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SUPERIOR COURT OF NEW JERSEY  
CAMDEN COUNTY  
LAW DIVISION, CIVIL PART  
DOCKET NO. L-2682-20

M.A. and D.A., individually and on behalf of  
B.V.,

Plaintiffs,

v.

CHERRY HILL BOARD OF EDUCATION  
and LYNN E. SHUGARS in her official  
capacity as Business Administrator/Board  
Secretary and Records Custodian of the Cherry  
Hill Board of Education,

Defendants.

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Decided: April 12, 2021

Walter M. Luers, Esq., and Jamie Epstein, Esq., for Plaintiffs, M.A. and D.A., individually and on behalf of B.V.

Eric L. Harrison, Esq., and Raina Marie Pitts, Esq., for Defendants, Cherry Hill Board of Education and Lynn E. Shugars

DEBORAH SILVERMAN KATZ, A.J.S.C.

**INTRODUCTION**

This action comes before this court by way of a Verified Complaint and Order to Show Cause, docketed as CAM-L-2682-20. It is filed by plaintiffs, M.A. and D.A., individually and on behalf of B.V. as the parents and legal guardians [hereinafter “plaintiffs”], against defendants, Cherry Hill Board of Education, a body politic and corporate under the laws of the State of New Jersey [hereinafter “the Board”], and Lynn E. Shugars, the Board’s Business

Administrator/Secretary and Records Custodian. In this matter, plaintiffs, pursuant to the Open Public Records Act [hereinafter “OPRA”],<sup>1</sup> seek access to the following records: (1) attorney invoices reflecting legal services provided to the Board regarding B.V.; (2) special education and education file of B.V.; (3) the health records of B.V.; and (4) emails, memoranda, text messages, voice mail, letters and communications regarding B.V. from July 1, 2017 to June 6, 2020 to or from any of the persons listed in plaintiffs’ June 6, 2020 OPRA request.<sup>2</sup> On December 15, 2020, defendants provided all outstanding communications to plaintiffs. Accordingly, the sole remaining issues are defendants’ Motion to Dismiss and plaintiffs’ application for reasonable attorneys’ fees and costs as prevailing parties pursuant to the catalyst theory. Upon careful consideration of the parties’ filings and arguments, the court hereby **DENIES** defendants’ Motion to Dismiss and **GRANTS** plaintiffs’ application for reasonable attorneys’ fees and costs, thus bringing an end to this matter.

### PROCEDURAL HISTORY

On August 7, 2020, plaintiffs filed their Verified Complaint and Order to Show Cause docketed under CAM-L-2682-20, which sought access to the following records pursuant to OPRA: (1) attorney invoices reflecting legal services provided to the Board regarding B.V.; (2) special education and education file of B.V.; (3) the health records of B.V.; and (4) emails, memoranda, text messages, voice mail, letters and communications regarding B.V. from July 1,

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<sup>1</sup> N.J.S.A. 47:1A-1 to -13.

<sup>2</sup> Pls.’ Compl. ¶ 7.

2017 to June 6, 2020, to or from any of the persons listed in plaintiffs' June 6, 2020 OPRA request.<sup>3</sup> The same day, plaintiffs filed an amended letter brief.<sup>4</sup>

On August 12, 2020, the court executed the Order to Show Cause and set a return date of October 9, 2020.

On October 7, 2020, plaintiffs filed a substitution of counsel, consenting to the substitution of Cohn Lifland Pearlman Herrmann & Knopf LLP.<sup>5</sup>

On October 8, 2020, in order to pursue a potential settlement of the matter, the parties consented to extend the deadline for defendants to file their Answer to October 12, 2020.<sup>6</sup> The court rescheduled oral argument to November 6, 2020.

On October 13, 2020, Raina M. Pitts, Esq. entered an appearance as counsel for defendants and filed a Motion for Extension of Time to Answer seeking to extend the time in which to answer the Verified Complaint by thirty days. On October 22, 2020, plaintiffs filed opposition to the defendants' Motion, arguing they had already consented to an extension of the deadline twice. On October 26, 2020, defendants filed a reply to plaintiffs' opposition explaining that counsel was requesting additional time to become familiar with the matter as previous counsel was on family leave.<sup>7</sup>

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<sup>3</sup> Ibid.

