

IN THE MATTER OF THE STATE BOARD
OF EDUCATION'S DENIAL OF
PETITION TO ADOPT REGULATIONS
IMPLEMENTING THE NEW JERSEY HIGH
SCHOOL VOTER REGISTRATION LAW

AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY, PROJECT VOTE, and
FAIR ELECTIONS LEGAL NETWORK,

Appellants

NEW JERSEY COMMISSIONER OF
EDUCATION and NEW JERSEY BOARD
OF EDUCATION,

Respondents.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Docket No. A-5681-09T3

Sat below: Bret Schundler, as
Commissioner of Education and
Secretary of the New Jersey
State Board of Education

**BRIEF AND APPENDIX OF APPELLANTS
AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY,
PROJECT VOTE and FAIR ELECTIONS LEGAL NETWORK**

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PRELIMINARY STATEMENT

Nearly 100,000 young people graduate from a public, charter, or private high school in New Jersey every year. To protect their voting rights, the Legislature vested all these students with a right to receive from their school administrators (1) a voter registration form and (2) instructional materials about the importance of voting. N.J.S.A. 18A:36-27 (known as the "High School Voter Registration Law"; hereinafter "HSVRL"). To ensure that all these schools would comply with this critical obligation, the Legislature simultaneously imposed a requirement that the Commissioner of Education "shall adopt . . . rules and regulations necessary to implement the provisions of this Act." N.J.S.A. 18A:36-28 (emphasis added).

That was twenty-five (25) years ago.

Today, private and charter school students still have no regulatory protections whatsoever. And students enrolled in a district public school have only the most meager of protections: a requirement that, once every three years, some school district administrator must check a box on a checklist affirming compliance. The State only extended those meager protections to these students in early 2010.

For both of these classes of students therefore, the State Department of Education's (DOE) inaction falls far below what is

"necessary" to bring about compliance with the high school voting law, as neither of these two classes of students is adequately protected under existing regulations.

In early 2010, a coalition of voting advocates (including the three Appellants as well as the now-defunct Department of the Public Advocate) filed a formal rulemaking petition with DOE asking that it comply with its long-ignored regulatory obligation. The DOE, however, denied the petition, refusing to fulfill the Legislature's promise made to these 100,000 students annually that the State would protect their voting rights.

In order to vindicate the rights of these students, appellants American Civil Liberties Union of New Jersey (ACLU-NJ); Project Vote; the Fair Elections Legal Network (FELN) bring this appeal. To protect the rights of these two groups of students, this Court should order DOE to create an adequate set of controls to protect their civic rights.

PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

This appeal arises from a Petition for Rulemaking (the "Petition") submitted to the DOE on January 8, 2010, by four voter advocacy groups: the ACLU-NJ, Project Vote, FELN; and the New Jersey Department of the Public Advocate ("Public

¹ For the convenience of the Court, the intertwined Procedural History and Statement of Facts are presented here as a single section.

Advocate").² (1a-17a).³ Each of these entities has substantial expertise in voting rights and election administration matters. (3a).

The Petitioners acted pursuant to the provisions of N.J.S.A. 52:14B-4(f), which allows any interested party to petition a department in writing for a new administrative rule or for the amendment or repeal of such a rule. See also N.J.A.C. 6A:6-4.1 (rulemaking petitions to the Department of Education).

The Petition presented a wealth of information on the history of student and youth voting (2a, 8a-10a), and asked the DOE to impose, on public and private schools, a set of substantive standards and accountability requirements to fulfill its obligation to ensure schools' compliance with the 1985 HSVRL.

A. The High School Voter Registration Law.

In 1985, the Legislature adopted, and then-Governor Thomas Kean signed, the HSVRL. N.J.S.A. 18A:36-27 and -28. The HSVRL offers protections to all New Jersey students as they approach voting age; as the DOE has aptly described the law, "[s]ince

² On June 30, 2010, the Public Advocate was abolished by statute, see P.L. 2010, c. 34, and as a result is not participating in this appeal.

³ Numbers followed by an "a" such as 1a, 2a, 3a, etc., refer to the Appellant's Appendix submitted with this Brief.

