

In re Applicability of Certain Statutes & Regulations to Rutgers

Superior Court of New Jersey, Appellate Division

September 29, 2026, Argued; October 21, 2026, Decided

DOCKET NO. A-3160-23

Reporter

2026 N.J. Super. Unpub. LEXIS 2354 *; 2026 LX 612984; 2026 WL 3151659

IN THE MATTER OF THE APPLICABILITY OF
CERTAIN STATUTES AND REGULATIONS TO
RUTGERS, THE STATE UNIVERSITY OF **NEW
JERSEY**.

Notice: NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE **APPELLATE DIVISION**.

PLEASE CONSULT **NEW JERSEY RULE 1:36-3** FOR
CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from the Office of the
Secretary of Higher Education, Docket No. 23-01.

*In re Statutes, 262 N.J. 421, 348 A.3d 662, 2026 N.J.
LEXIS 65, 2026 WL 173331 (Jan. 13, 2026)*

Core Terms

higher education, exempt, mission, programmatic,
academic program, state university, academic degree,
governing board, new program, board of trustees,
restructure, labor market, duplicate, visitorial,
supervision, graduate, charter, vest, sufficient evidence,
appoint, manual, curriculum, discipline, career, unduly,
cooperation, oversight, recommend, budget, staff

Counsel: Peter G. Verniero argued the cause for
appellant Rutgers, the State University of **New Jersey**
(Sills Cummis & Gross, PC, attorneys; Peter G. Verniero
and Michael S. Carucci, of counsel and on the briefs;
Stephen A. Moran, on the briefs).

Melina M. Meneguín Layerenza, Assistant Attorney
General, argued the cause for respondent Higher
Education (Jennifer Davenport, Attorney General,
attorney; Donna Arons, Assistant Attorney General, of
counsel; Colin Klika, Ryan J. Silver, and Matthew Lynch,
Deputy Attorneys General, on the brief).

Judges: Before Judges Firko and Bergman.

Opinion

PER CURIAM

Appellant Rutgers, the State University of **New Jersey**
(Rutgers), appeals from the August 3, 2023 final
administrative decision and the August 9, 2024 final
administrative determination of the Office of the
Secretary of Higher Education (OSHE), holding that
Rutgers must comply with *N.J.A.C. 9A:1-2.10 to - 2.14*.
These regulations, which the OSHE adopted in March
2022, pursuant to the authority granted under *L. 2021,*
c. 27, require review of institutions' proposed new
academic degree programs by the **New Jersey**
Presidents' Council (NJPC) and authorize the OSHE to
reject a proposed new [*2] academic degree program
based upon the consideration of specified criteria—
sufficient academic quality, evidence of labor market
demand, duplication with comparable programs of study
in the State, and whether the proposed new program
will require significant additional State resources.

Rutgers objects to application of the regulations on the
grounds that it is statutorily and constitutionally exempt
from State control over its academic programs as a
matter of law. We agree and reverse.

I.

Factual Background

Rutgers is a public research university, which educates
more than 69,000 students and employs more than
27,000 faculty and staff. *See Rutgers, By the Numbers,*
Rutgers, The State Univ. of N.J.,
<https://www.rutgers.edu/about/by-the-numbers> (last
visited Oct. 7, 2026). Rutgers was founded in 1766, as a
private institution governed by a board of trustees.

In 1889, the Legislature provided that "any college in
this [S]tate founded or hereafter to be founded under

and by virtue of the provisions of any general act of the legislature," shall have "the right, power and privilege . . . to give diplomas and confer degrees upon those who shall successfully complete the prescribed course of study," [*3] with the exception of "any degree or diplomas authorizing the practice of medicine, dentistry or law." L. 1889, c. 116.

The 1912 Act

In 1912, the Legislature passed L. 1912, c. 315, providing that "[n]o school or institution of learning conducted within this State shall hereafter confer any degree or degrees until the terms and conditions of such degree or degrees shall first be submitted to and approved of by the State Board of Education of the State of New Jersey." *Id.* § 1. The statute also provided "that nothing in this section contained shall apply to any school or institution of learning which shall have been established and conducted within this State for a period of twenty-five years prior to the passage of this act" (1887). *Ibid.*

The 1916 Act

In 1916, the Legislature passed a law requiring the licensing of all new and continuing institutions of higher education. L. 1916, c. 152. The 1916 law also provided for the State Board of Education to review and approve the bases for the conferring of degrees, as follows:

No . . . institution of learning conducted within this State . . . in recognition of the attainment or proficiency of any member thereof, scholar, student, subscriber or other person, in pursuing or graduating from any [*4] course or courses of study, arts or learning conducted by it or another such school, corporation, association or institution, shall admit any such person to the grade of a degree by conferring . . . any degree upon any such person or persons, without first submitting the basis or conditions thereof to the State Board of Education of the State of New Jersey, and obtaining therefrom its approval of the basis or conditions thereof so submitted and of the practice of conferring and bestowing of such degrees upon such persons

[*Id.* § 2.]

This section of the statute did not apply to institutions that had been established and operating in the State "for

a period of twenty-five years prior to the passage of this act, nor to any school or schools conducted under the public school systems of the State." *Ibid.*

Thus, Rutgers was considered exempt and could award new degrees without prior approval from the State Board of Education. See [*Shelton Coll. v. State Bd. of Educ.*, 48 N.J. 501, 519-23, 226 A.2d 612 \(1967\)](#);¹ Formal Op. No. 12-1951, 1951-53 Op. N.J. Att'y Gen. at 24.²

The 1917 Act

In 1917, the Legislature passed a statute, L. 1917, c. 32, designating the "Rutgers Scientific School" as the "State University of New Jersey," as follows:

The Rutgers Scientific School, being the State Agricultural College, the State College for the Benefit of [*5] Agriculture and the Mechanic Arts, maintained by the "Trustees of Rutgers College in New Jersey," and under the general powers of supervision and control of the Board of Visitors of the State Agricultural College, be and hereby is also designated the State University of New Jersey under the same general powers of supervision and control of the same board of visitors.

[See Richard P. McCormick, Rutgers: A Bicentennial History 15 (1966).]

The First Rutgers Act

In 1945, the Legislature passed the first Rutgers Act (the first Rutgers Act), L. 1945, c. 49, under which the entirety of Rutgers was "collectively designated as the

¹ In [*Shelton*, 48 N.J. at 516-19](#), decided in 1967, our Supreme Court upheld the authority of the State Board of Education to regulate the issuance of degrees. In the course of its discussion, the Court suggested that even as of the 1960s—i.e., post-1945 and 1956 Rutgers Acts—the State Board of Education recognized Rutgers as exempt from such regulation. [*Id.* at 512 n.2, 521 n.4](#).

² The Attorney General, responding to a query from the State Commissioner of Education, opined that "a college which conferred degrees in course prior to March 17, 1891," had the "authority generally, without approval from the State Board of Education, to award other degrees in course not given by said college prior to the aforesaid date." Formal Op. No. 12-1951, 1951-53 Op. N.J. Att'y Gen. at 24.

State University of New Jersey to be utilized as an instrumentality of the State for providing public higher education and thereby to increase the efficiency of the public school system of the State." *Id.* § 1.

The First Rutgers Act

in effect, provided for a purely contractual arrangement between the Trustees and the [S]tate whereby the [S]tate bought collegiate educational services from the Trustees in return for annual appropriations to the institution by the Legislature in an amount to be agreed upon each year, with the Trustees given full operational responsibility, as well as custody and control of [S]tate property in the university [*6] complex, under visitorial general powers of supervision of the State Board of Education.

[\[Rutgers, The State Univ. v. Piluso, 60 N.J. 142, 155, 286 A.2d 697 \(1972\).\]](#)

Specifically, under the terms of the first Rutgers Act, the government agreed to appropriate funds for Rutgers's facilities and services, including the acquisition of lands and the erection and equipping of buildings, in exchange for the Board of Trustees agreeing to utilize the facilities as an instrumentality of public higher education, *L. 1945, c. 49, §§ 6-7*; the Board of Trustees was expanded to include more government and government-appointed representatives, *id.* § 8; the "general powers of supervision and control" of the Board of Visitors were "transferred to the State Board of Education," as well as "extended to the State University of New Jersey as hereinbefore designated."

On the same day as the first Rutgers Act, the Legislature passed a second statute, *L. 1945, c. 51*, restructuring the State's management of public education. That statute established a State Department of Education (Department), consisting of a State Board of Education and a Commissioner of Education.