<sup>4</sup> Plaintiffs first filed letter brief contained a small error on the first page; Pls.' Verified Compl., Letter Br. 1.

<sup>5</sup> Walter M. Luers, Esq. remains the attorney of record for plaintiffs.

<sup>6</sup> R. 4:6-1(c).

<sup>7</sup> Defs.' Reply to Opp'n to Mot. for Extension of Time to Answer.

On October 30, 2020, the court granted defendants' Motion for an extension and ordered that defendants answer or otherwise respond to plaintiffs' Verified Complaint by November 13, 2020.

Thereafter, the court rescheduled oral argument to December 14, 2020.

On November 13, 2020, defendants filed their Answer arguing that: (1) the requested documents are student records and therefore exempt from production under OPRA; (2) plaintiff's argument that parents are without remedy to challenge a denial is without merit; and (3) by way of defendants' response to plaintiffs' second OPRA request, plaintiffs have received all of the requested records rendering the Order to Show Cause moot.<sup>8</sup>

On November 23, 2020, plaintiffs filed a reply brief arguing that: (1) plaintiffs, as the parents and legal guardians of B.V., have the right to access B.V.'s student records under OPRA; (2) plaintiffs have prevailed under the catalyst theory because defendants produced some of the documents requested only after suit was filed; and (3) this matter is not moot because two issues remain undecided: the production of communications records and the prevailing party determination.<sup>9</sup>

On December 1, 2020, defendants requested the court's permission to file a sur-reply.<sup>10</sup> Plaintiffs opposed defendants' request as untimely and stated that sur-replies are prohibited in OPRA summary proceedings. The court granted defendants' request to file a sur-reply and ordered that same be filed on or before December 8, 2020.

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<sup>8</sup> Defs.' Answer.

<sup>9</sup> Pls.' Reply.

<sup>10</sup> R. 1:6-3(a).

On December 7, 2020, defendants filed the sur-reply requesting the dismissal of plaintiffs' Verified Complaint because: (1) student records retain their protected status under the New Jersey Pupil Records Act;<sup>11</sup> (2) plaintiffs' reliance on L.R. v. Camden City Public School District, 238 N.J. 547 (2019) is misplaced; and (3) plaintiff is not a prevailing party under OPRA.<sup>12</sup>

On December 9, 2020, Jamie Epstein, Esq. entered his appearance as co-counsel for plaintiffs.

After hearing oral argument on December 14, 2020, the court executed a Case Management Order on December 16, 2020, which suggested that defendants voluntarily provide the documents they deemed appropriate pursuant to plaintiffs' OPRA request on or before January 15, 2021.<sup>13</sup> Pursuant to the Order, the parties were allowed to file additional applications, as appropriate, within thirty days after the receipt of the documents.

On December 16, 2020, Eric L. Harrison, Esq. entered his appearance on behalf of defendants.

On January 13, 2021, defendants filed an additional brief requesting the dismissal of this matter because they fully complied with the court's December 16, 2020 Case Management Order.

On January 14, 2021, plaintiffs informed the court of several unresolved issues. Plaintiffs alleged that defendants' document production was still incomplete and that they are the prevailing party pursuant to the catalyst theory.

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<sup>11</sup> N.J.A.C. 6A:32-1.1 to -14.2.

<sup>12</sup> Defs.' Sur-reply.

<sup>13</sup> The court's reasoning is set forth on the record.

On March 3, 2021, the court held a Case Management Conference to discuss the parties' additional filings. The court scheduled oral argument for defendants' Motion to Dismiss on March 22, 2021, and ordered that plaintiffs file opposition to defendants' Motion on or before March 15, 2021.

On March 15, 2021, plaintiffs filed their opposition to the Motion to Dismiss the Verified Complaint. Plaintiffs argued that: (1) parents or legal guardians of a minor student have the right to their own student records through OPRA; and (2) not all responsive records had been produced.

On March 22, 2021, the court heard argument on defendants' Motion to Dismiss the Verified Complaint and on plaintiffs' application for fees pursuant to the catalyst theory.

