



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**FINAL DECISION**

**ON EMERGENT RELIEF**

**L.B. ON BEHALF OF J.B.,**

Petitioner,

v.

**EDISON TOWNSHIP BOARD**

**OF EDUCATION, MIDDLESEX COUNTY,**

Respondent.

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OAL DKT. NO. EDS 05457-20

AGENCY DKT. NO. 2020-31731

**Esther M. Canty-Barnes, Esq.,** for petitioner (Rutgers School of Law-Newark,  
Education and Health Law Clinic, attorneys)

**Douglass M. Silvestro, Esq.,** for respondent (Busch Law Group LLC, attorneys)

Record Closed: June 17, 2020

Decided: June 18, 2020

BEFORE **JACOB S. GERTSMAN, ALJ** t/a:

**STATEMENT OF THE CASE**

Petitioner L.B. on behalf of student J.B., seeks emergent relief staying the graduation of J.B. until a determination can be made on due process claims.<sup>1</sup> Respondent Edison Township Board of Education, (District or Edison) responded that petitioner has not set forth any emergent situation that would necessitate the staying of the graduation, nor established any of the elements necessary for emergent relief to be granted.

## PROCEDURAL HISTORY

On June 9, 2020, petitioner filed a petition for emergent relief with the Office of Special Education Policy and Dispute Resolution (SPDR or Department). The matter was transmitted to the Office of Administrative Law (OAL) on June 16, 2020, for an emergent relief hearing and a final determination in accordance with 20 U.S.C.A. §1415 and 34 C.F.R. §§ 300.500 to 300.587.<sup>2</sup>

Petitioner filed a brief in support of the motion on June 17, 2020, and the District reserved its right to put forth its opposition at oral argument. Oral argument was held on June 17, 2020, 2020. At the direction of the undersigned, the District filed a post-hearing submission later on June 17, 2020, to memorialize arguments made during oral argument, and the record closed. The motion for emergent relief is now ripe for consideration.

## FACTUAL DISCUSSION AND FINDINGS

For purposes of deciding this request for emergent relief, the following facts which form the basis for the determination herein, are not in dispute. Accordingly, I **FIND** the following as **FACT**:

1. J.B. is a twenty-one-year-old student enrolled in the Edison School District and resides with his parents L.B. and J.B. in Edison, New Jersey.
2. J.B. was classified as autistic by the Edison Board of Education after his parents moved into the Edison School District on January 15, 2019.

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<sup>1</sup> Petitioner additionally sought the withholding of J.B.'s diploma to allow his former district, the Roselle School District (Roselle), to provide compensatory education as ordered by an ALJ in a separate matter. However, as that matter is under appeal in federal court by both parties, the OAL does not have jurisdiction over this claim.

<sup>2</sup> Petitioner's underlying due process claim seeking compensatory education was not transmitted with the emergent petition, and remains at the SPDR.

3. He currently attends an out-of-district placement at the New School in Somerset, New Jersey, an approved New Jersey private school for the handicapped. The school year will end on June 18, 2020.
4. The parent[s] and J.B. relocated to Edison in January 2019, at which time the District assumed responsibility for his education and transportation from Roselle.
5. J.B. attained the age of twenty-one on October 13, 2019, and is therefore scheduled to “age out” of the District and educational services generally at the end of the 2019-2020 school year (this month), pursuant to N.J.A.C. 6A:14-1.3 (see definition of “Age 21”). In accordance with State rules and District practice, J.B. has been or shortly will be issued a diploma in light of his aging-out.
6. Petitioner’s underlying due process petition, which remains at SPDR, claims that J.B. did not receive the full benefit of the education due to him from March through June 2020 due to the statewide shutdown caused by the COVID-19 pandemic. J.B. has received virtual services provided by his out-of-district placement during the shutdown.

### **LEGAL ANALYSIS AND CONCLUSION**

The regulations governing controversies and disputes before the Commissioner of Education provide that “[w]here the subject matter of the controversy is a particular course of action by a district board of education . . . the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner’s final decision in the contested case.” N.J.A.C. 6A:3-1.6(a). The regulations further provide that the Commissioner may “[t]ransmit the motion to the OAL for immediate hearing on the motion.” N.J.A.C. 6A:3-1.6(c)(3).

At such a hearing, the petitioner must show that he or she satisfies the following four standards:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

N.J.A.C. 6A:3-1.6(b); citing Crowe v. DeGioia, 90 N.J. 126 (1982). The petitioner must prove each of these standards by clear and convincing evidence. Garden State Equal. v. Dow, 216 N.J. 314, 320 (2013) (citation omitted).

