

STATE OF RHODE ISLAND  
PROVIDENCE, SC.

SUPERIOR COURT

In the Matter of:

PROVIDENCE STUDENT UNION, :  
AMERICAN CIVIL LIBERTIES UNION :  
OF RHODE ISLAND, RHODE ISLAND :  
BLACK BUSINESS ASSOCIATION, RI :  
TEACHERS OF ENGLISH LANGUAGE :  
LEARNERS, TIDES FAMILY SERVICES, :  
RHODE ISLAND DISABILITY LAW :  
CENTER, DIRECT ACTION FOR RIGHTS :  
AND EQUALITY, RICK RICHARDS and :  
TOM SGOUROS :

Plaintiff/Petitioners, :

C.A. No.:

And :

RHODE ISLAND BOARD OF EDUCATION :  
and EVA-MARIE MANCUSO in her capacity :  
as Chair. :

Defendants/Respondents. :

**FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT  
AND INJUNCTIVE RELIEF**

**Introduction**

1. This action seeks a declaration that the Rhode Island Board of Education violated the Administrative Procedures Act by failing to promptly consider a Petition prohibiting high stakes testing as a graduation requirement, and further seeks a declaration that the Board, when it finally considered the Petition on September 9, 2013, violated the Act and the Open Meetings Act by considering the Petition in secret, rather than in open session.

## **Parties and Jurisdiction**

2. The Providence Student Union (“PSU”) is a youth-led student organizing program with chapters at multiple Providence public high schools. A number of PSU students have been labeled at risk of not graduating because of the high stakes testing graduation requirement, and so are currently undergoing significant harm from the effects of curriculum narrowing, loss of electives and even core classes, and the replacement of real learning with test prep, both during the school year and the summer. Students believe a formal, public hearing process is necessary.

3. The American Civil Liberties Union of Rhode Island (ACLU/RI) is a non-partisan, non-profit organization with over 2,000 members in Rhode Island, whose mission is to preserve and protect civil rights and liberties. Since at least 2008, ACLU/RI has raised concerns with the Rhode Island Department of Education and other policy-makers about the use of “high stakes testing” in Rhode Island and its disproportionate and adverse impact on racial minorities, English Language Learners, students with disabilities, and other vulnerable groups.

4. The Rhode Island Black Business Association (“RIBBA”) is a non-profit organization dedicated to enhancing the growth and economic empowerment of minority owned businesses by providing them a forum to competitively participate in the local and global economy, primarily through business development, legislative advocacy, business mentoring, quality educational opportunities and professional development. In recognition of the clear connection between education and business, and the questionable validity of high stakes testing as an educational tool, RIBBA has strongly supported efforts to rescind the state’s high stakes testing requirement.

5. The Rhode Island Teachers of English Language Learners (“RI TELL”) is a non-profit professional organization for ESL and Bilingual Education teachers in Rhode Island. As an

affiliate of International TESOL (Teachers of English for Speakers of Other Languages), the purpose of RI TELL is to serve Rhode Island teachers of English Language Learners and their students, from Pre-K through Adult Education. Among the many reasons RI TELL opposes high stakes testing in English for English Language Learners is that testing students in a language the state itself has verified they do not read or write proficiently is neither valid nor reliable.

6. Tides Family Services is a not-for profit organization that provides a range of community-based services for the state's most at-risk adolescents. These systems of support, which include individual and family programming conjunction with educational programming and advocacy, are increasingly critical in today's education and job market. Since a high school diploma communicates a level of independence and growth that will provide our clients with the opportunity to pursue a better job and future educational opportunities, Tides believes that to deny or substantially discourage the attainment of this basic credential is to knowingly increase chronic school absenteeism and ongoing social isolation.

7. Rhode Island Disability Law Center ("RIDLC") is the private non-profit law office that is the designated protection and advocacy agency for the State of Rhode Island. In this capacity, RIDLC advocates for the special education rights of students with disabilities, as well as their efforts to obtain post-secondary education and/or vocational supports. RIDLC endorses those national studies and best practice models that counsel against using high-stakes tests to determine graduation readiness for students with disabilities, and instead support the use of multiple indicators of student learning and skills to demonstrate graduation readiness.

8. Direct Action for Rights and Equality ("DARE") is a member led organization whose mission is to organize low-income families in communities of color for social, political and economic justice. DARE works to undo the systems of oppression that are the root cause of

the problems facing those communities, and opposes the structural racism and further disenfranchisement of communities that standardized testing requirements cause.