For the reasons stated hereinbelow, the court **DENIES** defendants' Motion to Dismiss and **GRANTS** plaintiffs' application for fees pursuant to the catalyst theory.

#### **FINDINGS OF FACT**

On May 8, 2020, plaintiffs filed an administrative action against the Board with the Department of Education's Office of Special Education Programs [hereafter "the Administrative Action"] alleging that the Board was failing to provide plaintiffs with free appropriate public education in the least restrictive environment by segregating B.V. with her disabled peers.<sup>14</sup> This matter was subsequently transmitted to the Office of Administrative Law.<sup>15</sup>

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<sup>14</sup> Defs.' Mot. for Extension of Time to Answer, Certification of Raina M. Pitts, ¶ 8, Ex. G; Opp'n to Defs.' Mot. for Extension of Time to Answer, Certification of D.A., ¶ 3; Defs.' Answer ¶ 7, however, states that the Administrative Action was filed on July 9, 2020.

<sup>15</sup> This matter was transmitted to an administrative law judge in the Office of Administrative Law and scheduled for a hearing on July 16, 2020; OAL Docket No.: EDS 06354-2020 S, Agency Ref. No. 2020-31711; Defs.' Mot. for Extension of Time to Answer, Certification of Raina M. Pitts, ¶ 8.

On June 6, 2020, plaintiffs submitted a written OPRA request<sup>16</sup> to defendants seeking copies of (1) financial records/files of B.V.;<sup>17</sup> (2) special education and education file(s) of B.V. such as records kept by staff who provided B.V. special educational or educational services and the files of evaluators of B.V.; (3) the health records file(s) of B.V.; and (4) communications records files referring to B.V. from July 1, 2017 to [June 6, 2020].<sup>18</sup> The OPRA request further sought personnel information pursuant to N.J.S.A. 47:1A-10.<sup>19</sup>

On June 23, 2020, the Board responded to the OPRA request via email.<sup>20</sup> Defendants provided the personnel information requested pursuant to N.J.S.A. 47:1A-10.<sup>21</sup> Regarding the financial records/files, defendants stated that no responsive records existed. As to the other requested records, defendants denied access on the basis that such records were not subject to OPRA and referred plaintiffs to Ms. LaCoyya Weathington, Director of Pupil Services.<sup>22</sup> While

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<sup>16</sup> Pls.' Compl., Certification of Walter M. Luers, Ex. A.

<sup>17</sup> Financial records consist of contracts, bills, invoices, receipts, ledger accounts, purchase orders, payments, both sides of canceled checks which document payment of services provided to B.V. and for payment for services provided to the Board for legal services; Pls.' Compl. ¶ 7.

<sup>18</sup> Communication records consist of emails, memos, text messages, voice mail and letters, etc.; Pls.' Compl. ¶ 7.

<sup>19</sup> While the personnel or pension records of any individual in the possession of a public agency is not considered a government record, an individual's name, title, position, salary, payroll record, length of service, date of separation and the reason therefor, and the amount and type of any person received is considered a government record under OPRA; N.J.S.A. 47:1A-10.

<sup>20</sup> Pls.' Compl., Certification of Walter M. Luers, Ex. B.

<sup>21</sup> Pls.' Compl. ¶ 8.

<sup>22</sup> Ibid.; Defs.' Answer, Ex. 2.

defendants stated that their attorneys would review potentially responsive attorney records, the attorney invoices were not produced as of the filing of the Verified Complaint.<sup>23</sup>

On August 10, 2020, Jamie Epstein, Esq. contacted defendants' counsel via email and suggested that the parties resolve both the Administrative Action and the instant OPRA request within one settlement agreement.<sup>24</sup>

On September 9, 2020, the parties agreed on the terms of the settlement agreement that incorporated both the Administrative Action and the OPRA request, subject to approval by the Board.<sup>25</sup> The parties agreed that if the settlement agreement was not approved by the Board at their September 29, 2020 Board Meeting, the matter would proceed to trial.<sup>26</sup> The Board subsequently failed to consider the settlement agreement. It is unclear whether the parties continued the settlement efforts after the Board Meeting.<sup>27</sup>

On October 5, 2020, Jamie Epstein, Esq. filed a second OPRA request on behalf of B.V.<sup>28</sup> This OPRA request, in addition to new personnel information pursuant to N.J.S.A.