1985, the [S]tate of New Jersey has required every public and non public school to provide students with voter registration forms and information about the importance of voting." (25a). Thus, the obligation of all schools, both public and private, to conduct a voter drive and provide students with related civic education, is a mandate of long standing.

N.J.S.A. 18A:36-27 was amended early in 2010 to clarify the timing of the voter drive and to delete obsolete language regarding the role of county election officials in carrying out this law, see P.L. 2009, c. 281. Yet nothing was changed regarding this basic mandate that has been in effect for 25 years. The law currently reads as follows:

The board of education of each school district and the appropriate school officials in each nonpublic school shall provide a voter registration form, a summary of voter registration eligibility requirements, and material describing the role of a citizen and the importance of voting to each eligible high school pupil prior to the graduation date for the school year. This material shall be nonpartisan and conform to the provisions of N.J.S. 18A:42-4.

[N.J.S.A. 18A:36-27.]

In Section 2 of the HSVRL, the Legislature also mandated that the Commissioner of Education ensure that all schools were following the HSVRL's substantive requirements - handing out a voter form to students at a time when they are eligible⁴ to

⁴ While the statute does not define "eligible," it presumably means "eligible to vote," i.e., a U.S. citizen, resident of the

register, and providing the required civics instruction to those same eligible students. There is no ambiguity in this statute, which reads:

The Commissioner of Education shall adopt pursuant to the "Administrative Procedures Act," P.L. 1968, c. 410 (C. 52:14B-1 et seq.) rules and regulations necessary to implement the provisions of this act.

[N.J.S.A. 18A:36-28 (emphasis added)].

In other words, there was an explicit mandate to issue regulations "necessary" to ensure that all schools adhere to the substantive requirements of N.J.S.A. 18A:36-27 and be accountable for the same.

B. The DOE's Inaction to Protect Students Despite Evidence of Low Youth Voting Rates and School Noncompliance with the HSVRL.

The Petition to the DOE recited studies showing that despite the statutory mandate of the HSVRL, anywhere from 40 to 60 percent of New Jersey high schools did not comply with the twin substantive mandates of the law: (1) distributing a voter registration form to each eligible student; and (2) provided the associated civic instruction. (2a).

The DOE favorably cited to these studies in a October 2008 press release still found on its website, where the DOE said:

state and county for 30 days prior to the election, at least 18 years of age on the date of the election, and having no disqualification for voting because of a criminal history. N.J.S.A. 19:4-1.

According to a study that was conducted in 2004 by the New Jersey Center for Civic & Law-Related Education and the Eagleton Institute, only 40 percent of the 189 New Jersey school districts surveyed actually ran a voter registration program. In Spring 2007, the Department [of the Public Advocate] conducted its own survey of teachers, education coordinators, superintendents, high school class presidents and principals in public and non-public schools. That random survey showed only a 44 percent rate of compliance with the law's mandate to distribute both voter registration forms and educational materials.

[See <http://www.state.nj.us/education/news/2008/1003vote.pdf>

(last visited October 18, 2010)].

This noncompliance is especially troubling when analyzed with other evidence about the voting patterns of young New Jerseyans. The Petition described the most recent Census data on youth voter participation, showing that even in the historic 2008 presidential election, 64.1% of eligible New Jerseyans cast ballots, compare to 52.5% of eligible 18 to 24 year olds. (8a). The Census also observed a similar gap between youth registration and participation and that of the population at large, in the 2004 and 2000 elections, and it ranged from 12 to 23 percent. (Id.) This gap is in part caused by barriers to voting like students' "failure to meet the registration deadline and failure to know where or how to register." (Id.) These barriers affect students and youths more than the rest of the population, making it crucial for "educators to offer an meaningful registration opportunity and to teach about how, when

and where to register to vote and cast a ballot." (Id.)

Earlier this year, the League of Women Voters and Project Vote established a groundbreaking program to register 27,000 students at 100 high schools in five states across the country. The League and Project Vote believe that these voter drives will "create long-term change by encouraging life-long civic participation from young people" especially in the disadvantaged communities they are targetings. See http://www.lwv.org/AM/Template.cfm?Section=High_School_Registration_Project&Template=/TaggedPage/TaggedPageDisplay.cfm&TPLID=214&ContentID=15228.