The Commissioner was designated as the head of the Department and the official agent of the State Board of Education. *Id.* §§ 7, 11. The State Board of Education [*7] was "vested" with "[t]he general supervision and control of public instruction in this State," and "charged with the duty of planning and recommending respecting the unified, continuous and efficient development of public education including public higher education." *Id.* § 1.

However, the Department's supervision and control of

Rutgers was limited, as set forth in the first Rutgers Act, which did not allow the State to exercise any control over Rutgers's conferral of degrees or development of academic programs for new degrees. As for Rutgers in particular, *L. 1945, c. 51*, provided that the State Board of Education was required to

[i]nvestigate and recommend respecting the needs for facilities and services at the State University of New Jersey as an instrumentality of the State for providing public higher education and thereby to increase the efficiency of the public school system of the State, advise with the State University of New Jersey regarding its annual budget for services, lands, buildings, and equipment and jointly with the State University make recommendations to the Governor and to the Legislature in support of such budget, and make with the State University contracts in behalf of the State [*8] in accordance with legislative appropriations.

[*Id.* § 2(r).]

Also, consistent with the language of the first Rutgers Act, the Board of Education was granted the right to

[e]xercise visitorial general powers of supervision and control over such institutions of higher education as may be utilized by the State. Its visitorial general powers of supervision and control are hereby defined as visiting such institutions of higher education to examine into their manner of conducting their affairs and to enforce an observance of their laws and regulations and the laws of the State;

[*Id.* § 2(t).]

Thus, "Rutgers had now achieved legal recognition as the State University of New Jersey, seemingly bringing to a culmination an evolutionary process that had begun in 1864 with its designation as the land-grant college of New Jersey. It had also succeeded very largely in preserving its autonomy." [McCormick, at 265](#). "But the question that remained to be answered was whether an autonomous university controlled by a Board of Trustees only a minority of whom were public appointees could, in fact, win support as a state university." [Id. at 265-66](#).

Consistently with the legislative contract, the Rutgers Board of Trustees exercised "supervision [*9] and control of the conduct of the University," maintained "a

general oversight of the curricula of the institution in all of its divisions and establishe[d] ordinances, orders and laws for the University to be executed by the President"; and the State Board of Education annually made contracts with the university. *Trs. of Rutgers Coll. v. Richman*, 41 N.J. Super. 259, 275-76, 125 A.2d 10 (Ch. Div. 1956). As previously discussed, as our Supreme Court recognized in *Shelton*, 48 N.J. at 512 n.2, 521 n.4, the State Board of Education deemed Rutgers to be exempt from regulations relating to its issuance of degrees.

The Second Rutgers Act - 1956

In 1954 and 1955, the Rutgers Board of Trustees engaged two committees to study how to reorganize the university's management. Committee members met with the Governor and State officials, and prominent citizens. They also met with legal counsel in order to address "the intricate legal problems involved in transferring authority from the Trustees to a [proposed] [S]tate-appointed board [of governors]."

In 1956 the Legislature passed a second Rutgers Act (the second Rutgers Act), L. 1956, c. 61, titled "Rutgers, The State University Act of 1956."

As explained by our Supreme Court in the 1970s:

The 1956 Act provided for the creation, by contract between the Trustees and the [S]tate, of an entirely different kind of entity and arrangement [than the 1945 Act]. At the time of the adoption [*10] of the statute the institution represented an even greater and more complex conglomeration of public and private assets, physical and financial, than existed when the 1945 statute was enacted. The large investment of [S]tate monies both previously and in the eleven[-]year interim dictated the need for public rather than private control. At the same time the private properties and funds held by the Trustees were so intermixed, in the operation of the entire institution, with those derived from [S]tate appropriations that the university could not be conducted without the use of both the public and private assets. Separation was practically impossible. And there was a general demand for a true state university, with financial and other potentialities sufficient to meet present and future needs of the [S]tate. Also the Trustees could not, consistent with their general and special trust obligations with respect to the private assets, simply turn them over to the [S]tate.

The solution provided by the statute, which became a consummated contract by the acquiescence of the Trustees . . . was a unique one. A *Board of Governors* was created, with the majority of its members [S]tate[-]appointed, [*11] and was given full authority and control over all aspects of the conduct and operation of the university, subject to collaboration in budget aspects with and to the general visitorial powers of the State Board of Education (now the State Board of Higher Education). The old Board of Trustees remained, augmented by the [S]tate[-]appointed Governors as additional members, but with practically no powers as far as the running of the institution is concerned . . . [T]heir principal function is to retain title to and to control, pursuant to general or special trust obligations, properties, funds and trusts vested in them at the effective date of the new institution (then valued at approximately \$50,000,000) or subsequently vested in them by specific designation.

The overall result of the legislative contract therefore is an autonomous public university — not merely a contractual relationship or an institution both public and private at the same time.

[*Rutgers*, 60 N.J. at 155-57 (citations omitted) (emphasis added).]

Accord *Fine v. Rutgers*, 163 N.J. 464, 467-68, 471-72, 750 A.2d 68 (2000) (holding the second Rutgers Act created a hybrid, "public, but autonomous, institution"); see also *Trs. of Rutgers*, 41 N.J. Super. at 278-82, 287 (discussing the second Rutgers Act and proposed reorganization of the university under the statute). [*12]

The second Rutgers Act explicitly repealed section three of the first Rutgers Act, "all acts and parts of acts inconsistent with this Act," and stated that "all provisions of the Charter and resolutions of the Board of Trustees of the Corporation inconsistent with the provisions of this Act shall be of no further force or effect on and after September 1, 1956." L. 1956, c. 61, § 38(c).

The preamble of the second Rutgers Act explained its purpose, stating:

Whereas, the Trustees control and administer properties and funds of great value, derived from private sources, which are utilized in furtherance of public higher education of the people of the State of New Jersey and its further and continuous development in conjunction with the support of the

State, and it is deemed advisable in the interest of the State University and of the people and the increasingly efficient and productive utilization of its educational facilities and services that the name of the State University be changed and that the Board of Trustees of Rutgers College be reorganized as is hereinafter provided, and that a Board of Governors be established, having supervision over and vested with the conduct of the University, a majority of whom shall be appointed by the Governor of [*13] the State with the advice and consent of the Senate, and that the Board of Trustees shall continue in an over-all advisory capacity, retaining control over the private properties and funds vested in it, subject to the application thereof to the purposes of public higher education as hereinafter provided, and the enactment of this Act is deemed and declared to be in the public interest, and thereby to increase the efficiency of the public school system; . . .

[/d.]

Further, the second Rutgers Act created a Board of Governors, *id.* § 5, consisting of two non-voting members (the Commissioner of Education and the president of the university) and eleven voting members, six of whom were to be appointed by the Governor, with the advice and consent of the Senate, and five of whom were to be appointed by the Board of Trustees from among its members. *Id.* § 7.

Finally, the second Rutgers Act required that the Board of Trustees be "reorganized and reconstituted" and "have and exercise the powers, authority, rights and privileges" as set forth and expressed in the Act. *Id.* § 6. See also *Id.* § 19 (setting forth authorities of Board of Trustees). As for government interference with the Boards, the second Rutgers [*14] Act provided:

The Boards shall have and exercise the powers, rights and privileges that are incident to their respective responsibilities for the government, conduct and management of the Corporation, and the control of its properties and funds, and of the University, *and the powers granted to the Corporation or the Boards or reasonably implied, may be exercised without recourse or reference to any department or agency of the State, except as otherwise expressly provided by this Act or other applicable statutes.* The provisions of [R.S. 52:17A-11](#) and 13 shall not be deemed or construed to be applicable to the Corporation or the University.

[/d. § 21 (emphasis added).]

The second Rutgers Act also

declared to be the public policy of the State of New Jersey that

(i) *the University shall be and continue to be given a high degree of self-government and that the government and conduct of the corporation and the University shall be free of partisanship, and*

(ii) *that resources be and continue to be provided and funds be and continue to be appropriated by the State adequate for the conduct of a State University with high educational standards and to meet the cost of increasing enrollment and the need for proper facilities.* [*15]

[/d. § 20 (emphasis added) (currently codified as amended at [N.J.S.A. 18A:65-27](#)).]