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<sup>23</sup> Pls.' Compl. ¶ 9, 10.

<sup>24</sup> Defs.' Motion for Extension of Time to Answer, Certification of Raina M. Pitts, ¶ 9, Ex. G.

<sup>25</sup> Defs.' Motion for Extension of Time to Answer, Certification of Raina M. Pitts, ¶ 12; Opp'n to Defs.' Mot. for Extension of Time to Answer, Certification of D.A., ¶ 11.

<sup>26</sup> Opp'n to Defs.' Mot. for Extension of Time to Answer, Certification of D.A., ¶ 13.

<sup>27</sup> Plaintiffs claim that settlement efforts were discontinued; Opp'n to Defs.' Mot. for Extension of Time to Answer, Certification of D.A., ¶ 17-18, 31. Defendants claim that settlement discussions were still ongoing; Defs.' Answer, ¶ 18.

<sup>28</sup> Defs.' Motion for Extension of Time to Answer, Certification of Raina M. Pitts, ¶ 16, Ex. F.



47:1A-10, sought access to the same documents, but for the period in between June 6, 2020 and October 5, 2020.<sup>29</sup>

On October 15, 2020, defendants requested an additional five business days to respond to plaintiffs' second OPRA request.<sup>30</sup>

On October 22, 2020, defendants provided plaintiffs with the documents and information sought in their October 5, 2020 OPRA request, but advised plaintiffs that the student records sought were exempt from production under OPRA.<sup>31</sup> However, because the second OPRA request provided the Board with parent permission for access to such records pursuant to N.J.A.C. 6A:32-7.5(e)(14),<sup>32</sup> the Board released B.V.'s medical file, B.V.'s student file, and communication records referring to B.V.<sup>33</sup>

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<sup>29</sup> Ibid.

<sup>30</sup> Defs.' Answer, ¶ 24, Ex. 6.

<sup>31</sup> Defs.' Reply to Opp'n to Mot. for Extension of Time to Answer, 2; Defs.' Answer, ¶ 30-31.

<sup>32</sup> N.J.A.C. 6A:32-7.5(e)(14) states that:

Authorized organizations, agencies, and persons shall include only the following: . . .  
(14) Organizations, agencies, and persons from outside the school if they have the written consent of the parent or adult student. Organizations, agencies, and persons shall not transfer student record information to a third party without the written consent of the parent or adult student . . .

[N.J.A.C. 6A:32-7.5(e)(14).]

<sup>33</sup> Defs.' Answer, ¶ 31.

Plaintiffs have not pled that the documents provided in response to the second OPRA request were not responsive.<sup>34</sup> At this time, the second OPRA request is not the subject of any proceeding.<sup>35</sup>

During oral argument on December 14, 2020, defendants argued that they learned for the first time that plaintiffs still had not received certain communications requested in their June 6, 2020 OPRA request.<sup>36</sup> Plaintiffs never reached out to Ms. LaCoyya Weathington, Director of Pupil Services, as directed by Ms. Shugars, the Custodian of Records, in defendants' June 23, 2020 response to plaintiffs' OPRA request, nor did plaintiffs reach out to defendants' counsel<sup>37</sup> informing them that they had not yet received all requested records.<sup>38</sup>

After oral argument, defendants obtained and forwarded all outstanding communications to plaintiffs on December 15, 2020.<sup>39</sup> Upon receipt of the documents, Walter M. Luers, Esq. requested changes to defendants' redactions because they were not done so in a "visually

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<sup>34</sup> Defs.' Answer, ¶ 32.

<sup>35</sup> Pls.' Reply, 3.

<sup>36</sup> Defs.' Mot. to Dismiss, 2.