Indeed, the Legislature had expressed these very concerns when it adopted the HSVRL. The Senate Education Committee Statement to Assembly No. 989 states:

The lowest rates of voter registration and voting tend to occur among the youngest eligible citizens.

This bill represents an effort to address the problem by providing high school seniors with a voter registration form and nonpartisan material to inform the students of the importance of participating in the decisions of government through voting.

Despite this legislative mandate, it is apparent in the record that the DOE deemed N.J.S.A. 18A:36-28 a complete dead letter for 24 years. Specifically, until January 2010, the DOE did not issue any regulations about the substantive content of N.J.S.A. 18A:36-27, or regarding accountability for its

compliance. Thus, it did nothing to protect either public school or nonpublic school students.

C. The January 2010 Revisions to the School District Accountability Process.

After 24 years of inaction to safeguard the voting rights of students, in January 2010, the DOE finally took a meager, insubstantial step to protect the rights of district public school students, while still leaving private and charter school students wholly unprotected. The "safeguard" for district public school students consisted only of a once-every-three-years check-off on a 144-page accountability form. It contained no further accountability, review or enforcement mechanism, and contained no explanation or guidelines as to how voter education should occur.

1. The Accountability Process for District Public Schools.

DOE, pursuant to statutes and regulations, operates an accountability review program known as the Quality Single Accountability Continuum (QSAC). See generally <http://www.state.nj.us/education/genfo/qsac/>. In general, the QSAC program requires a triennial review of public school districts. N.J.A.C. 6A:30-3.1(a). The keystone of the QSAC process is the completion of a 144-page checklist by each school district, which is subsequently reviewed by DOE personnel. See

N.J.A.C. 6A:30-3.1(b); N.J.A.C. 6A:30 App. A; 42 N.J.R. 192-336 (Jan. 19, 2010).⁵

The DOE characterizes the QSAC checklist - formally known as the District Performance Review (DPR) - as a "self-assessment tool." N.J.A.C. 6A:30-3.2(a). The regulations contemplate that school district teachers, administrators, board of education members, and members of the public, will all have some input into the process of completing the DPR. See N.J.A.C. 6A:30-3.2(b)-(g). Ultimately, the school district submits the DPR to the county superintendent of schools and thereafter, to the Commissioner of Education. N.J.A.C. 6A:30-3.3.

Even though the HSVRL has been in effect for 25 years, there was no mention of this law in earlier iterations of the QSAC process. In January 2010, however, the DOE finally included a passing reference to the HSVRL in its revisions to the DPR.

The January 2010 amendment to the DPR provided that a school district administrator must check a box on the 144-page checklist affirming that "The district has provided a voter registration form and voting description material to each eligible high school pupil in compliance with N.J.S.A. 18A:36-27." 42 N.J.R. at 285 and 418. District administrators are

⁵ County special school districts use a slightly shorter, 130-page checklist.

invited, but not required, to submit "suggested documentation" as backup for a claim of compliance consisting of a "[c]opy of sample voting registration forms and materials." Id. The DPR provides absolutely no further guidance or detail. Moreover, the checklist item appears is a section of the DPR on "student conduct, school safety and security" rather than a more apt location such as "instruction and program" or "high school/graduation." See generally 42 N.J.R. at 190-91 (discussing the department's proposal and commenters' reaction about the unusual choice of where to place the requirement).

This completion of a checklist item once every three years represents the entirety of the State's directives about what public school districts must do to substantively comply with the HSVRL, and be accountable for compliance.

2. Charter and Private School Students, and Certain Public Schools, Are Not Covered by the QSAC Process.

The QSAC process excludes a substantial number of New Jersey schools from its coverage. While the HSVRL protects the rights of all New Jersey students, the QSAC process does not apply to many of those schools. For example, charter schools need not comply with its requirements. N.J.A.C. 6A:30-1.1(c). Education service commissions and certain vocational schools are also exempt from the QSAC requirements. Id. In addition, schools that are "public" but are not operated by a district

board of education are not covered. (These "nondistrict public" schools include state-operated facilities such as the Marie H. Katzenbach School for the Deaf or education programs operated by the Department of Human Services, the Department of Corrections, and the Juvenile Justice Commission). Finally, the QSAC process covers none of the approximately 13,000 students who graduate from a private New Jersey high school every year.⁶

In short, none of these students has any protection from the DOE about their voting rights, from any section of DOE regulations. They do not even enjoy the minimalist requirements found in the QSAC process.