See also [In re Determination of Exec. Comm'n on Ethical Standards, 116 N.J. 216, 223, 561 A.2d 542 \(1989\)](#) ("[T]he absorption of Rutgers University within the framework of State-supported education has been marked by an overriding concern for the academic freedom of one of the nation's oldest and greatest universities."). The second Rutgers Act also stated:

This Act being deemed and hereby declared necessary for the welfare of the State and the people of New Jersey to provide for the development of public higher education in the State and thereby to increase the efficiency of the public school system of the State, shall be liberally construed to effectuate the purposes and intent thereof.

[L. 1956, c. 61, § 36.]

The statute established a Board of Higher Education, within the Department, which was assigned specific tasks. Relevant here, the Board of Education was to "[e]stablish minimum standards for all public institutions of higher education for degree granting, *approve new programs and degrees* and approve discontinuance of degrees and educational programs as required." L. 1966, c. 302, § 4(e) (emphasis added). The second Rutgers Act provided, however, that

[n]othing . . . in this act shall be construed to prevent individual institutions from establishing higher minimum [*16] standards for degree granting "programs" as used in this subparagraph

means areas or fields in which degrees or nondegree certificates might be granted and shall not include individual courses nor course content nor shall it include the course composition of areas or fields already in existence;

[*Ibid.*]

In addition, the statute tasked the Board of Higher Education with "review[ing] periodically existing programs of instruction, research, and public service in the public institutions of higher education, and advis[ing] them of desirable change." *Id.* § 4(k).

With respect to Rutgers in particular, the statute provided:

All of the duties, functions and powers of the existing Department of Education pertaining to Rutgers, the State University, are hereby transferred to and vested in the Department of Higher Education established hereunder and, *notwithstanding any provision of this act, the Department of Higher Education shall have no duties, functions or powers with respect to Rutgers, the State University, except for those transferred as aforesaid.*

[*Id.* § 13 (emphasis added).]

The 1966 statute further provided, in relevant part:

42. This act being deemed and hereby declared necessary for the welfare of [*17] the State and the people of New Jersey to provide for the development of public higher education in the State and thereby to increase the efficiency of the public school system of the State, shall be liberally construed to effectuate the purposes and intent thereof.

43. *All acts and parts of acts inconsistent with any of the provisions of this act are, to the extent of such inconsistency, hereby repealed; provided, however, that nothing in this act shall be construed as expressly or impliedly repealing any provision of the "Rutgers, The State University Act of 1956," P.L. 1956, c. 61.*

[L. 1966, c. 302, §§ 42-43 (emphasis added).]

See also N.J.S.A. 18A:65-9.1 (saving the second Rutgers Act from repeal).

The 1984 Regulations

In 1983, the Board of Higher Education (the Board) proposed new regulations to replace those that had expired. 15 N.J.R. 1418(a) (Sept. 6, 1983). When adopting the regulations in 1984, 16 N.J.R. 543 (Mar. 19, 1984), the Board prefaced the regulations with the following statement:

In developing and administering the rules for licensure, the Board and Department are mindful of the responsibilities vested in the trustees of individual institutions and of the institutional autonomy that is characteristic of American higher education. These rules delineate the Board's expectations for degree granting institutions of higher education; [*18] in the case of institutions already licensed and accredited, they do not contemplate that, in the absence of compelling reason, the Board will substitute its review processes. (N.J.A.C. 9:1-2.1) for those of the institutions themselves or for those of the established accrediting agencies.

[*Id.* at 537.]

The Board also recognized that institutions whose charters antedated 1887 were "exempt from approval of the basis or conditions for awarding the degree as stipulated in N.J.S.A. 18A:68-6." *Ibid.* Rutgers was not included in the Department's list of exempt, pre-1887 institutions. *Id.* at 543. The Department included a number of "assumptions" that "governed the drafting of these regulations and serve[d] to define their scope and intention."

The 1984 regulations specifically addressed the approval of new degree programs, stating:

The basis or conditions for the conferring of degrees not previously approved by the Board of Higher Education with respect to a particular institution, shall be submitted for prior approval in accordance with law. *The Board will examine the quality of the proposed program, the institution's ability to offer the program and the extent to which the program unnecessarily duplicates or supplements existing programs offered [*19] by other institutions.*

[*Id.* at 543 (N.J.A.C. 9:1-2.4) (emphasis added).]

The 1984 regulations also provided for periodic review of existing graduate programs, although the reviews

would be by the institutions themselves, and cooperatively with regional and professional accrediting agencies. *Id. at 544* (N.J.A.C. 9:1-4.2(b)). The regulations provided for standards of review of doctoral degree programs. *Id. at 545* (N.J.A.C. 9:1-4.7(e)).

The [Higher Education Restructuring Act of 1994](#)

The Legislature adopted the Higher Education Restructuring Act of 1994 (the 1994 Act). L. 1994, c. 48. The Legislature found that: "the elimination of unnecessary State oversight and its accompanying bureaucracy will serve to unleash the creativity and innovation of" institutions of higher education; and "in order to provide institutions with the ability to fulfill their mission and Statewide goals, greater decision making and accountability must be placed at the institutional level and structures must be established to ensure cooperation among institutions and coordination at the State level." *Id.* § 2(b), (e).

The Department of Higher Education was abolished, *id.* § 4. The Commission on Higher Education (the Commission), codified at [N.J.S.A. 18A:3B-13](#), and the [New Jersey](#) Presidents Council (NJPC), codified as amended at [N.J.S.A. 18A:3B-7 to - 12](#), were created. The NJPC would consist of "[e]ach president of a public institutional of higher education in the State [*20] and of an independent institution which receives direct State aid." *Id.* § 7. The president of Rutgers was designated as a member of the NJPC's executive board. *Id.* § 12(a).

Relevant here, the NJPC was granted responsibility, "consistent with State and federal law," to "review and make recommendations to the Commission concerning proposals for new programs that exceed the programmatic mission of an institution or that change the programmatic mission of an institution." *Id.* § 8(b). "Programmatic mission" was defined as "all program offerings consistent with those levels of academic degrees or certificates that the institution has been authorized to grant by the State Board of Higher Education prior to the effective date of this act or approved thereafter by the commission." *Id.* § 3.

In addition, the NJPC was granted responsibility to

review and comment on proposals for new programs that demand significant added resources or raise significant issues of duplication but do not exceed the programmatic mission of the institution or require a change in the programmatic mission. If the council determines that a proposed new

program is unduly expensive or unduly duplicative, the council shall refer that proposal [*21] to the commission for review; however, unless the commission disapproves of that program within [sixty] days of its referral, the program shall be deemed approved.

[*Id.* § 8(c).]

The Commission was granted responsibility for "final administrative decisions over new academic programs that go beyond the programmatic mission of the institution and final administrative decisions over a change in the programmatic mission of an institution," *id.* § 14(f), and "exercising any other power or responsibility necessary in order to carry out the provisions of this act." *Id.* § 14(l). The Commission also was tasked with adopting rules and regulations to carry out the provisions of the 1994 Act. *Id.* § 15. The Commission was not granted "general authority to render final administrative decisions on matters arising under the laws governing higher education except as otherwise specifically provided" in the statute. *Id.* § 29.

As for institutions' governing boards, the Legislature provided:

The governing board of each public institution of higher education shall have the following general powers and duties to fulfill its mission and the State wide goals *in cooperation with other institutions and the State coordinating structures*:

a. To [*22] develop an institutional plan and to *determine the programs* and degree levels *to be offered by the institution* consistent with this plan and the institution's programmatic mission; . . .

[*Id.* § 6 (emphasis added).]

As for construction of the 1994 Act in regard to Rutgers, the Act provided:

This Act shall not be construed to impair any vested rights, grants, charter rights, privileges, exemptions, immunities, powers, prerogatives, franchises or advantages continued, granted or obtained by Rutgers, the State University under the "Rutgers, the State University Law," [N.J.S.A. 18A:65-1 \[to - 103\]](#) nor shall this act be construed to impose additional powers, duties or responsibilities upon Rutgers, The State University not contained within [N.J.S.A. 18A:65-1 \[to - 103\]](#).

[*Id.* § 26.]

The 1994 Act amended the second Rutgers Act, as well as *L. 1967, c. 271*, to amend the authority and responsibility of the Board of Governors to state that it had the power to:

Authorize any new educational department or school consistent with the institution's programmatic mission or approved by the Commission on Higher Education.

[*L. 1994, c. 48, § 181* (amending [N.J.S.A. 18A:65-25\(i\)](#)).]