### **1. Irreparable Harm**

As the Supreme Court explained in Crowe, 90 N.J. 126, “[o]ne principle is that a preliminary injunction should not issue except when necessary to prevent irreparable harm.” Id. at 132 [citing Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303 (E. & A. 1878)]. Indeed, the purpose of emergent relief is to “prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.” Ibid. [quoting Thompson ex rel. Bd. of Chosen Freeholders v. Paterson, 9 N.J. Eq. 624, 625 (Sup. Ct. 1854)].

The threshold standard for irreparable harm in education is showing that once something is lost, it cannot be regained. M.L. ex rel. S.L. v. Bd. of Educ. of Ewing, EDU 4949-09, Initial Decision (June 15, 2009), modified, Acting Comm’r (June 15, 2009), <http://njlaw.rutgers.edu/collections/oal/>. Here, J.B. is a twenty-one-year old student scheduled to graduate on June 18, 2020. Further, as he turned twenty-one on October 13, 2019, prior to the end of the school year, he will “age out” of the District pursuant to N.J.A.C.. 6A:14-1.3. (“Age 21” means the attainment of the twenty-first birthday by June 30 of that school year. Students with disabilities attaining age twenty-one during the school year shall continue to be provided services for the balance of that school year.

Petitioner is seeking to stay the graduation of J.B. until the resolution of the due process claim concerning compensatory education as “[i]rreparable harm may result to the petitioner if he graduated from the District as graduation of a student means that a student has met the criteria of a state issued diploma.” [Brief in support of motion for emergent relief of Esther M. Canty-Barnes, Esq. (Canty-Barnes Brief) at 3-4.] However, issues substantially similar to the instant matter were addressed by the Third Circuit in Ferren C. v. School Dist. of Philadelphia, 612 F.3d 712 (3rd Cir. 2010). There, the Court held that, “[u]nder the IDEA, a school district’s obligations to provide and a student’s right to receive a FAPE both terminate when the child reaches the age of twenty-one.” Ferren C., 612 F. 3d 712, 717 (citations omitted). However, the Court also confirmed that

[d]espite the text of section 1412(a)(1)(A), which statutorily limits a school district’s obligation to provide a FAPE only to students under the age of twenty-one, an individual over that age is still eligible for compensatory education for a school district’s failure to provide a FAPE prior to the student turning twenty-one.

Id. at 718.

Accordingly, petitioner’s argument fails. Put simply, the mere fact that J.B. graduates and receives a diploma from Edison would not render him ineligible for compensatory education should petitioner prevail in the underlying due process claim. Based on the foregoing, I **CONCLUDE** that there is no irreparable harm to J.B.<sup>3</sup>

## 2. Settled Legal Right

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<sup>3</sup> Both the petition for emergent relief, and the brief in support of the petition, fail to explicitly request “stay put” protections for J.B. However, the District argues that “[p]etitioners appear to be requesting that J.B. receive ‘stay put’ protections pending the result of the underlying petition regarding compensatory services.” [Brief in opposition to emergent relief of Douglass M. Silvestro (Silvestro Brief) at 1.]

The Court in Ferren C. held that students were not entitled to “stay put” rights upon reaching age twenty-one as the IDEA did not apply at that point as a matter of law. Specifically, the Court noted that the District Court in that case was faced with the question of whether the student’s placement in Ferren C. “was pendent during these judicial proceedings under the stay-put provision of the IDEA,” and that the Court “denied Ferren’s request for pendency as a statutory right under section 1415(j) finding that the IDEA does not protect young adults who are over the age of twenty-one.” Id. at Footnote 1. Accordingly, as J.B. has reached the age of twenty-one, and the IDEA does not apply to students who have attained the age of twenty-one regardless as to whether any due process claims are pending, I **CONCLUDE** that he is not entitled to “stay-put” of his current out-of-district placement.

Next, emergent relief “should be withheld when the legal right underlying plaintiff’s claim is unsettled.” Crowe, 90 N.J. at 133 (citing Citizens Coach Co., 29 N.J. Eq. at 304–05). Petitioner argues that “[t]he right of a student who is eligible for special education and related services to receive a FAPE is well settled under the IDEA and the New Jersey Administrative Code. See, 20 U.S.C.A. §1412; N.J.A.C. §6A:14-1.2 (Canty-Barnes Brief at 4).<sup>4</sup> Here, petitioner’s underlying due process petition claims that J.B. did not receive the full benefit of the education due to him from March through June 2020 due to the statewide shutdown caused by the COVID-19 pandemic. While the law is decidedly unsettled on the effect of the use of remote learning during the pandemic to comply with the provisions of an IEP, petitioner’s underlying claim, that FAPE was not provided, clearly shows a well-settled legal right underpinning the claim. Accordingly, I **CONCLUDE** that the petitioner has met his burden.

### 3. Likelihood of Success on the Merits

Petitioner has not demonstrated that they are likely to succeed on the merits of the underlying claim. Under this emergent relief prong, “a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits.” Crowe, 90 N.J. at 133 [citing Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115–16 (E. & A. 1930)]. This typically “involves a prediction of the probable outcome of the case’ based on each party’s initial proofs, usually limited to documents.” Brown v. City of Paterson, 424 N.J. Super. 176, 182–83 (App. Div. 2012) [quoting Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 397 (App. Div. 2006)].