9. Rick Richards is a member of the ACLU/RI and a retired employee of the Rhode Island Department of Education's Offices of Testing, School Improvement and School Transformation. He has testified at a number of public hearings in opposition to the use of high stakes testing.

10. Tom Sgouros is a member of the ACLU/RI, and a freelance engineer, policy analyst, and writer. He is the parent of a high school student whose educational opportunities have been damaged, he believes, by the state's high stakes testing policies. He has written a number of articles about, and testified on, the issue of high stakes testing.

11. Eva-Marie Mancuso is the Chair for the Rhode Island Board of Education.

12. The Rhode Island Board of Education ("RIBOE") is the administration agency responsible for promulgation of high school graduation requirements.

13. Jurisdiction over the Petition for Writ of Mandamus is vested in the Superior Court pursuant to R.I. Gen. Laws § 8-2-16. Jurisdiction over the Complaint for Declaratory Judgment is vested in the Superior Court pursuant to R.I. Gen. Laws § 9-30-1 et. seq.

### **Facts**

14. By letter dated May 20, 2013, certain organizations, including Petitioners, urged the RIBOE to rescind regulations adopted by its predecessor, the Board of Regents for Elementary and Secondary Education, that condition receipt of a high school diploma on passing a "high stakes test," the New England Common Assessment Program ("NECAP"). The letter noted that the newly-constituted RIBOE "has not had the opportunity to consider the full consequences" of the NECAP requirement, and particularly in light of the "potentially

devastating impact of the requirement,” asked the RIBOE to consider “alternative strategies to improve student outcomes.” A true and accurate copy of the May 20, 2013, letter is attached as Exhibit A.

15. The RIBOE did not respond to the May 20, 2013, letter.

16. By letter dated June 21, 2013, certain organizations, including Petitioners, submitted a petition pursuant to R.I.G.L. 42-35-6 and the RIBOE’s Title A Regulations, A-1-23, proposing amendments to the “Secondary School Regulations: K-12 Literacy, Restructuring of the Learning Environment at the middle and high school levels, and proficiency based graduation requirements (PBGR) at High Schools” (the “Petition”).

17. The Petition addressed the controversy surrounding implementation of the NECAP graduation requirement by inviting an “official and structured rule-making process” which would essentially prohibit high stakes testing as a graduation requirement, and instead, require that any such assessment “be used to promote school and district accountability and improvement and to target early and intensive remediation to individual students and to at-risk sub-groups.” However, the June 21, 2013, letter was careful to note that Petitioners “were not requesting Board members to take a definitive stand on the merits of the Petition,” but rather to initiate a “public rule-making process” in which there might be “timely, meaningful and structured consideration of this critical issue.” The letter designated ACLU/RI as the contact agency for any response to the Petition. A true and accurate copy of the June 21, 2013 letter and Petition is attached as Exhibit B.

18. By letter to ACLU/RI dated July 12, 2013, RIBOE Chair Mancuso responded to the Plaintiffs’ letter and Petition by stating that RIBOE members would be receiving “an in-depth informational briefing on the relationship between large-scale assessments and graduation

requirements” at annual retreat on August 24 and 25, and that “the Board has taken no action to ‘deny’ your position” but was also not “in a position to begin formal rulemaking within the prescribed time period [specified in 42-35-6].”

19. The letter concluded by stating that it should be considered “equivalent to a ‘denial’ of your petition . . . born of temporal circumstance only.” A true and accurate copy of the July 12, 2013 letter is attached as Exhibit C.

20. Upon information and belief, RIBOE did not discuss or consider in any manner Plaintiffs’ Petition prior to the distribution of Defendant Mancuso’s letter, nor did RIBOE discuss or vote upon either denying the Petition or initiating rule-making proceedings pursuant to 42-35-6.

21. A regularly scheduled meeting of the RIBOE was held on July 15, 2013. The meeting was held within thirty (30) days of Plaintiffs’ Petition to RIBOE.

22. The agenda for the July 15, 2013 RIBOE meeting did not include a discussion or consideration of Plaintiffs’ Petition. A true and accurate copy of the posted agenda for the July 15, 2013 RIBOE meeting is attached as Exhibit D.

23. Upon information and belief, RIBOE did not discuss or vote upon either denying the Plaintiffs’ Petition or initiating rule-making proceedings pursuant to 42-35-6 at its July 15, 2013 meeting.

24. Defendant Mancuso’s “denial” of the Petition, without any discussion or vote by the RIBOE, is not a denial by “the agency” as required by 42-35-6.