The 1995 Regulations

In 1995, the extant regulations were proposed for re adoption, 27 N.J.R. 1381(b) (Apr. 3, 1995), and re adopted, 27 N.J.R. 2396(b) (June 19, 1995), pending amendments consistent with [*23] the Higher Education Restructuring Act of 1994. The regulation addressing new degree programs, N.J.A.C. 9:1-2.4, which had not been altered since 1984, was listed as "reserved." 27 N.J.R. at 1385; 27 N.J.R. at 2399.

The 1997 Regulations

In 1997, the regulations were amended in order to address the Higher Education Restructuring Act of 1994 and the creation of the Commission on Higher Education to replace the former Board and Department of Higher Education. 29 N.J.R. 4602(a) (Nov. 3, 1997). There was no regulation addressing the review of new degree programs, except for a regulation addressing institutions wishing to exceed their programmatic mission, for which Commission approval was required. See 29 N.J.R. at 4608.

The NJPC's Academic Issues Committee (AIC) reviewed proposed new academic programs pursuant to the authority granted under the Higher Education Restructuring Act of 1994. The documents of record reflect the NJPC's understanding that it was responsible for "reviewing and commenting on proposals for new degree programs that demand significant added resources or raise significant issues of duplication but do not exceed the programmatic mission of the institution or require a change in the programmatic mission."

The AIC's standards and procedures are set forth in a

manual (AIC Manual), which was regularly updated. With respect to initiating new academic degree programs, the AIC Manual [*24] required institutions to submit several analyses (including a consultant's report) that addressed specified factors, including, for example: the objectives of the program; an evaluation and learning outcomes assessment plan; the relationship of the program to the institution's strategic plans, and other programs.

The AIC Manual also addressed "possible outcomes" of the AIC's review. Prior to 2022 the manual stated if a concern was identified, it would review and comment on the program, and if necessary, seek to resolve the differences through informal mediation or a hearing.

The NJPC acknowledged that certain institutions were exempt from the review of new academic programs due to the date of their charters, prior to April 1, 1887. However, the NJPC did not recognize Rutgers as one of the exempt institutions.

After adoption of the 1994 legislation, and through 2021, Rutgers participated in the NJPC as a member of the Board and as a member of the AIC. It participated in reviewing proposed new degree programs submitted by other institutions, and it submitted proposals for new Rutgers degree programs, without claiming to be an exempt institution.

*Replacement of the Commission with the OSHE [*25]*

In 2011, then-Governor Chris Christie abolished the Commission and transferred its functions, powers, and duties to the Secretary of Higher Education. See [Reorganization Plan No. 005-2011, A Plan for the Abolition of the New Jersey Commission on Higher Education and Providing for the Transfer of the Functions, Powers, and Duties of the Commission to the Secretary of Higher Education, 43 N.J.R. 1625\(a\) \(Aug. 1, 2011\)](#). That change was codified in 2021. *L. 2021, c. 27*.

The Regulations at Issue on Appeal

In 2021, the Legislature considered proposed legislation that would make significant changes to the law governing higher education. Such legislation was adopted as *L. 2021, c. 27*, and had an effective date of September 1, 2021.

Relevant here, *L. 2021, c. 27* altered the standards

applied by the NJPC when reviewing proposals for new programs that do not exceed an institution's programmatic mission, and allowed the Secretary of Higher Education to make final agency decisions when necessary. Specifically, L. 2021, c. 27 amended [N.J.S.A. 18A:3B-8\(c\)](#) to provide that the NJPC "shall have the responsibility, consistent with State and federal law, to":

(c) review proposals for new programs that do not exceed the programmatic mission of the institution or require a change in the programmatic mission, according to standards established by the secretary through regulations promulgated pursuant to the "[Administrative Procedure Act](#)," . . . for the following:

- (1) sufficient academic quality;
- (2) sufficient evidence of labor market demand for the [*26] program;
- (3) duplication with comparable programs of study in the State; and
- (4) whether the proposed new program will require significant additional State resources.

If the [NJPC] determines according to the review standards set by the secretary that a proposed new program may be of insufficient academic quality, may lack sufficient evidence of labor market demand, maybe duplicative of comparable programs of study, or may be unduly expensive to the State, the council shall refer that proposal to the secretary for review pursuant to [\[N.J.S.A. 18A:3B-14\(f\)\]](#).

[L. 2021, c. 27, § 1(c).]

In turn, L. 2021, c. 27 amended [N.J.S.A. 18A:3B-14\(f\)](#) to provide that

within [sixty] days of referral of a proposed new program by the [NJPC], the secretary may deny approval of programs proposed by institutions of higher education which do not exceed the programmatic mission of the institution, but which may be of insufficient academic quality, may lack sufficient evidence of labor market demand, may be duplicative of comparable programs of study, or may be unduly expensive to the State as determined by the [NJPC] according to the review standards set by the secretary

. . . .

[L. 2021, c. 27, § 2(f).]

In November 2021, the OSHE issued proposed regulations. The NJPC had a copy of the draft regulations, which were [*27] the subject of discussion at NJPC meetings.

On February 9, 2022, the OSHE adopted the proposed regulations, with an effective date of March 7, 2022. See [54 N.J.R. 433\(a\) \(Mar. 7, 2022\)](#). Five new regulations, [N.J.A.C. 9A:1-2.10 to - 2.14](#), are the subject of this appeal.

[N.J.A.C. 9A:1-2.10](#)

First, [N.J.A.C. 9A:1-2.10](#) addresses the NJPC's obligation to review proposals for new academic programs as follows:

(a) The Presidents' Council shall review proposals for new academic degree programs that do not exceed the programmatic mission of the institution according to the following standards:

1. Sufficient academic quality as set forth at [N.J.A.C. 9A:1-2.11](#);
2. Sufficient evidence of labor market demand for the program as set forth at [N.J.A.C. 9A:1-2.12](#);
3. Duplication with comparable programs of study in the State as set forth at [N.J.A.C. 9A:1-2.13](#); or
4. Whether the proposed new program will require significant additional State resources as set forth at [N.J.A.C. 9A:1-2.14](#).

(b) *If, upon review, the Presidents' Council determines that a program may be of insufficient academic quality, may lack sufficient evidence of labor market demand, may be duplicative of comparable programs of study, or may be unduly expensive, the Presidents' Council shall refer the program to the Secretary for review pursuant to P.L. 2021, c. 27. Any such referral of a program shall:*

1. Identify the standard [*28] or standards that have not been met;
2. Identify the specific criteria within each standard

that have not been met; and

3. Provide a written description of the basis of each determination by the Presidents' Council that a standard or criteria has not been met.

[\[N.J.A.C. 9A:1-2.10](#) (emphasis added).]

[N.J.A.C. 9A:1-2.11](#)

Next, [N.J.A.C. 9A:1-2.11](#) explains how the NJPC must evaluate whether a proposed new academic program is of "sufficient academic quality," stating:

(a) The Presidents' Council shall evaluate proposals for new academic degree programs for sufficiency of academic quality based on the following criteria:

1. The status of the institution's State licensure and accreditation by a nongovernmental entity recognized by the U.S. Secretary of Education;

2. Appropriately qualified faculty, instructors, staff instructors, and/or administrators;

3. A plan for the dedication of sufficient resources, including human resources, to implement and maintain the program;

4. Clearly stated program objectives that are related to the institutional mission, strategic plan, and, where appropriate, to the careers, professions, or practices into which graduates of the program are expected to enter;

5. Appropriate student learning outcomes that incorporate:

i. Appropriate **[*29]** scaffolding to allow students to build on knowledge as they progress through curriculum; and

ii. A variety of assessments and corresponding rubrics for students to demonstrate content mastery and skill acquisition;

6. Evidence of program rigor in the curriculum. To demonstrate rigor in the curriculum, institutions shall provide the following in the proposal:

i. Program outcomes detailing what students will be able to demonstrate at completion of the curriculum;

ii. Planned curriculum with course descriptions, including a plan to provide students access to faculty, instructors, and/or staff; and

iii. Comparisons to the curricula of the same or similar programs at other institutions, if applicable, and if such curricula are available;

7. Evidence of employer input in the development of the new program, where appropriate, which may include:

i. Participation of employers on advisory committees;

ii. Letter of support from a chamber of commerce demonstrating the need and desire for the program;

iii. Summary of employer or professional association feedback on the new program proposal and institution's response to the feedback;

iv. Evidence of employer/institution partnership agreements to provide research, **[*30]** experiential learning, or other equivalent opportunities to students in the program;

v. Survey results from employers in the field highlighting the skills and expertise needed with a clear connection to the program proposal;

vi. Plan to ensure continued partnership with employers in the field for the new program proposed; and/or

vii. Other documentation of direct employer or industry participation in the design of the program;

8. Evidence that demonstrates a commitment to equity, accessibility, and affordability within the new program, which may include:

i. A program equity statement for the program/field that is supported by evidence of an institution's demonstrated commitment to and valuing of diversity, equity, and inclusion. Evidence may include, but is not limited to, equitable enrollment and employment outcomes for historically underrepresented groups;

ii. A plan to monitor student progress in the program in order to address unanticipated or unknown barriers to equitable program completion outcomes; and/or

iii. A plan to provide student services and

accommodations to support equitable program completion outcomes; and

9. A plan for continuous review and improvement of the new academic **[*31]** program. Such plan shall include the following:

- i. The primary activities within the program that are to be reviewed, including how the program will adapt for new technology and developments within the field;
- ii. Regularly scheduled time periods/intervals for review;
- iii. Metrics for program monitoring and guidance for how the institution will course correct, if needed; and/or
- iv. Input by students, field experts, and external reviewers in program review processes.

