

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6566-01T3

MARK CHESS,

Petitioner-
Respondent/Cross-Appellant,

v.

BOARD OF EDUCATION OF
BOROUGH OF BERGENFIELD,

Respondent-Appellant,

and

DAVID C. HESPE, COMMISSIONER OF
EDUCATION and NEW JERSEY STATE
BOARD OF EDUCATION,

Respondents-Respondents.

Argued: October 20, 2004 .Decided: **JAN 12, 2005**

Before Judges King, Newman and Holston, Jr.

On appeal from the New Jersey State Board of
Education, SB-60-00 and SB-27-01 (consolidated).

Sidney A. Sayovitz argued the cause for appellant
(Schenck, Price, Smith & King, attorneys; Joanne
L. Butler, of counsel; Meredith L. Grocott, Arla
D. Cahill, and Mariann Crincoli, on the brief).

Michael C. Walters, Deputy Attorney General,
argued the cause for respondents (Peter C.
Harvey, Attorney General, attorney; Patrick
DeAlmeida, Deputy Attorney General, of counsel;
Mr. Walters, on the brief).

Lawrence S. Lustberg argued the cause for respondent/cross-appellant (Education Law Center, attorney; Elizabeth Athos and Ellen M. Boylan, of counsel and on the brief) and for Amici Curiae Association for Children of New Jersey, Statewide Parent Advocacy Network of New Jersey, and New Jersey Parents' Caucus and on behalf of the Education Law Center (Gibbons, Del Deo, Dolan, Griffinger & Vecchione, attorneys; Mr. Lustberg and Shavar D. Jeffries, on the brief).

Michael F. Kaelber, Senior Associate Counsel, argued the cause for Amicus Curiae New Jersey State Boards Association (Cynthia J. Jahn, General Counsel/Assistant Executive Director, attorney; Mr. Kaelber, on the brief).

PER CURIAM

This case involves an educational, administrative problem which we conclude must and, seemingly promptly, and should be so resolved by the administrative arm of the executive branch of government. We conclude that the issue raised is moot, in this case, though doubtless recurring, and likely to evade judicial review. However, we decline to undertake a judicial resolution. We dismiss the appeal as moot, for reasons we will explain. We leave the solution to the executive branch in the first instance under its rulemaking responsibility.

Appellant Board of Education of the Borough of Bergenfield (appellant) appeals from a final decision of the State Board of Education (State Board) holding that appellant had an obligation to provide an "alternative education" to Mark Chess, a student

whom appellant had expelled while he was enrolled in the tenth grade. "Alternative education" refers to schooling offered through one of the county- or local-based programs initially developed in the late 1980s and 1990s to educate "at-risk" students who were disruptive or disaffected within the regular school setting.

Chess's expulsion arose after he brought five weapons to school: three boxcutters, a concealed razor blade, and a Swiss Army knife, and used one of the boxcutters to slash the back of another student's jacket. Patricia Hargrove, for herself and on behalf of her child, Mark Chess, appealed the expulsion to the Commissioner of Education, who affirmed the decision and found no obligation to provide Chess with an alternative education following expulsion. On further administrative appeal, the State Board reversed, relying upon its understanding of the New Jersey Constitution, which requires the Legislature to provide for a "thorough and efficient system of free public schools" for instruction of all children between the ages of five and eighteen years. N.J. Const. art. VIII, § IV, ¶ 1 (the Education Clause). As a result of emergency relief granted by the State Board, Chess was enrolled in an alternative education program from November 27, 2001 until he reached age nineteen in July 2003. Chess was a twelfth-grade student in the 2002-2003 school

year. He did not fully satisfy his high-school graduation requirements that year. According to his counsel, no further educational services were provided; Chess reached his twentieth birthday on July 19, 2004.

Meanwhile, we granted petitioners' motion to remand to the State Board to consider whether N.J.S.A. 18A:38-1 required appellant to provide Chess alternative educational services until age twenty, or even twenty-one. The State Board found that under the statute, consistent with the constitutional guarantee, Chess was entitled to alternative education from appellant until he reached his twentieth birthday. Appellant challenges that decision.