Rhode Island Gen. Laws § 42-35-6 provides:

Any interested person may petition an agency requesting the promulgation, amendment, or repeal of any rule. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition. *Upon submission of a petition, the agency within thirty (30) days*

*shall either deny the petition in writing (stating its reasons for the denials) or initiate rule-making proceedings in accordance with § 42-35-3.*

Emphasis added.

Rhode Island Gen. Laws § 42-35-3 provides:

(a) Prior to the adoption, amendment, or repeal of any rule the agency shall:

(1) Give at least thirty (30) days notice of its intended action. The notice shall include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved, and of the time when, the place where, and the manner in which interested persons may present their views thereon. The notice shall be mailed to all persons who have made timely request of the agency for advance notice of its rule-making proceedings, and published in a newspaper or newspapers having aggregate general circulation throughout the state; provided, however, that if the action is limited in its applicability to a particular area, then the publication may be in a newspaper having general circulation in the area. In lieu of newspaper publication, advance notice of proposed rulemaking by the department of health may be provided via electronic media on a website maintained by the office of the secretary of state. Authorization for such electronic notice shall commence on July 1, 2005. In lieu of newspaper publication, advance notice of proposed rulemaking by all other state departments, agencies and authorities may also be provided via electronic media on a website maintained by the office of secretary of state, and authorization for such electronic notice shall commence on May 1, 2008. Copies of proposed rules shall be available at the agency at the time of the notice required by this subsection, and by mail to any member of the public upon request. The agency shall also prepare a concise summary of all non-technical amendments being proposed that shall be made available with copies of the proposed rules themselves.

(2) Afford all interested persons reasonable opportunity to submit data, views, or arguments, orally or in writing. In the case of rules, opportunity for oral hearing must be granted if requested by twenty-five (25) persons, or by a governmental subdivision or agency, or by an association having not less than twenty-five (25) members. The agency shall consider fully all written and oral submissions respecting the proposed rule. Upon adoption of a rule, the agency, if requested to do so by an interested person, either prior to adoption or within thirty (30) days thereafter, shall issue a concise statement of the principal reasons for and against its adoption, incorporating therein its reasons for overruling the considerations urged against its adoption.

(3) Demonstrate the need for the adoption, amendment, or repeal of any rule in the record of the rulemaking proceeding. The agency shall demonstrate that there is no alternative approach among the alternatives considered during the rulemaking proceeding which would be as effective and less burdensome to

affected private persons as another regulation. This standard requires that an agency proposing to adopt any new regulation must identify any other state regulation which is overlapped or duplicated by the proposed regulation and justify any overlap or duplication.

(4) Comply with § 42-35-3.3.

(5) Ensure that any proposed additions, deletions or other amendments to the rules and regulations be clearly marked. If an agency proposes adoption of a new rule to supersede an existing rule, the agency shall make available a summary of all non-technical differences between the existing and proposed rules. An agency's lawful promulgation of amendments to an existing rule shall be deemed to supersede and repeal the previous enactments of that rule, provided that the public notice required under subdivision (a)(1) of this section indicated such an intent.

(b) If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon less than thirty (30) days' notice, and states in writing its reasons for that finding, it may proceed without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule so adopted may be effective for a period of not longer than one hundred twenty (120) days renewable once for a period not exceeding ninety (90) days, but the adoption of an identical rule under subdivisions (a)(1) and (a)(2) is not precluded.

(c) No rule hereafter adopted is valid unless adopted in substantial compliance with this section, but no contest of any rule on its face on the ground of noncompliance with the procedural requirements of this section may be commenced after two (2) years from its effective date, but a contest of any rule as applied to the complainant may proceed if the complainant can demonstrate prejudice as a result of the agency's noncompliance with this section.

25. Greater than thirty (30) days passed after submission of the Petition and proposed amendment., but the RIBOE failed and refused to either deny the Petition or initiate formal rule-making proceedings within that time period.

26. On or about August 14, 2013, the RIBOE met in closed, executive session to discuss the instant lawsuit as filed on July 24, 2013.

27. Immediately following that executive session, Defendant Mancuso publicly announced that the RIBOE would be considering the Petition at its September 9, 2013 meeting.