[\[N.J.A.C. 9A:1-2.11.\]](#)

[N.J.A.C. 9A:1-2.12](#)

[N.J.A.C. 9A:1-2.12](#) addresses how the NJPC must evaluate whether there is "sufficient labor demand" for a proposed new academic program, as follows:

(a) The Presidents' Council shall evaluate proposals for new academic degree programs for sufficiency of labor market demand based on the following criteria:

1. A program proposal shall be deemed to have shown sufficient labor market demand for the program when the following apply:

i. The Classification of Instructional Programs (CIP) number for the program is mapped to a single occupation or set of occupations listed in the Standard Occupational Classification (SOC) as set forth in the 2020 CIP-SOC Crosswalk created by the Bureau of Labor Statistics and the National Center for Education Statistics, **[*32]** which is incorporated herein by reference, as amended and supplemented, and available at nces.ed.gov/ipeds/cipcode/Files/CIP2020_SOC2018_Crosswalk.xlsx; and

ii. The proposal contains evidence of substantial labor market demand for the occupation or occupations that are mapped to the program, as

supported by documentation of demand from the New Jersey Department of Labor and Workforce Development.

2. A program proposal that does not meet the criteria at (a)1 above shall provide evidence for one or more of the criteria listed in this paragraph for the Presidents' Council to review and determine whether sufficient labor market demand exists:

i. Evidence of projected increasing demand in the careers, professions, or practices that graduates of the program are prepared to enter;

ii. Evidence that the current number of graduates from existing programs at other institutions in the State will not be adequate to meet the projected demand in the careers, professions, or practices that graduates of the program are prepared to enter;

iii. Evidence that the current profile of graduates from existing programs is not in accordance with the projected demand in the careers, professions, or practices that **[*33]** graduates of the program are prepared to enter;

iv. Evidence of substantial employer engagement, which may include, but is not limited to, program appraisal, program partnerships, and opportunities to review and comment on the program, in the development of program curriculum; or

v. Evidence of strength in the employment outcomes from current degree programs at the institution at the same academic degree level of the program.

(b) On the basis of evidence presented by the institution, the Presidents' Council may determine that sufficient labor market demand exists for a program proposal that does not meet either set of criteria at (a) above, if the Presidents' Council determines that:

1. There are insufficient data available to assess the program according to the criteria at (a) above;

2. There is sufficient evidence of preparation for a career, profession, or practice through the program; and

3. A majority of graduates from the program are reasonably likely to obtain employment, including self-employment, in the careers, professions, or

practices indicated in the program proposal within [twelve] months of:

- i. Graduation from the program; or
- ii. The receipt of a terminal degree in a program [*34] sequence that includes the proposed program.

[\[N.J.A.C. 9A:1-2.12.\]](#)

[N.J.A.C. 9A:1-2.13](#)

[N.J.A.C. 9A:1-2.13](#) addresses how the NJPC must evaluate whether a proposed new academic program is duplicative of comparable programs, stating:

(a) A proposal for a new academic degree program that is for an academic degree program that is currently offered by other institutions in the State at the same degree level and in the same academic discipline shall include a listing of all currently offered programs at the same degree level and in the same academic discipline.

(b) Where a listing pursuant to (a) above is present, the Presidents' Council shall evaluate the proposal for excessive duplication with comparable programs and determine whether the proposal includes:

1. Evidence of a relevant relationship between the proposed academic degree program and the institutional mission or a specific area of institutional academic focus; and

2. Evidence that a collaborative approach with another institution of higher education that currently offers the program per the listing included with the proposal pursuant to (a) above, including, but not limited to, articulation agreements and joint degree programs, would not be cost effective or a feasible alternative to offering [*35] the proposed academic degree program.

(c) If the Presidents' Council finds that a program proposal meets the requirements at (b) above, the Presidents' Council shall determine whether the program is in the best interests of the State through a determination as to whether one or more of the following have been demonstrated:

1. Evidence of significant instructional differentiation from currently offered programs at other institutions in the State that are at the same degree level and in

the same academic discipline;

2. Evidence of projected student population differentiation from currently offered programs at the same degree level and in the same academic discipline;

3. Evidence of projected sustainable cost savings for students compared with the cost of currently offered programs at the same degree level and in the same academic discipline; and

4. Evidence of student and community demand at the institution and in the region for the program, including, but not limited to, evidence that shows demand through:

i. Surveys or interviews of current students, faculty, and staff at the institution;

ii. Surveys or interviews of elected officials or other members of the institution's local community; [*36]

iii. Documented capacity constraints within currently offered programs at the same degree level and in the same academic discipline at other institutions; and

iv. Data on State and/or regional enrollment trends.

(d) A program proposal that does not meet the requirements at (b) or (c) above shall be referred by the Presidents' Council to the Secretary pursuant to [N.J.A.C. 9A:1-2.10\(b\)](#) as a program that may be duplicative of other programs in the State.

[\[N.J.A.C. 9A:1-2.13.\]](#)

[N.J.A.C. 9A:1-2.14](#)

Finally, [N.J.A.C. 9A:1-2.14](#) addresses how the NJPC must evaluate whether a proposed new academic program requires significant additional State resources, stating:

(a) The Presidents' Council shall evaluate proposals for new academic degree programs for whether significant additional State resources are required based on the following information:

1. The total of the projected budget for the proposed academic program that would be supported by either direct State support and/or indirect State support, including, but not limited to,

State student assistance grant and scholarship programs;

2. The projected increase in direct State support to the institution due to the proposed academic program;

3. The projected increase in indirect State support to the institution due to the proposed [*37] academic program;

4. Any concurrent changes to the budget of the institution that may represent a projected reduction in State support to the institution; and

5. The anticipated length of time that any projected increases in State support would be required for the program.

(b) When the Presidents' Council has determined that a new academic program does require significant additional State resources, the Presidents' Council shall evaluate the proposal to determine whether the significant additional State resources would be unduly expensive to the State, based on the following information:

1. Evidence that the proposed academic program will:

i. Offset continued State support for the program through sustained increases to State revenue and any additional economic impact to the State generated by the program; and/or

ii. Become sustainable within five years in the absence of the significant additional State resources that were used to establish the program; and

2. The institutional plan for integrity and compliance monitoring, as well as internal fiscal controls, to prevent misuse of State funding and government resources.

[\[N.J.A.C. 9A:1-2.14.\]](#)

The NJPC's 2022 AIC Manual incorporated these changes in its procedures [*38] and standards for the review of proposed new academic degree programs.

Rutgers Claimed Exemption from [N.J.A.C. 9A:1-2.10 to - 2.14](#)

On April 4, 2022, Rutgers wrote to the OSHE, expressing its opinion that the new regulations infringed upon the university's autonomy with respect to academic programming provided for in the Rutgers Act of 1956, and the Higher Education Restructuring Act of 1994. Rutgers stated that, "although [it] will not submit items for approval by the AIC and NJPC, it will notify the OSHE of new programs or changes to existing programs to ensure such programs are accurately reflected in the 'Inventory of Degree and Certificate Program Offerings.'" Rutgers also requested guidance "on how best to facilitate submission of such notifications as do other exempt institutions in New Jersey." Lastly, Rutgers stated that it would "continue to participate as an active member" of both the NJPC and the AIC, as it deemed such participation "critical to the institution and the State of New Jersey."