On the cross-appeal, Chess contends that the State Board erred in dismissing the Commissioner and the State Board (collectively, State respondents) as parties. We find it unclear after the remand whether Chess remains interested in this issue.

This is the further procedural background. In a resolution dated March 21, 2000 appellant voted 3-2 to permanently expel Chess from the district, stating that he "henceforth will have no further entitlement to an education within the school district." He and his parents challenged his expulsion by filing a verified petition of appeal with the Commissioner on June 16, 2000. The matter was transmitted to the Office of Administrative Law (OAL) for hearing.

Petitioners sought emergency relief on July 31, 2000 which the ALJ granted on August 18, 2000. The ALJ's order directed appellant to immediately assess Chess's alternative education needs, to identify an appropriate alternative education program for him, and to place him no later than the first day of the 2000-2001 school year. On September 15, 2000 the Commissioner issued his determination, modifying the ALJ's decision by requiring home instruction, eschewing an alternative educational setting, while the case was pending. Petitioners appealed to the State Board from that determination; they requested their appeal (State Board Docket #60-00) be held in abeyance pending the Commissioner's decision on the merits.

Prior to the OAL hearing, the ALJ dismissed the State respondents as parties. The OAL hearing involved only appellant

as a respondent. ALJ Ravin heard the matter over four days from January 30 to March 15, 2001. He issued his initial decision on May 25, 2001. He declined to address petitioners' claims that appellant's action violated Chess's rights under the Education Clause, but found that New Jersey's statutory and regulatory scheme did not explicitly address the provision of an alternative education following expulsion. The ALJ concluded, however, that appellant's failure to consult with appropriate sources before permanently expelling Chess without an alternative education program was arbitrary, capricious and unreasonable. The ALJ ordered appellant to evaluate whether Chess was a child with a disability. If he was, the district should follow the disciplinary procedures for classified students; if he was not, then the expulsion was not arbitrary, capricious or unreasonable.

In his July 16, 2001 decision reviewing the ALJ's initial decision on the merits, the Commissioner rejected the ALJ's determination that appellant was required to conduct evaluations to ascertain whether Chess was a child with disabilities, because Chess had not timely raised that issue and could still raise it appropriately, if desired. The Commissioner concurred with the ALJ regarding the lack of jurisdiction to decide the constitutional issue, and with the conclusion that the expulsion

was not arbitrary, capricious or unreasonable.

Petitioners then appealed to the State Board from the Commissioner's decision, requested that this appeal be consolidated with their earlier appeal, and on August 1, 2001, moved for emergency relief. On September 5, 2001 the State Board granted emergency relief, directing appellant to immediately assess Chess's alternative education needs and to place Chess in an appropriate alternative education program. In the event that Chess's placement in an alternative program could not be achieved by the first day of the 2001-02 school year, appellant was to provide Chess with home or out-of-school instruction until an appropriate placement could be arranged.

On September 10, 2001 appellant sought reconsideration and a stay of that decision. Petitioners cross-moved for enforcement of the State Board's decision because appellant had taken no action to assess or place Chess. On September 25, 2001 appellant began providing Chess with home instruction. The State Board's review on reconsideration reinforced its conclusion that appellant must provide Chess with an alternative education placement during the pendency of the case and denied the stay request. By motion filed on September 25, 2001 appellant sought leave to appeal from the grant of emergency relief, which we denied.

Following the May 15, 2002 report of its Legal Committee, the State Board decision was adopted on July 5, 2002. The State Board concluded "from both a legal and educational policy perspective that a student who is expelled from school must be provided with an alternative education program" up to the earlier of the student's high school graduation or the student's nineteenth birthday.

Appellant filed its appeal on August 15, 2002. Petitioners filed their timely cross-appeal on August 29, 2002. The State Board filed a statement of items comprising the record on appeal in October 2002 and an amended statement of items comprising the record on appeal in January 2003. We granted two motions to permit participation as amicus curie, one by the New Jersey School Boards Association (NJSBA) and the second by three advocacy groups: the Association for Children of New Jersey, Statewide Parent Advocacy Network of New Jersey, and New Jersey Parents' Caucus (the amici group).

