days, and unless such time limit is otherwise extended, this recommended decision shall become a final decision under N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 30, 2017 _____

DATE



BARRY E. MOSCOWITZ, ALJ

Date Received at Agency:

June 30, 2017 _____

Date Mailed to Parties:

dr