On June 14, 2023, the OSHE rejected Rutgers's claim of exemption from the new regulations, finding that Rutgers's analysis of the issue was "flawed and led to an erroneous conclusion." According to the OSHE, the Legislature intended that Rutgers would be subject to the Higher Education Restructuring Act of 1994, as [*39] well as the 2021 amendments, and it would "fully participate in all of the processes for which the NJPC is responsible, including the review of new academic degree program proposals." The OSHE pointed to Rutgers's own behavior as consistent with this understanding of the law, noting that since passage of the 1994 act, "Rutgers has, without objection, submitted new academic degree program proposals to the NJPC for review and has abided by the determinations rendered by that body."

The OSHE further opined that Rutgers's participation as a permanent member of the NJPC, without being subject to the NJPC's review of new academic degree program proposals

would lead to a result completely illogical on its face, with a permanent executive board member and rotating chair of the body permitted to enjoy selective application of statutory obligations. Such a result could ultimately destabilize the functioning of the NJPC and undermine the legislative mandate expressing the will of the citizens of the State that new academic degree program proposals be reviewed according to the standards established by this office. And, given Rutgers'[s] continued receipt of large sums of taxpayer dollars, the determination [*40] that Rutgers is exempt from these accountability regulations designed to protect

student investments is an untenable and unacceptable result.

Finally, the OSHE stated that it was aware Rutgers had "taken steps to establish new academic programs for the 2023-2024 academic year that were not submitted to either the NJPC or [OSHE] prior to implementation." The OSHE stated that "Rutgers should cease and desist any further actions to establish those programs until they have been submitted for review in accordance with the . . . laws and regulations and ultimately approved by [OSHE]." "Otherwise, [it would] have no choice but to deny Rutgers[s] ability to create those programs based upon its failure—by way of refusal—to show that those programs meet the standards regarding sufficient academic quality, sufficient evidence of labor market demand for the programs, duplication with comparable programs of study in the State, and whether the proposed new programs will require significant additional State resources. See [N.J.S.A. 18A:3B-8\(c\)](#)."

By letter to the OSHE dated July 11, 2023, Rutgers maintained its position that it was exempt from the new regulations. Rutgers stated that "the NJPC's statutory responsibilities [*41] cannot be interpreted to curtail Rutgers' rights and privileges or to impose additional responsibilities on Rutgers, contrary to the bargained-for guarantees of autonomy and self-governance that are memorialized in the Rutgers Act," as the Legislature acknowledged at N.J.S.A. 18A:3B.

Rutgers expressed that "throughout Rutgers' history as well as the statewide higher education system's evolution, the State—through all three branches of government—has consistently recognized and reaffirmed Rutgers' autonomy." According to Rutgers, this autonomy included the authority to create new academic degree programs without State approval, and Rutgers retained that authority with passage of the second Rutgers Act in 1956 and the 1994 Higher Education Restructuring Act. The letter went on to say: "Thus, Rutgers has had—for over two centuries—and still has, the authority to determine and develop its academic programs without recourse to any department or agency of the [S]tate."

Rutgers countered the OSHE's "suggestion that [S]tate appropriations to Rutgers somehow precludes recognition of Rutgers' autonomy, and its exemption from the approval process" for new academic degree programs, arguing that the suggestion [*42] "demonstrates a profound misunderstanding of the Rutgers Act." Rutgers argued that the Rutgers Act

constituted a legislative contract between Rutgers and the State, in which the State agreed to provide "sufficient [S]tate resources" to Rutgers, as well as "guarantee" that Rutgers would retain its "powers, authorities, and prerogatives."

Rutgers further rejected the OSHE's contention that it would be anomalous for Rutgers to remain a member of the NJPC while the institution was not subject to review of new programs by the NJPC. As to this issue, Rutgers noted the Legislature explicitly established Rutgers's membership on the NJPC, and "every other institution that qualifies for the exemption has historically been, and continues to be, a member of the NJPC."

In conclusion, Rutgers stated that "notwithstanding the lack of [S]tate review, Rutgers follows a rigorous internal review and vetting process to promote the academic excellence of new academic programs and ensure appropriate input, accountability, and decision-making at multiple levels." In addition, Rutgers vowed to "inform [the] OSHE of its new academic programs and material changes to existing programs for inclusion in the State [*43] Inventory of Program Offerings."

The OSHE's August 3, 2023 Final Agency Decision

On August 3, 2023, the OSHE issued a final agency decision, incorporating the June 14, 2023, decision, and holding that "Rutgers must set aside its position . . . and follow the statutory requirements through participation in the new academic proposal review conducted by the NJPC, as set forth at [N.J.S.A. 18A:3B-8](#) and [N.J.S.A. 18A:3B-14](#), respectively, and the standards set by this office at [N.J.A.C. 9A:1-2.10 to 2.14](#)."

Rutgers moved for reconsideration, which the OSHE denied on August 9, 2024. In denying reconsideration, the OSHE relied upon its prior analysis of Rutgers's legal arguments, and also rejected Rutgers's new argument that it was an exempt institution by virtue of the date of its charter.

The OSHE determined that "[t]hrough Rutgers may have qualified as a charter institution at one time based on its date of establishment, it gave up that status by 1956—and at least some of the academic autonomy that may have flowed from it through the 1945 law, L. 1945, c. 49, and the Rutgers Act—when it agreed to assume a public institutional status as 'The State University of New Jersey.' Thus, "[t]he terms of Rutgers's new status were codified by the Legislature through the Rutgers

Act. L. 1956, c. 61; [N.J.S.A. 18A:65-1 to - 103](#)."

Analyzing [*44] the 1956 Rutgers Act, the OSHE stated:

Generally speaking, the Rutgers Board of Governors[s] powers, authority, rights, and privileges are expressly delineated in the Rutgers Act and notably do not include the explicit authority to unilaterally develop, approve, or implement academic programs. See L. 1956, c. 61, §§ 18.1 to 18.10; [N.J.S.A. 18A:65-12 to - 23](#). This absence is in stark contrast with specific portions of the Rutgers Act that explicitly give the Board of Governors the authority to create "any new educational department or school." See [N.J.S.A. 18A:65-25\(j\)](#). Notably, however, even that express power is currently divided between the Board of Governors and the State, depending upon whether any such new department or school is within Rutgers's "programmatic mission" or not. *Ibid*. Further, at the time of the Rutgers Act's enactment, any new department or school needed both the approval of the "State Board of Education" and additional appropriations by the legislature if any such new department or school would "require, at the time of establishment or thereafter, an additional expenditure of money." L. 1956, c. 61, § 18(10).

The OSHE concluded that

while the Rutgers Act does not explicitly resolve the question of Rutgers's autonomy from State curricular review, in the absence of [*45] express language in the Act recognizing such purported autonomy, Rutgers must show that it had a vested right to be exempt from academic program review that predated the enactment of the Rutgers Act, and was unaltered by entry into a contractual relationship with the State in 1956. Rutgers has failed to make that showing. Stated differently, in the absence of an express grant of autonomy or a pre-existing vested right to be exempt from State oversight, nothing in the Rutgers Act or [the 1994 Higher Education Restructuring Act] purports to grant Rutgers the degree of autonomy it now asserts.

The OSHE rejected Rutgers's reliance on the Attorney General's Formal Op. No. 12-1951, 1951-53 Op. N.J. Att'y Gen. at 24. The OSHE noted that this opinion predated both the 1956 Rutgers Act and the 1994 Restructuring Act, "and, in any event, it addresses the

limitations on degree conferral—not programmatic design autonomy—imposed on colleges established before 1891 by a materially different statute that is no longer in effect." The OSHE observed: "The opinion therefore is not relevant to the question presented here and cannot subvert a plain language reading of [the Higher Education Restructuring Act of 1994] and the [1956] Rutgers Act."

The OSHE concluded that "because Rutgers has historically submitted new academic [*46] programs for NJPC review and a potential, subsequent review by the OSHE and its predecessors, its current position that its 'charter' status exempts it from the NJPC's review process is unavailing." And the OSHE noted that Rutgers had "not provided any evidence that it ever requested to be included on the list of charter institutions maintained by the NJPC in the [AIC] Manual, or that Rutgers ever sought from the OSHE or the NJPC a recognition of its purported 'charter' status." This appeal followed.

Before us, Rutgers argues it is exempt from the subject regulations under the 1912 Rutgers Act, and the Higher Education Restructuring Act of 1994. Rutgers contends it is exempt from the regulations as a matter of state and federal constitutional law, since application of the regulations would violate the Rutgers Act, which is a contract between Rutgers and the State. Finally, Rutgers maintains that its submission of earlier programs for review by the NJPC does not constitute consent to impair the Rutgers Act or a waiver of its challenge to the disputed regulations.