D. The Petition and the Agency Denial.

Based on the 24 years of DOE inaction and based on the reliable studies of schools' noncompliance, on January 8, 2010, the appellants herein filed their Petition for Rulemaking with the DOE. (1a-17a). Included in the petition was extensive research about the statutory authority for the action, and detailed research showing the need for the rule. (2a-4a, 8a-10a). It also included the proposed text of a rule. Divided into two subchapters, one for public and charter schools, and

⁶ According to the National Center for Education Statistics, private high schools in New Jersey graduated 13,340 students in 2006-07, the most recent year for which federal statistics are available. See National Center for Education Statistics, Digest of Education Statistics, 2009, Table 62, available at http://nces.ed.gov/programs/digest/d09/tables/dt09_062.asp.

the other for private schools, the proposal laid out a comprehensive set of substantive actions that schools must take, along with detailed instructions on how schools must report compliance with the law. (11a-15a).

After two extensions (18a, 21a-22a), the DOE ultimately denied the petition on or about June 18, 2010. (24a-27a). First, it expressly acknowledged that "every public and non public school" must comply with the HSVRL. (25a). It also acknowledged that this requirement was in effect "[s]ince 1985," (id.), yet it was unable to recite anything it had done before 2010 to enforce compliance with the HSVRL, as required by N.J.S.A. 18A:36-28. The DOE then opined that a mere one year of data from the new, meager addition to the QSAC forms constituted a sufficient showing that districts were complying with the law (26a). This was in stark contrast to their adoptive admission less than 2 years before (see page 6, supra), that noncompliance was widespread.

Even if DOE's newfound claims about district public schools were true, however, the denial letter did not discuss any attempt to collect data from charter schools, private schools, or the nondistrict public schools to which the QSAC process does not apply. And it did not regulate these entities, leaving their students bereft of regulatory protections. In sum, it

made no effort to understand whether these schools were aware of the law, understood it, or complied with it.

Appellants filed a timely appeal with this Court on July 28, 2010. (28a-29a).

ARGUMENT

APPELLANTS ARE ENTITLED TO AN ORDER COMPELLING DOE TO ADOPT REGULATIONS ENFORCING THE LONG-STANDING LEGAL MANDATES PROTECTING THE VOTING RIGHTS OF EVERY HIGH SCHOOL STUDENT IN NEW JERSEY

A. The Appellate Division Has the Obligation to Correct Agency Inaction that is Contrary to Legislative Mandates or Unsupported by Record Evidence.

Pursuant to R. 2:2-3(a)(2), "every proceeding to review the action or inaction of a State administrative agency [shall] be by appeal to the Appellate Division." Pascucci v. Vagott, 71 N.J. 40, 52 (1976); see also In re Failure by the Department of Banking and Insurance, 336 N.J. Super. 253, 261 (App. Div. 2001) (appeal of state agency's refusal to set fee schedule for certain dental procedures); Hospital Center at Orange v. Guhl, 331 N.J. Super. 322, 329 (App. Div. 2000) (allowing an appeal of a state agency's refusal to act on a rate appeal "within a reasonable time"). "The term 'action' found in the rule, includes inaction." Id. (quoting Mathews v. Finley, 46 N.J. Super. 175, 177 (App. Div.), certif. denied, 25 N.J. 283 (1957)).

It is "firmly established" in New Jersey that the actions of administrative agencies "are subject to judicial review and supervision" to ensure fairness. Id. at 333 (citing In re Arndt, 67 N.J. 432, 436 (1975)) (other citations omitted).