On July 2, 2003 appellant filed a motion to suppress those portions of petitioners' reply brief that argued in favor of modifying the State Board's decision to extend Chess's rights to alternative education through his twenty-first birthday, asserting that this issue was not raised below. We granted appellant's motion to strike, denied the alternative motion to

supplement the record on that issue, and permitted the parties to move for a limited remand if desired, pursuant to R. 2:9-1, to properly raise the argument.

On August 28, 2003 petitioners moved for a limited remand to the State Board, and we granted that motion in mid-September 2003. The State Board issued its decision on the limited remand on December 3, 2003 denying the right to education to age 21. As permitted, the parties filed supplemental appellate briefs to address that decision.

II

Chess, born on July 19, 1984 resided with his mother Hargrove, his stepfather, and his two younger siblings in Bergenfield. The incident that led to Chess's expulsion occurred on January 26, 2000. Chess was age fifteen and in the tenth grade at Bergenfield High School.

Chess had been a student in the Bergenfield Public Schools since seventh grade. While he was a student at Bergenfield Middle School, the child study team evaluated Chess and concluded that he was not eligible for special education and related services. The team found that Chess had average to high average intelligence, but his daily functioning was not commensurate with his tested ability, due to a lack of homework

preparation and studying for tests. The team found no learning disabilities or major emotional factors interfering with his ability to function in school at that time. The team recognized past emotional factors that may have interfered with his ability to perform, but found no such interference as of the evaluation.

Chess's marks for ninth grade at Bergenfield High School covered the full range of available grades, and dropped off from the midyear to the year's end. Chess's disciplinary history in ninth grade included two detentions; six days of in-school suspension; and two periods of five-day home suspension, one of which was for fighting with another student. During the first part of his tenth grade year, Chess was failing three classes, and he received "incompletes" in three others. Both the high school Principal and the Director of Guidance jointly sent a letter to Chess's parents in December 1999, stating concern about his failing grades. They referred him to the school's Pupil Assistance Committee (P.A.C.), which was a resource to students and families of students experiencing academic difficulty. The meeting with the P.A.C. was scheduled to take place after the incident that led to Chess's expulsion.

There had been no referral to, or consultation with, the child study team while Chess was a student at Bergenfield High School. He was never classified as eligible for special

education or related services under the Individuals with Disabilities in Education Act (IDEA) and was never identified as a qualified individual with a disability under Section 504 of the Rehabilitation Act of 1973.

Prior to the January 26, 2000 incident which led to his expulsion, Chess's tenth-grade year included this discipline history: detentions and twelve days of in-school suspension for cutting classes and missing detentions; and eight days home suspension in January 2000 for two incidents of stealing possessions of other students, a book bag and a baseball hat.

According to Chess, the incident that led to his expulsion was preceded by a discussion with another student, N.S., in the cafeteria, during which N.S. sat across the table from Chess. N.S. asked Chess why he did not have a coat. When Chess responded "because I couldn't afford one," N.S. made fun of him, and the others present laughed at what N.S. said. This humiliated Chess. The school bell rang, and the students in the cafeteria headed into the commons area to their classes. Chess was walking behind N.S. but had not intentionally followed him. They were simply going in the same direction.

Chess approached N.S. from behind and, using a box cutter, cut across the back of the jacket he was wearing. According to Chess, he had lifted the jacket up from N.S.'s back when he made

the cut. N.S., not physically injured, reported the incident to Assistant Principal John Nowicky.

According to N.S., he had not been in the cafeteria, and had not been talking with Chess prior to the coat slashing. He had been sitting in the commons and left from there to go to class. N.S. had not made any comments to Chess about his coat.

During questioning by Bergenfield High School administrators, Chess was found to have three box cutters, one razor blade scraper, and a Swiss army knife on his person. Chess admitted bringing the weapons to school and using the largest razor-blade box cutter, which had an extended blade length of three inches, to cut N.S. 's jacket. Each of these items was capable of use as a weapon to produce death or serious bodily injury.

According to Chess he brought the weapons to school "to show off" and he "didn't come to school thinking I was gonna use them on anybody." He knew they were not allowed in school, but he did not think he would be expelled simply for bringing them to school.