II.

"The judicial capacity to review administrative agency decisions is limited." *Brady v. Bd. of Rev.*, 152 N.J. 197, 210, 704 A.2d 547 (1997). "Unless a [c]ourt finds that the agency's action was arbitrary, capricious, or unreasonable, [*47] the agency's ruling should not be disturbed." *Ibid*. "The [c]ourt 'can intervene only in those rare circumstances in which an agency action is clearly inconsistent with its statutory mission or with other State policy.'" *Ibid*. (quoting [George Harms Constr. Co. v. N.J. Tpk. Auth.](#), 137 N.J. 8, 27 (1994), 644 A.2d 76).

Applying that deferential standard of review, the court's inquiry is limited to considering whether: (1) did the agency follow the law, including express or implied legislative policies; (2) is the agency's decision supported by substantial evidence in the record; and (3) in applying the legislative policies applied to the facts, led the agency to reach a clearly erroneous and

unreasonable conclusion. *In re Eastwick Coll. LPN-to-RN Bridge Program*, 225 N.J. 533, 541, 139 A.3d 1146 (2016); *Brady*, 152 N.J. at 210-11; *In re Musick*, 143 N.J. 206, 216, 670 A.2d 11 (1996). Appellant bears the burden of proof. *Smith v. Ricci*, 89 N.J. 514, 525, 446 A.2d 501 (1982).

At the same time, courts are not bound by an agency's decision on questions of law. *Melnik v. Bd. of Educ. of the Delsea Reg'l High Sch. Dist.*, 241 N.J. 31, 40, 224 A.3d 617 (2020); *Lavezzi v. State*, 219 N.J. 163, 172, 97 A.3d 681 (2014); *Utey v. Bd. of Rev., Dep't of Lab.*, 194 N.J. 534, 551, 946 A.2d 1039 (2008). Courts will reject any agency interpretation of law that is manifestly mistaken or unreasonable. *Zimmerman v. Sussex Cnty. Educ. Servs. Com'n*, 237 N.J. 465, 476, 206 A.3d 365 (2019); *L.M. v. State, Div. of Med. Assistance & Health Servs.*, 140 N.J. 480, 489-90, 659 A.2d 450 (1995). Here, the issues presented are based on legal interpretation of statutes and regulations, which we review de novo.

III.

Rutgers maintains it is exempt from the subject regulations under the 1912 Rutgers Act and the Higher Education Restructuring Act of 1994. According to Rutgers, the exemption first contained in the 1912 Act remains good law and is presently codified [*48] under Title 18A. Rutgers argues it is a pre-1887 institution and continues to remain exempt from having to submit its academic degree programs to the State for approval. We agree.

It is clear that, prior to the two Rutgers Acts in 1945 and 1956, the university was not regulated by the State with respect to its ability to confer degrees, or the terms and conditions under which it conferred degrees. Although the State began regulating these matters under L. 1912, c. 315, and L. 1916, c. 152, universities such as Rutgers, that had been established prior to 1887, were exempt from such regulation.

Moreover, this exemption from regulation applied to a university's development of new degree programs. As explained in 1951 by then-Attorney General Theodore D. Parsons, any college deemed exempt from regulation by L. 1916, c. 152, by virtue of their date of establishment, was "free generally to establish and award new degrees in its own discretion." Formal Op. No. 12-1951, 1951-53 Op. N.J. Att'y Gen. at 25; see also *Quarto v. Adams*, 395 N.J. Super. 502, 513, 929 A.2d 1111 (App. Div. 2007) (noting that although Attorney General opinions are not binding, they are

entitled to "a degree of deference").

This exemption from regulation still exists, and is codified at *N.J.S.A. 18A:68-6*, which states:

No school, corporation, association or institution of learning conducted within [*49] this State and licensed by the Commission on Higher Education, nor any officer or member thereof, in recognition of the attainment or proficiency of any person in pursuing or graduating from any course or courses of study, arts, or learning conducted by it or another such school corporation, association or institution, shall admit any such person to the grade of a degree by conferring, or participating in conferring, any degree upon any person unless that degree program is consistent with the programmatic mission of the institution or is approved by the commission.

Nothing contained in this section shall apply to any school, corporation, association or institution of learning, or officer or member thereof, which was established and conducted within this State on April 1, 1887, and was then in the course of admitting persons to the grade of a degree by conferring the same upon them in recognition of their attainments or proficiencies, nor to any school conducted under the public school system.

[*N.J.S.A. 18A:68-6* (emphasis added).]

In *Shelton*, 48 N.J. at 512 n.2, 521 n.4, our Court noted that the State Board of Education deemed the exemption to such regulation applicable "only to the colleges listed in fn.2," and the universities listed in [*50] footnote two included Rutgers. Specifically, the second Rutgers Act vested in the Board of Governors the general right to supervise the university. L. 1956, c. 61, § 18. Previously, that role had been fulfilled by the Board of Trustees, pursuant to the university's charter. Prior to 1956, the Board of Trustees had been responsible for developing the university's curriculum and degree programs. Thus, under the 1956 Rutgers Act, such powers were transferred from the Board of Trustees to the Board of Governors.

The 1956 Rutgers Act also provided that the Board of Governors would be controlled by the State. That is, the State was granted the authority to appoint the majority of the Board's voting members (through appointment by the Governor, with the advice and consent of the Senate), and the Commissioner of Education was designated a non-voting member of the Board of

Governors. *L. 1956, c. 61, § 7*. Thus, the Board of Governors serves as the oversight with respect to Rutgers's academics and degree programs.

In fact, in 2012, the Board of Governors was explicitly given comparable authority with respect to Rutgers University-Camden. See *L. 2012, c. 45, § 30* (codified at [N.J.S.A. 18A:65-14.10](#)). Notably, with respect to Rutgers-Camden, the Board of Governors "shall establish" [*51] "standards for the establishment and evaluation of academic programs," and "standards for the award of degrees to students enrolled in the academic degree programs." [N.J.S.A. 18A:65-14.10\(a\)](#) and [\(b\)](#).

The 1956 Rutgers Act also contained a list of authorities specifically delegated to the Board of Governors that collectively include the authority to approve new degree programs, their curricula, and courses of study. For example, the Board of Governors was granted "authority and responsibility" to "[d]etermine policies for the organization, administration and development of the [u]niversity," as well as "[s]tudy the educational . . . needs of the [u]niversity," and direct and control the university's expenditures, including decisions with respect to educational personnel. *L. 1956, c. 61, §§18(1)-(2), (4), (8)*. The Board of Governors also was granted incidental and reasonably implied powers to perform those duties. *Id.* § 21.

The 1956 Rutgers Act also expressed an understanding that Rutgers maintained its unique status: (1) by declaring it the public policy of the State that Rutgers "shall be and continue to be given a high degree of self-government" and "shall be free of partisanship," *id.* § 20(l)(i); and (2) by stating that "the powers granted to . . . the Boards [*52] or reasonably implied, may be exercised without recourse or reference to any department or agency of the State, *except as otherwise expressly provided by this Act or other applicable statutes*," *id.* § 21 (emphasis added).

The only indication in the 1956 Rutgers Act that the Board of Governors's control over academics could be limited by a State department or agency is in the provision granting the Board of Governors authority and responsibility to "[a]uthorize any *new educational department or school* which will require, at the time of establishment or thereafter, an additional expenditure of money," but only "if the establishment thereof is *approved by the State Board of Education* and provision is made therefor in the annual or a supplemental appropriation act or a special act of the Legislature or

otherwise." *Id.* § 18(10) (emphasis added).

We conclude based upon our *de novo* review, by granting the Board of Governors and Board of Trustees authority to exercise their powers "without recourse or reference to any department or agency of the State, except as otherwise expressly provided by this Act or other applicable statutes," *L. 1956, c. 61, § 21*, the clear intent of the 1956 Rutgers Act is to prevent State departments [*53] or agencies from exercising unlimited regulatory power over Rutgers, including through the adoption of new statutes and new regulations that impose new obligations on the university beyond what is permitted in the 1956 legislative contract and the statutes that existed at the time the parties entered into the contract.