Thus, the courts will not hesitate to overturn agency action or inaction when (1) the agency's action "violat[es] the enabling act's express or implied legislative policies"; or (2) there is a lack of "substantial evidence in the record to support the findings on which the agency based its action"; or (3) when, "in applying the legislative policies to the facts the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of relevant factors." In the Matter of Petitions for Rulemaking, N.J.A.C. 10:82-1.2 and 10:85-4.1, 117 N.J. 311, 325 (1989).

These same factors also apply in the course of judicial review of an agency's failure to adopt regulations proposed in a formal rulemaking petition, as appellants have done here. Id.; see also I/M/O N.J.A.C. 10:71-4.7(b)(4)(ii), Dkt. No. A-0915-07T1, slip op. at 10 (App. Div. Sep. 22, 2008).⁷

B. Since it is Undisputed that the Rules and Regulations of DOE are Devoid of Any Reference to the Voter Registration Rights of Private School, Charter School, and Nondistrict Public School Students, this Court Should Order Prompt Action by DOE.

As demonstrated above, the regulations and directives of DOE are utterly silent about the HSVRL rights of students who attend charter schools, private schools, or those nondistrict public schools falling outside the QSAC process. DOE's failure

⁷ The decision is reprinted at 36a-55a as required by R. 1:36-3.

to adopt regulations to safeguard the voting rights of this class of students, should therefore be set aside.

Their inaction can and should be set aside under each of the three grounds for invalidating agency inaction identified in Matter of Petitions for Rulemaking, supra.

First, the inaction violates the express and implied terms of the HSVRL. The statute directs voter registration activities by officials of "each school district and . . . each nonpublic school." N.J.S.A. 18A:36-27 (emphasis added). It says the DOE "shall adopt . . . rules and regulations necessary to implement the provisions of this act." N.J.S.A. 18A:36-28 (emphasis added). By neglecting to make rules or regulations that protect private school or charter school students, as well as students whose nondistrict public schools are not subject to the triennial QSAC review, DOE is simply flouting the express terms of the statute. Likewise, DOE's inaction also contradicts the implied policies behind the HSVRL, identified in the above-cited Assembly Education Committee statement. The intent of the statute was to enhance the civic rights of all graduating seniors, regardless of the type of school they attend. DOE's deafening silence on this matter is also contrary to this implied legislative intent.

Second, there is no substantial evidence in the record substantiating the DOE's action. In their denial of the

rulemaking petition, DOE acknowledges that students at "non public school[s]" (25a) have full rights under the HSVRL, but there is not a word in the decision or a scintilla of record evidence that purports to protect these students. Indeed, the DOE collected data about district-based public schools and claimed that the HSVRL was "clear and well understood in districts." (26a). While this claim is dubious, as will be explained in Point C., infra, simply put, there is no evidence that speaks to present compliance or understanding of the law in private, charter, or nondistrict public schools, much less any attempt to justify why such schools should not be regulated prospectively.

Third, the refusal to act is palpably unreasonable in light of the legislative policies that animated the adoption of the HSVRL. The HSVRL is an expansive law covering all New Jersey students. It was passed with the specific intent of fighting "[t]he low[] rates of voter registration and voting [which] tend to occur among the youngest eligible citizens." Senate Education Committee Statement to Assembly No. 989. And it included direction to the DOE that it "shall adopt" - not "may adopt" or "should adopt" - regulations to enforce it. N.J.S.A. 18A:36-28. The utter lack of any regulatory protections for private, charter, or nondistrict public school students is an

affront to the Legislature's motivation in imposing regulatory duties on the DOE.

The courts have invalidated agency action and inaction based on the three-prong test set forth in Matter of Petitions for Rulemaking in instances far less alarming than what has occurred here. For example, in Hospital Center, the Division of Medical Assistance and Health Services failed - on a regular basis - to provide hospitals with prompt review of their appeals from administrative determinations of Medicaid reimbursement rates. Hospital Center, 331 N.J. Super. at 326. The Appellate Court found that the Division "ha[d] an obligation to decide Medicaid rate appeals within a reasonable period of time, and that the Division failed to satisfy that obligation." Id. at 328. Although the court refused to set an exact time limit to decide appeals, it also recognized that the current amount of time taken by the Division was both unreasonable and unjustifiable. Id. at 335.