Board Policy Number 5114, as contained in appellant's Policy Manual and in the 1999-2000 Parent/Guardian Student Handbook and Calendar, advised parents and students that the punishment for a weapons infraction was "[m]inimum 10 day HS

[home suspension] with consideration for expulsion." The Handbook also defined expulsion as "permanent removal from school rolls." Chess was suspended from Bergenfield High School for ten days, pending further disciplinary action.

Appellant held a disciplinary hearing on March 21, 2000, at which Chess was represented by legal counsel. At the hearing, appellant heard testimony from Nowicky; the Principal of Bergenfield High School, Ross Medlar; Bergenfield Police Officer Christopher Carter; Superintendent Dr. John Galish; Chess; Hargrove; and Chess's stepfather. Galish recommended expulsion as the appropriate penalty for Chess, because: (1) he believed that the offense was an egregious one which could have resulted in serious injury or death; (2) he believed that Chess's action was premeditated and that Chess followed N.S. from one area to another; (3) Chess had brought five weapons to school, knowing that weapons were prohibited; and (4) Galish did not believe that Chess intended to slash only at N.S.'s jacket, rather than at N.S. himself.

Appellant considered various terms of suspension but they were rejected as not sufficiently severe. During the deliberations, one of appellant's members expressed concerns about how sad it would be to end Chess's educational opportunity at such a young age by expulsion; the discussion turned to

Chess's ability to change residence to attend school in another district. Galish was aware, however, that Chess had two younger siblings in the Bergenfield public schools.

The subject of alternative education was never discussed or recommended. Galish did not raise it because "it's not a required option that I need to consider in a case like that" and because "it cost money, and alternative education programs can be very expensive." He added that Bergenfield had a history of defeating eighteen out of the last twenty-five budgets, and that voters "were just getting back in a pattern of passing budgets and having confidence in the system." He explained that the voters expected the district "to be using money responsibly on the people who are willing and able to do things the right way." Accordingly, Galish "just didn't feel it [alternative education] was an appropriate option to be considered at that point for an offense as egregious as having brought five weapons to school and using one of them to slash at another student."

Appellant adopted a resolution dated March 21, 2000 determining that Chess "has engaged in conduct of a very serious nature (aggravated assault of a fellow student with weapons) which presents a danger to the safety and well-being of the entire school community," and that Chess "has engaged in conduct which constitutes good cause for expulsion." Accordingly, the

resolution provided that Chess would be "permanently expelled from the district" and that he "henceforth will have no further entitlement to an education within the school district." Appellant never solicited nor received reports or testimony from any school guidance counselor, social worker, psychologist, or psychiatrist prior to making the decision to expel Chess without providing an alternative education program. The expulsion resolution noted that appellant's Board Policy 9314 required "child study team evaluation prior to expulsion and the continued provision of education services during a period of expulsion," but appellant waived that requirement here, finding that the policy's provisions "do not accurately reflect current law and regulation" and "do not reflect the intent of the Board."

Appellant's Board Policy Number 5114 required individual instruction or an alternate educational program for every student who was suspended from the district's schools. Under this policy, Chess received home instruction from February 16 through March 20, 2000. Appellant terminated Chess's home instruction upon his expulsion. As a result of the Commissioner's order awarding emergency relief to Chess, on September 26, 2000, the Board again began providing Chess with approximately eight and one-half hours of home instruction per

week. Chess did not receive any credit for his tenth-grade year as a result of his expulsion on March 21, 2000 and he was repeating tenth grade during the home instruction commenced in September 2000.

Appellant had no policy that required providing alternative education to any student following expulsion from the Bergenfield Public Schools. Appellant did not operate a formal alternative education program, and never recommended that Chess be placed in an alternative education program. In Galish's opinion, Bergenfield had successfully addressed the needs of students within its own high school by providing individual support, and had not found a need for alternative programs. Bergen County had previously operated an alternative education program, which ceased around 1997.

The Bergenfield Police Department was notified of the January 26, 2000, incident. Juvenile charges were filed against Chess for aggravated assault, third-degree, and unlawful possession of weapons on school grounds, fourth-degree. Chess pled guilty and was adjudicated a juvenile delinquent for a disorderly persons offense and a fourth-degree weapons charge. A thirty-day sentence in the Juvenile Detention Center was suspended and Chess was sentenced to probation, to payment of court fines and \$200 restitution to N.S., and to attendance and

completion of the court's Service Learning Program. He was also ordered to have no contact with N.S. He successfully completed the court-ordered program, receiving awards for perfect attendance and for completing all of the assignments.