The State counters that reference to "this Act or *other applicable statute*," has no temporal bound, and thus refers to both existing and future statutes, and permits the State unlimited regulatory authority over the university's academics, which the State contends is "an area in which Rutgers . . . ceded authority to the State," as opposed to matters of university "governance," as to which the State concedes Rutgers must consent to changes. The State contends it has the authority to regulate Rutgers's academic programming as it so chooses, in its sole discretion, arguing: "Once Rutgers ceded to the State the supervision over certain academic matters and compliance with education laws, as it gradually began doing so as early as 1864 and as it confirmed in the first Rutgers Act of 1945, it became up to the State to choose how and to what extent to exercise its authority [*54] in an area of recognized State concern."

In support of its argument, the State relies in large part upon its "visitorial powers" over the university, which were first granted in 1864 and continue to this day. See [N.J.S.A. 18A:65-34](#). For example, the State avers that "visitorial powers" are defined the same way in the 1945 Rutgers Act, *L. 1945, c. 49, § 8*, as in the 1945 statute establishing the State Department of Education in 1945, *L. 1945, c. 51, § 2(t)*, such that "visitorial powers" must be read to extend to full regulatory authority, including over "programmatic matters," just as with respect to other institutions of higher learning. We reject the State's argument.

In 1945, the State Department of Education was granted numerous powers over universities beyond visitorial powers, *L. 1945, c. 51*. Indeed, its "visitorial powers" are included in a statutory section that enumerates the

powers (a) through (u), with "visitorial powers" being only a single subpart (t). *Id.* § 2. A separate enumerated power (o) was to "[a]pprove the basis or conditions for conferring degrees," as permitted under listed statutes (the 1912 and 1916 statutes, and not the 1945 Rutgers Act). *Id.* § 2(o). And, the statute was also specific when addressing the State Department of Education's role with respect to Rutgers, consistent with the 1945 Rutgers [*55] Act. Compare *Id.* § 2(r) with L. 1945, c. 49, § 10.

Accordingly, the term "visitorial powers" must be limited to its own terms, such that it means only "visiting the State University of New Jersey to examine into its manner of conducting its affairs and to enforce an observance of its laws and regulations and the laws of the State." L. 1945, c. 49, § 8. The statute cannot be read expansively, to mean full regulatory authority, as the State argues. See Int'l Hod Carriers Union Loc. 426 v. Int'l Hod Carriers Union Loc. 501, 101 N.J. Eq. 474, 475, 138 A. 532 (Ch. 1927) (holding "courts do not exercise visitorial powers over voluntary associations or their proceedings except to prevent the violation of some law of the [S]tate or to protect or enforce some right already acquired.") (quoting headnote from Mayer v. Journeymen Stone-Cutters' Ass'n, 47 N.J. Eq. 519, 20 A. 492 (Ch. 1890)); see also Cuomo v. Clearing House Ass'n, LLC, 557 U.S. 519, 525-29, 129 S. Ct. 2710, 174 L. Ed. 2d 464 (2009) (considering historic meaning of "visitorial powers"); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 673-77, 4 L. Ed. 629 (1819) (Story, J., concurring); Mayer v. Oxidation Prods. Co., 110 N.J. Eq. 141, 142-44, 159 A. 377 (Ch. 1932).

Rutgers's reliance on the Higher Education Restructuring Act of 1994 is also unavailing. This Act was designed to return autonomy to colleges and universities. See N.J.S.A. 18A:3B-2. To that end, the legislature history indicates:

Under the bill, each institution's board of trustees will have final authority over the management and operation of the institution, including institutional planning, fiscal affairs, construction and contracts, employment and compensation of staff, tuition and fees, controversies and disputes, [*56] and program and degree offerings, so long as they are consistent with the institution's mission and applicable State law.

[Senate Education Committee Statement to S1118 (June 6, 1994).]

The Act was clearly intended to free public colleges and universities from the Department of Higher Education's control over their operational decisions. Nothing in the Act's history suggests that it was intended to impair Rutgers's autonomy. At bottom, we agree with Rutgers it is exempt from the new regulations under N.J.S.A. 18A:3B-26, its charter, and legislature history of academic independence. As noted above, we find no basis to conclude OSHE's March 2022 regulations were intended to affect the continued applicability of any of these statutes.

IV.

Rutgers next contends its submission of earlier programs did not constitute consent to the impairment of the Rutgers Act or a waiver of its challenge to the March 2022 regulations. Rutgers maintains that it voluntarily cooperated with the NJPC "as a matter of comity, cooperation or courtesy, from 1994 to 2022 before the new regulatory regime sprang up." As a State instrumentality, Rutgers's argument cannot be held to the doctrine of waiver, "especially when its core mission [*57] and rights are at stake."

We consider whether the 1994 statute amended the parties' 1956 legislative contract. A legislative contract creates rights that cannot be retracted or modified, and it prohibits the Legislature's ability to revisit its policy choices. Berg v. Christie, 225 N.J. 245, 260-62, 264, 137 A.3d 1143 (2016). Of course, parties to a contract may modify their contracts, or waive certain provisions. However, there must be clear evidence of the parties' mutual assent to do so. Cnty. of Morris v. Fauver, 153 N.J. 80, 95-97, 99-100, 104-05, 707 A.2d 958 (1998). And, as a general matter, the State could not be viewed as having waived any rights that existed under the legislative contract simply by choosing not to exercise them. *Id.* at 104-05. "[T]he application of waiver or estoppel principles to government actions is to be most strictly limited." Buonviaggio v. Hillsborough Twp. Comm., 122 N.J. 5, 17, 583 A.2d 739 (1991).

Here, there is no clear evidence of the parties' intent in 1994 to modify their 1956 legislative contract or waive any rights under it. While a Rutgers dean served as a member of the advisory panel that recommended the 1994 legislation, the record does not contain any resolutions or minutes from the Rutgers Board of Governors or Board of Trustees reflecting their discussion of, or agreements to, the legislation. Moreover, there is nothing in the record indicating that the Legislature [*58] consulted with Rutgers about the legislation, or that either party understood the legislation

as altering their legislative-contractual relationship in a substantive way. See, e.g., [Kravotil v. Angelson](#), 473 N.J. Super. 484, 520-35 (Law Div. 2020) (agreeing with argument by Rutgers that application of residency requirements of *New Jersey First Act*, N.J.S.A. 52:14-7, to its Board of Governors would violate its legislative contract with the State, and noting Legislature's prior practice of seeking Rutgers's consent for changes to its governance).

Saliently, the record contains no rejection of any of Rutgers's proposals for new degree programs. And there is no evidence of any previous conflict between Rutgers and the State with respect to the adoption of new degree programs.

As for the 2021 statute and 2022 regulations that are the basis for this appeal, the State counters they are not significantly different from the regime they replace, since they require consideration of proposed degree programs using criteria similar to the criteria considered by the NJPC since 1994. However, we find there are significant differences.

For example, the new statute and regulations require consideration of whether there is "sufficient evidence of labor market demand for the program." [N.J.S.A. 18A:3B-8\(c\)\(2\)](#); N.J.A.C. 9A:1:2-2.12. Previously, as set [*59] forth in the AIC Manual, the NJPC considered "demand" as an element of "need" for a proposed degree program. However, "labor market demand" was considered only for proposed academic programs that were career-oriented or professional in nature, and student demand was considered for non-career or non-professional programs.

Most significantly, the 1994 legislation provided only for NJPC's review of proposals for new programs that did not exceed an institution's programmatic mission. *L. 1994, c. 48, § 8(c)*. It did not provide for a State veto over such programs. However, the 2021 legislation does. [N.J.S.A. 18A:3B-8\(c\)](#); [N.J.S.A. 18A:3B-14\(f\)](#).

The State minimizes this expansion of its authority. But, it is a significant difference for Rutgers, because it opens Rutgers to OSHE's veto power, whereas no such power existed under the regime established in 1994. Rutgers's programmatic mission has always extended to doctoral degrees. Therefore, Rutgers's proposed new degree programs are always within its existing programmatic mission rather than exceeding its programmatic mission. As a result, under the 1994 regime, OSHE could not claim veto power over Rutgers's proposed degree programs, whereas under

the 2021 legislation it claims the right to assert such power. [*60]

We are similarly unpersuaded by the State's contention that the 1994 legislation including NJPC oversight, applied to Rutgers because the legislation specifically included the President of Rutgers as a rotating chair of the NJPC. The State's argument is unavailing because the 1994 statute also included pre-1887, exempt, independent institutions as members of the NJPC, [N.J.S.A. 18A:3B-7](#), and the NJPC's executive board, [N.J.S.A. 18A:3B-12](#). It is undisputed that those independent institutions participated in the NJPC notwithstanding that they are exempt from NJPC review.

Reversed. We do not retain jurisdiction.

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