Furthermore, in Pascucci, the Division of Public Welfare set "lower levels of financial assistance to persons classified as 'employable' than to those classified as 'unemployable.'" Pascucci, 71 N.J. at 43. These classifications conflicted with a statute that created a legislative standard for the classification of individuals in the state. Id. at 48. As a result, the Supreme Court found that the Division's regulation

was "plainly discordant on its face with the statutory purpose."
Id. at 49.

Additionally, In the Matter of Petitions for Rulemaking itself, the Supreme Court invalidated agency inaction because of a violation of "the enabling act's express or implied legislative policies." In the Matter of Petitions for Rulemaking, 117 N.J. at 325. There, a coalition of nonprofit groups filed a rulemaking petition intending to establish standards of need for recipients of welfare because the Department of Human Services had failed to do so. Id. at 313-314. The Court found that implied intent within the statute was for the Department to determine the proper assistance for needy people and establish standards. Id. at 325. Accordingly, the Court affirmed the Appellate Division's order to the Department to engage in a regulatory process to fix the proper standard of need. Id. at 315.

Similar to what occurred in these cases, agency inaction here has left private, charter, and nondistrict public school students without any of the regulatory protections that are required by statute. "Administrative action cannot subvert or enlarge upon the statutory policy . . . [and] cannot deviate from the principle and policy of the statute." Matter of Freshwater Wetlands Rules, 238 N.J. Super. 516, 526 (App. Div. 1989).

The New Jersey Legislature passed the HSVRL in 1985. Since 1985, DOE has issued no regulations covering any private schools, charter schools, or nondistrict public schools. Given the decision of Hospital Center, where waiting 120 days or more for agency action was found to be unreasonable, it is completely fair to determine that forcing these students to wait 25 years for regulatory protections about their right to receive voter registration materials is completely unjustifiable and unreasonable.

The Department of Education offers no justification for their inaction, nor has the Department shown any indication that it plans to adopt any regulations for these schools. Therefore, this Court should intervene by issuing an order directing the DOE to afford regulatory protections to this class of students. Accord, In re Bluewater Network, 234 F.3d 1305, 1316 (D.C. Cir. 2000) (Coast Guard's failure to issue oil pollution regulations despite "a clear statutory mandate, a deadline nine years ignored, and an agency that has admitted continued recalcitrance" justified issuance of writ of mandamus "to undertake prompt . . . rulemaking"); Estate of Smith v. Heckler, 747 F.2d 583 (10th Cir. 1984) (granting mandamus relief to compel rulemaking activity because "the duty to promulgate regulations . . . [was] fully supported by the statute and its legislative history" and the agency was unjustified in its inactions).

C. The DOE's Action Regarding the HSVRL Rights of Students in District Public Schools, which Assesses Compliance by a Check-off Box in a 144-page Checklist Submitted Once Every Three Years, Falls Below the Minimum Standard Necessary to Protect these Students' Rights.

A state agency's action will be set aside if it "plainly transgresses the statute it purports to effectuate or alters the terms of the statute and frustrates the policy embodied in it." In the Matter of Adopted Amendments, 365 N.J. Super. 255, 265 (App. Div. 2003). The applicable statute here directs DOE to pass regulations "necessary" to secure compliance with the substantive mandates of the HSVRL. N.J.S.A. 18A:36-28. The meager action taken by DOE to protect the voting rights of district public school students falls short of that requirement.

As outlined above, the extent of DOE's protection of district public school students' voting rights consists of a requirement that a district administrator check a box on the 144-page District Performance Review (DPR) form, once every three years, that affirms compliance with the law.

As the Petition makes clear, there are several deficiencies to this approach.

First, New Jersey's election laws are "arcane . . . highly detailed statutes . . . [that] are not easy to digest." Schundler v. Paulsen, 340 N.J. Super. 319, 328 (App. Div.), aff'd, 168 N.J. 446 (2001). Despite this complexity, the DPR is

notably devoid of any substantive guidance to school districts about how to conduct the voter drive and associated education. It was for this reason that the voting experts who submitted the Petition recommended that DOE provide detailed guidance to schools about when to conduct the voter drive, how to conduct the voter drive, what to advise students about the substantive law of voting qualifications, and the administrative steps that schools needed to take to process the completed forms by applicable deadlines. (See 11a, 12a, 14a) (proposed sections 1.3(b) and 2.3(b)). Such steps are necessary to completing a successful voter drive.