28. On or about September 6, 2013, the RIBOE posted the Agenda for its September 9, 2013 meeting. The Agenda provided, in pertinent part:

**9. EXECUTIVE SESSION**

*The Board may seek to enter into Executive Session to discuss --*

- a. Update on Collective Bargaining pursuant to RIGL §42-46-5 (a)(2) (all bargaining units except Graduate Assistants)*
- b. Discussion of Litigation – Prov. Student Union et al. v. Board of Ed. et al. pursuant to RIGL §42-46-5(a)(2)*

**10. ADDITIONAL ACTION ITEMS**

- a. Board Determination on Petition of Prov. Student Union et al.*

29. On September 9, 2013, a number of the Plaintiffs, including PSU, ACLU/RI, RITELL, RIDLC, and Richards; other signatories to the Petition; and members of the public who had been apprised of the meeting by the Plaintiffs, attended RIBOE's scheduled meeting in order to listen to and watch the discussion and deliberations of the members of the RIBOE in considering the Petition.

30. A true and accurate copy of the Notice is attached as Exhibit E.

31. At that meeting, the RIBOE went into closed, executive session to discuss the instant lawsuit as filed on July 24, 2013.

32. In addition to discussing the litigation, the RIBOE discussed and considered the "Determination on Petition of Prov. Student Union et al." in closed, executive session.

33. Immediately following the closed, executive session, Defendant Mancuso announced that the RIBOE had discussed and considered the Petition and had voted to deny the Petition by a vote of 6-5.

34. The RIBOE engaged in no public discussion of the Petition prior or subsequent to announcing the vote on it.

35. In addition to discussing in closed, executive session the instant litigation that, as filed on July 24, 2013, contested the RIBOE's failure to consider the Petition in a timely manner pursuant to the APA, the RIBOE unlawfully discussed the merits of the Petition itself in that session in knowing and/or willful violation of the Open Meetings Act, R.I.G.L. 42-46-1 et seq.

36. No exemption in the Open Meetings Act authorizes discussion in closed, executive session of a rule-making petition filed pursuant to the Administrative Procedures Act, nor was any such exemption cited by the RIBOE.

37. The RIBOE has demonstrated that it is unable or unwilling to consider the Petition in open session in a timely fashion.

38. Rhode Island General Laws 9-30-2 provides:

Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

39. A controversy exists concerning RIBOE's failure to respond to the Petition in a timely manner, and failure to consider the Petition in open session after due notice.

Wherefore, plaintiffs pray as hereinafter set forth.

**First Claim for Relief: Failure to Timely Consider Petition**

40. Paragraphs 1 through 39 are hereby incorporated by reference as though fully set forth herein.

41. The RIBOE violated the APA, G.L. section 42-35-6, by failing to timely consider the Petition.

WHEREFORE, Plaintiffs pray as hereinafter set forth.

**Second Claim for Relief: Failure to Consider Petition in Open Session**

42. Paragraphs 1 through 41 are hereby incorporated by reference as though fully set forth herein.

43. The RIBOE violated the Open Meetings Act by (a) failing to post a proper and accurate notice of the September 9, 2013 meeting, in derogation of R.I.G.L. 42-46-6 and (b) failing to meet in open, public session to discuss and deliberate concerning the Petition, in derogation of R.I.G.L. 42-46-3 and 42-46-4.

Wherefore, Plaintiffs pray as hereinafter set forth.

**Prayer for Relief**

WHEREFORE, Plaintiffs/Petitioners pray that this Honorable Court:

1. Issue a Declaratory Judgment, declaring that Defendants' failure to consider the Petition in a timely fashion violates the Administrative Procedures Act, § 42-35-6.
2. Issue a Declaratory Judgment, declaring that Defendants' notice of the September 9, 2013, meeting, by falsely promising a discussion of the Petition in open session, violates the Open Meetings Act.
3. Issue a Declaratory Judgment, declaring that Defendants' failure to discuss and consider the Petition in open session violates the Open Meetings Act.
4. Issue a Declaratory Judgment that the RIBOE's vote on September 9, 2013 denying the Petition is null and void.
5. Order the RIBOE to, within thirty (30) days, consider the Petition on its merits, in light of the fact that RIBOE is unable or unwilling to lawfully consider the Petition in accordance

with the APA and OMA, or in the alternative, order the RIBOE to reconsider and vote on the Petition in open session, within said time period.

6. Impose a fine of \$5,000 on the Defendants for engaging in a knowing and/or willful violation of the Open Meetings Act.

7. Order the RIBOE to publicly release all relevant portions of the minutes or recording of the closed, executive session held on September 9, 2013, in which the merits of accepting or rejecting the Petition was discussed.

8. Award Plaintiffs/Petitioners reasonable attorneys' fees and costs.

9. Order such other relief as the Court deems just and proper.

DATED: September \_\_\_\_, 2013

Plaintiff/Petitioners,  
By their attorneys,

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