With regard to the underlying claim against Edison<sup>5</sup>, at oral argument petitioner asserted that the unprecedented nature of the COVID-19 pandemic, and the specific effect of remote learning on J.B., demonstrate that petitioner is likely to prevail on the merits of the

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<sup>4</sup> In its supporting brief, petitioner argues this point as it relates to the compensatory education that is purportedly owed to J.B. by the Roselle School district (“Considering these circumstances, it is well settled that J.B. is entitled to a FAPE from the Roselle School District.” Id. at 5). As noted above, this tribunal does not have jurisdiction over this claim.

<sup>5</sup> Petitioner argues, “since the Roselle District failed to provide a program and placement for J.B. for over a year and the proposed placement, L.B. is likely to prevail on the issue that this diploma should be withheld in order to benefit from the services that are already court ordered.” (Canty-Barnes Brief at 6.) As noted above, this tribunal has no jurisdiction over petitioner’s claim against Roselle.

underlying due process claim. Edison argues, “[i]t is exactly for these reasons that Petitioners’ claims are unlikely to prevail.” (Silvestro Brief at 5.) These are unprecedented times, where New Jersey has been at the epicenter of the global COVID-19 pandemic, with its citizens directed by our Governor to stay at home. Further, the shutdown of schools and the institution

of statewide remote learning due to the pandemic disrupted the lives of all New Jersey students, including those who have IEPs.

However, while it is entirely possible that this specific issue will be the subject of prospective litigation in other matters outside of the underlying due process petition, as noted above, the law on the effect of the use of remote learning during the pandemic to comply with the provisions of an IEP remains unsettled. Accordingly, I **CONCLUDE** that petitioner has failed to demonstrate a reasonable probability of success on the merits.

#### 4. **Balancing the Equities**

The fourth and final emergent relief standard involves “the relative hardship to the parties in granting or denying relief.” Crowe, 90 N.J. at 134 [citing Isolantite Inc. v. United Elect. Radio & Mach. Workers, 130 N.J. Eq. 506, 515 (Ch. 1941), mod. on other grounds, 132 N.J. Eq. 613 (E. & A. 1942)]. Petitioner argues that the

District will not suffer any harm because it will simply be withholding the issuance of J.B.’s diploma so that the Roselle District can provide the special education and related services to which he is entitled. Moreover, the issue of compensatory education can be litigated while the underlying due process case is being litigated.

(Canty-Barnes Brief at 7.)

Edison counters that the granting of emergent relief would provide petitioner with “his sought-after three months of additional services at the Board’s expense before the parties even set foot in court to determine whether J.B. was entitled to those services. That is not equity. There is no ‘balancing’ to be had in that situation, it would simply be robbing the Board of its right to due process.” (Silvestro Brief at 5.) As noted above, the OAL has no jurisdiction over the Rosell matter. With regard to the underlying due process claim, as found above, J.B.’s graduation would cause no irreparable harm, nor would it negate his eligibility for compensatory education for a school district’s failure to provide a FAPE prior to the student turning twenty-one. Ferren C., 612 F. 3d 718 (citations omitted). Further, while petitioner has



met the burden to demonstrate that there is a settled legal right, he has failed to demonstrate the likelihood of success on the merits. In sum, petitioner will not be harmed by graduating on June 18, 2020, as he will retain his eligibility for any compensatory education that may be awarded in the future. Accordingly, I **CONCLUDE** that the District will suffer greater harm should emergent relief be granted than the petitioner will suffer if the requested relief is not granted.

Based upon the foregoing, I **CONCLUDE** that the petitioner has failed to meet all of the requirements set forth in N.J.A.C. 6A:3-1.6(b) warranting an order for emergent relief in this matter.

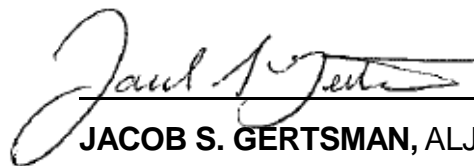
### **ORDER**

Accordingly, I **ORDER** that the petitioner's application for emergent relief be and hereby is **DENIED**.

No further issues remain upon resolution of this emergent matter; therefore, no further proceedings in this matter are necessary. This decision on application for emergency relief is final pursuant to 20 U.S.C. §1415(i)(1)(A) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C. §1415(i)(2). If the parent or adult student feels that this decision is not being fully implemented with respect to program or services, this concern should be communicated in writing to the Director, Office of Special Education Programs.

June 18, 2020

DATE



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**JACOB S. GERTSMAN**, ALJ t/a

Date Received at Agency:

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Date Mailed to Parties:

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JSG/nd