On two earlier occasions, appellant had paid for instruction for students expelled by the Board who were placed in juvenile detention facilities. The decision to provide educational services to those students was made by the detention facility in consultation with the Department of Education (Department). Appellant initially appealed to the Commissioner to reject the Department's financial assignment of these two students to the Bergenfield school district, in light of their expulsions, but eventually both appeals were withdrawn and appellant assumed obligation for these two students.

In the OAL hearing upon petitioners' challenge to Chess's expulsion, the ALJ found that "for purposes of reporting to the New Jersey Department of Education, expulsion is defined as when a student was expelled from school and not recommended for placement in any other alternative program run by the district or other agency." The ALJ also found as undisputed fact that 'expulsion was an action which the Department of Education has recognized as available to local school districts."

Galish named three factors as important in his expulsion

recommendation: the use of lethal weapons, that Chess had "pro-actively followed N.S. out of the cafeteria to the location where the slashing took place," and that Chess then slashed at N.S.'s coat. Without those factors, Galish probably would have recommended an eighteen-month suspension with home instruction. The ALJ specifically found that the record "does not establish that Chess had no intent to injure N.S.

Michael Greene, Ph.D., a developmental psychologist with thirty-five years of experience, testified as petitioners' expert in the causes and prevention of school and youth violence. Since April 1998, Greene had served as the Executive Director of the Violence Institute of New Jersey at the University of Medicine and Dentistry of New Jersey, which helped the Department develop strategies to address school violence within six school districts. Greene served as a consultant to other school districts and to State government in the areas of school and youth violence. At the Department's request and under Greene's stewardship, the Violence Institute developed a document titled "Identifying and Responding to Adolescents Who May Harm Others," for distribution to every New Jersey school.

Based on Greene's testimony, the ALJ found that expulsion without alternative education was "at the far end of the punitive approach to school discipline, without consideration

for psychological, social or educational needs." The ALJ also found that "expulsion without alternative education by a school district has many negative consequences for a student," including

denial of educational opportunity; reduction of the chances that a youngster will lead a productive and fruitful life; denial of critical factors - attachment to school, attachment to caring adults, and engagement with positive peers - that protect against the youngster continuing to act in ways that are increasingly aggressive or inappropriate, creation of resentment and stigma and deprivation of the opportunity to work on social development.

The ALJ further found that among the "best practices" recommended by experts in the field of school and youth violence regarding incidents involving the possession and use of weapons in school were "non-judgmental psychological assessment of the context of the incident, the student's psychological background and the student's current psychological functioning, motivations, and intent with regard to possession of the weapons" and "providing the student with the opportunity to be in a structured educational setting which enables him or her to progress educationally and that addresses the particular behavioral deficits exhibited by the student."

Among the State education reports presented during the OAL hearing was the Department's 1999 document, "A Guide and

Application for the Operation and Approval of High School Alternative Education Programs." That report described the history of alternative education programs in New Jersey, which began in a few districts in 1966, aimed at reducing student disruption in schools. As of 1999, eighteen county-wide programs that received State grant monies were operating, serving 777 students from 142 of the State's 300 high schools. According to the Alternative Education Association of New Jersey, there were also approximately 120 local alternative school programs serving over 4800 students. According to the Department's report, data showed that students who attended county-based alternative education programs "made significant academic and social gains in the alternative programs compared to their performances in their regular high schools. Improvement was evident in such academic measures as grade point average and credits earned, and in behavioral measures such as attendance, suspensions and related misconduct (e.g., violent behavior)." Alternative education programs were "designed to meet the specific needs, interests, and aspirations of at-risk youth who may be disruptive and/or disaffected with the traditional academic environment." Another State report submitted in evidence was the Department's June 2000 report on "Violence, Vandalism and Substance Abuse in New Jersey Schools," which stated that there

were 101 expulsions statewide in 1998-1999, and 755 removals to an alternative program.