But the statute requires more than a voter drive: it also gives students an entitlement to receive "material describing the role of a citizen and the importance of voting," all of which must be nonpartisan. N.J.S.A. 18A:36-27. For that reason, the voting experts who submitted the Petition also advised the DOE about mandatory and optional components of the voter education material. (See 12a, 13a, 14a, 15a) (proposed sections 1.3(c) and 2.3(c)). Accordingly, the Appellants recommended instruction about voter eligibility, the importance of voting, and instructions on where and when to cast a ballot in person or by mail, along with information about political offices, the scheduling of elections, and similar information. Id.

Disregarding the Appellant's advice without any substantive discussion or contrary advice in the record, DOE decided instead to leave individual school districts to puzzle out the "complex" voter laws, Schundler, 340 N.J. Super. at 328, and what to teach students about civics. This hardly provides the substantive direction that is "necessary" to comply with the HSVRL.

Second, the cursory treatment of the HSVRL is inconsistent with both the legislative intent of the law and the broader public interest. The Legislature intended for all eligible students to actually receive voter registration materials in addition to an education on voting in general while attending New Jersey high schools. The Legislature also expressly required the DOE to create regulations that would actively provide students with the proper materials for them to register to vote. Instead of the real substantive guidance that the Appellants had suggested, or a mandate that required the turnover of real data about the success rates of voter drives (16a) the agency opted to determine compliance by whether a box in a 144-page checklist was checked off or not. And even that requirement is in effect instituted only once every three years. This lack of regulatory directives at the level of particularity necessary to accomplish the Legislature's goals functions directly against this legislative intent.

Third, the cursory treatment of students' HSVRL rights is inconsistent with public policy. "The right to vote holds an exalted position in our State Constitution." In re Attorney General's Directive on Exit Polling, 200 N.J. 283, 302 (2009). More particularly, the public policy of encouraging voting by students and youths also has a long history in New Jersey. In Worden v. Mercer Co. Board of Elections, 61 N.J. 325, 345 (1972), the Supreme Court, striking down barriers to voting by college students, noted that the Legislature's goal was "not merely to empower voting by our youths but [to] affirmatively . . . encourage their voting, through the elimination of unnecessary burdens and barriers." This same civic-mindedness is evident in the legislative history of HSVRL. But twenty-five years later, the DOE's response is wholly inconsistent with that legislative intent or public policy, because it does not create a sufficient level of specificity about how to encourage youth voting.

Fourth, the DOE's treatment of data about public school compliance with the HSVRL deserved more attention than it received. As explained above (page 6), in 2008, DOE admitted the accuracy of surveys showing that anywhere from 40 to 60 percent of New Jersey's public school districts were out of compliance with the HSVRL. Rather than survey social studies supervisors or educators who are actually close to the process

of teaching high school seniors (as recommended by Appellants, see 19a-20a) DOE opted instead to rely on the QSAC data, which purported to show greater compliance rates. The record does not adequately explain why this method of data collection is sufficient to overcome a history of documented and acknowledged non-compliance.

The long term effects on these particular high school students has been proven in studies that have shown that students and youths tend to register to vote at rates much lower than their older counterparts. The greater implications of this gap are immeasurable. The State of New Jersey for the past 24 or more years has had generations of young citizens who have not been informed of their eligibility to vote, and who have not been taught the importance of their vote on society as a whole.

Thus, given the Department's unjustifiable and unreasonable inaction or insufficient actions in the face of a clear legislative mandate to ensure that students are properly informed of their right to vote, the Appellate Division should direct the Department of Education to implement sufficient regulations to protect the rights of students as required by the HSVRL.

CONCLUSION

For the foregoing reasons, this Court should reverse the DOE's denial of the Appellants' Petition, and direct the agency to propose and issue a rule that meaningfully enforces the HSVRL rights of all New Jersey students - whether at private, charter, or public schools.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
OF NEW JERSEY FOUNDATION

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