The ALJ saw no need to make findings regarding the relevance of those statistics on statewide experience with alternative education programs, because appellant had broad discretion in matters of pupil discipline. The ALJ noted, however, this evidence showed that less than half of the State's high schools had sent students to alternative education programs.

The ALJ concluded that the OAL was without jurisdiction to decide the constitutional question of whether the failure to provide Chess with an alternative education following his permanent expulsion violated Chess's right to a thorough and efficient education. He found that appellant's action of ordering expulsion without alternative education was not arbitrary, capricious or unreasonable, because alternative education following expulsion was not expressly mandated by statute or regulation. The ALJ further found, however, that the expulsion was flawed because appellant had failed to evaluate whether Chess was a student with a disability.

The Commissioner affirmed the ALJ's decisions regarding jurisdiction on the constitutional question and the validity of permitting expulsion without alternative education. The Commissioner set aside the ALJ's orders that Chess should be

evaluated for a disability.

The State Board reversed, basing its decision on the Education Clause and holding:

We have concluded from both a legal and educational policy perspective that a student who is expelled from school must be provided with an alternative education program until he either graduates from high school or reaches his nineteenth birthday, whichever comes first. In doing so, we stress the importance of providing educational services to students who present serious disciplinary problems. Although it may be more challenging to provide such students with effective educational services, we do not believe that it is sound educational policy to turn our back on students just because it may be difficult to educate them. To the contrary, it is all the more imperative that we fulfill our responsibilities to these children both for their sake and for society's.

As a result of the September 2000 decision by the Commissioner, Chess received home instruction for the 2000-2001 school year, during which he successfully passed the tenth grade. Thereafter, Chess was enrolled in an alternative education program, Academy High School at Passaic Community College, from November 27, 2001. Hargrove asserted that Chess needed to begin the eleventh grade in September 2001 to retain any chance of earning a high school diploma, because he would turn nineteen in July 2003, when his right to education under the Education Clause would end. Chess was in his senior year at Academy High School as of February 2003.

In its December 2003 decision on the limited remand, the State Board acknowledged that in its earlier decision, "[s]ince none of the parties raised the question, we did not examine the impact of N.J.S.A. 18A:38-1." Upon consideration, that statute reinforced the State Board's view that "a student's substantive right to continue his education following his removal from the regular education program for disciplinary reasons is derived from the New Jersey State Constitution," As such, the State Board concluded that N.J.S.A. 18A:38-1 obligated appellant to provide Chess with a free public education until his twentieth birthday.

The State Board found that N.J.S.A. 18A:38-1 defined which children were entitled to a free public education in a given school district, based upon their domicile. The statute did not expressly direct the continuation of educational services following expulsion or suspension. It concluded, however, that "[n]or in the face of the constitutional mandate can we interpret any of the provisions of N.J.S.A. 18A:37-1 et seq. to authorize a district to terminate the provision of all educational services to a child who has met the criteria of N.J.S.A. 18A:38-1." Accordingly, any child who met the domicile requirements was entitled to a free public education until the twentieth birthday.

The State Board rejected petitioners' arguments that the educational right extended to a student's twenty-first birthday. The State Board acknowledged that "students who are classified as being entitled to special education programs and services under N.J.S.A. 18A:46-1 et seq. are entitled to the continuation of such programs and services until their twenty-second birthday," but noted that Chess "does not fall within this classification."

The State Board saw no merit in limiting Chess's entitlement to special services because he had not previously asserted a claim under N.J.S.A. 18A:38-1 throughout the proceedings on his petition. The State Board's initial decision required appellant "to fulfill its constitutionally imposed obligation" to Chess, and appellant "will not suffer any undue prejudice by satisfying the statutory requirement" to provide educational services for an additional year. The State Board also rejected appellant's motion to supplement the record with information about Chess's academic performance during the 2002-03 school year, stating that this information had "no bearing" on appellant's legal obligation.

III

Chess reached his twentieth birthday on July 19, 2004. Accordingly, whether Chess was entitled to receive an

alternative education up until his nineteenth birthday, or even up until his twentieth birthday, is moot as far as he is concerned. Courts have often elected to resolve issues where matters become moot, where those matters "are of substantial importance and are capable of repetition, yet evade review." Mistrick v. Div. of Med. Assistance & Health Serv's., 154 N.J. 158, 165 (1998). More recently, in Joye v. Hunterdon Cent. Req'l High Sch. Bd. of Educ., 176 N.J. 568, 582-83 (2003), (quoting Clymer v. Summit Bancorp., 171 N.J. 57, 66 (2002)), the Court ruled on a school drug testing policy that became moot after the student plaintiffs had graduated, given the policy's "public significance and the likelihood 'that controversies similar to this one will present themselves in the future.'"

As stated at the outset, we decline to address this now moot issue in this case and on this record. Our decision on the merits will have no practical impact on the parties as to this case, will require our speculation about constitutional and legislative obligations, and will present problems of economic consequences which we are not equipped to handle, either on this record or institutionally.

Our decision to dismiss this appeal as moot is reinforced by the statements of the Deputy Attorney General at oral argument and his post-argument written submissions provided at

our request. We have been aware that for a period of time the State Board has contemplated giving the local boards guidance on the topics of expulsion and alternative education. 35 N.J.R. (March 17, 2003). Post-argument the Attorney General has provided us with this letter and extensive enclosures which state in pertinent part:

Pursuant to Judge King's request during oral argument today in the above-captioned matter, enclosed please find a copy of the Department's proposed regulations pertaining to student conduct (N.J.A.C. 6A:16) as presented to the State Board of Education at the First Discussion Level on October 6, 2004, which also can be found at the following web address:
<<<http://www.state.nj.us/njded/code/title6a/chap16/amenment8/>>>.

Specifically, proposed N.J.A.C. 6A:16-7.5 addresses the issue of the provision of an alternative education program following expulsion pursuant to N.J.S.A. 18A:37-2.

The "Summary" dated October 6, 2004 includes this comment:

N.J.A.C. 6A:16-7.5 Expulsions

This new section is proposed to address expulsions for general education students. At proposed N.J.A.C. 6A:16-7.5(a)1 the associated due process rights that an expelled student would be entitled to receive are provided. Additionally, for the reasons set forth above in the third paragraph of the section titled N.J.A.C. 6A:16-7.2, Short-term suspensions, the amendments proposed at N.J.A.C. 6A:16-7.5(a)2 and 2i require a district board of education to continue to provide educational services to a student, either in

an alternative education program or through home instruction, as appropriate, until the student graduates or reaches the age of 20. At proposed N.J.A.C. 6A: 16-7.5(a) 2ii, students are provided comparable educational services to those provided to students in public school of similar grades and attainments. Additionally, a rule is proposed at N.J.A.C. 6A:16.7.5(b) to require that the expulsion of a student with a disability from a receiving school be handled in accordance with N.J.A.C. 6A:14.

The proposed N.J.A.C. 6A: 16-7.5 contains the following obligation of the school district:

6A:16.7.5 Expulsions

(a) A general education student expelled from school pursuant to N.J.S.A. 18A:37-2, at a minimum, shall be provided with:

1. The procedural due process rights set forth at N.J.A.C. 6A:16-7.3 and 7.4.

2. An appropriate educational program or appropriate educational services, based on the criteria set forth under N.J.A.C. 6A:7.3(f), until the student graduates from high school or reaches the age of twenty.

i. The education program shall be consistent with the provisions of N.J.A.C. 6A:16-9.2 and 10.2 and N.J.A.C. 6A:14-2 and 4.3; whichever are applicable; or

ii. The educational services provided, either in school or out of school, shall be comparable to those provided in the public schools for students of similar grades and attainments, pursuant to the provisions of N.J.S.A. 18A: 38-25.

The Attorney General's office represented to us that the State Board planned to meet on December 1, 2004 on the subject, with the hope that proposed regulations would be finalized by early March 2005 and likely promulgated by June 1, 2005. With this background, and this augury for effective administrative action, we stay our hand in this context of mootness, laden with constitutional overtones, unclear legislative mandates, and complex statewide financial implications. Of course, if the executive branch does not act, future litigation may require our involvement. We understand there is no pending legislative proposal on the point.

Appeal dismissed.

**I hereby certify the foregoing
is a true copy of the original
on file in my office.**

Jim Flynn

CLERK OF THE APPELATE DIVISION