<sup>37</sup> Defs.' Mot. to Dismiss, Certification of Shifra Tarica, Esq., ¶ 3; Defs.' Mot. to Dismiss, Certification of Raina M. Pitts, Esq., ¶ 3; Defs.' Mot. to Dismiss, Certification of Paul H. Green, Esq., ¶ 3; Defs.' Mot. to Dismiss, Certification of Robin Ballard, Esq., ¶ 3; Defs.' Mot. to Dismiss, Certification of Eric L. Harrison, Esq., ¶ 18.

<sup>38</sup> Defs.' Mot. to Dismiss, 2-3; Defs.' Mot. to Dismiss, Certification of LaCoyya Weathington, ¶ 3.

<sup>39</sup> Defs.' Mot. to Dismiss, 1; Defs.' Mot. to Dismiss, Certification of Eric L. Harrison, Esq., ¶ 2-3, Ex. A.

obvious manner” and, as to the attorney/client privileged emails withheld, requested a privilege log.<sup>40</sup> Defendants complied with plaintiffs’ request the same day.<sup>41</sup>

On December 17, 2020, Jamie Epstein, Esq. requested that the documents be provided in PDF format.<sup>42</sup> On December 18, 2020, defendants provided plaintiffs with a link to the downloadable PDF files.<sup>43</sup>

On January 4, 2021, Walter M. Luers, Esq. requested from defendants’ counsel the absent text and voicemail messages which were referenced in the produced emails.<sup>44</sup> Defendants claimed that, after conducting a thorough search, no such messages exist.<sup>45</sup>

On January 14, 2021, plaintiffs wrote to the court to raise several unresolved issues. They argued that: (1) they were the prevailing party pursuant to the catalyst theory, (2) defendants were properly put on notice of their failure to provide the records, and (3) the OPRA request was denied and not responded to until after suit was filed.<sup>46</sup>

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<sup>40</sup> Defs.’ Mot. to Dismiss, Certification of Eric L. Harrison, Esq., ¶ 4, Ex. B.

<sup>41</sup> Defs.’ Mot. to Dismiss, Certification of Eric L. Harrison, Esq., ¶ 5-7, Ex. C.

<sup>42</sup> Defs.’ Mot. to Dismiss, Certification of Eric L. Harrison, Esq., ¶ 9, Ex. D.

<sup>43</sup> Defs.’ Mot. to Dismiss, Certification of Eric L. Harrison, Esq., ¶ 11, Ex. E.

<sup>44</sup> Defs.’ Mot. to Dismiss, Certification of Eric L. Harrison, Esq., ¶¶ 13, 15, Ex. F.

<sup>45</sup> Defs.’ Mot. to Dismiss, Certification of Eric L. Harrison, Esq., ¶¶ 14, 16.

<sup>46</sup> Pls.’ January 14, 2021 Br. 1-2.

### CONCLUSIONS OF LAW

While Ms. Pitts initially argued that the outstanding documents were exempt from production under OPRA, claiming that the Family and Educational Records Privacy Act<sup>47</sup> and the New Jersey Pupil Records Act<sup>48</sup> provide sweeping protections to student records preventing their disclosure in this case,<sup>49</sup> Mr. Harrison abandoned this argument during the December 14, 2020 hearing and committed to provide plaintiffs with the requested documents. The court's findings during that hearing are incorporated by reference herein. As all requested documents have been provided, and there is no OPRA request outstanding, the sole issue before this court is whether plaintiffs are the prevailing party pursuant to the catalyst theory.

Defendants request that this matter should be dismissed with no award of attorney's fees or costs to plaintiffs because defendants voluntarily disclosed all requested documents in plaintiffs' OPRA request.<sup>50</sup> Defendants argue that their response to plaintiffs' OPRA request was not a "denial."<sup>51</sup> Instead, defendants responded to the OPRA request by providing certain responsive materials and referred plaintiffs to Ms. Weathington, the Director of Pupil Services, for the records defendants claimed were exempt under OPRA.<sup>52</sup> Defendants argue that they first learned of plaintiffs' claim that they had not yet received certain records sought in their June 6,

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<sup>47</sup> 20 U.S.C. § 1232g.

<sup>48</sup> N.J.S.A. 18A:36-19.

<sup>49</sup> Defs.' Answer Br. 12-24; Defs.' Sur-reply 1-8.

<sup>50</sup> Defs.' Mot. to Dismiss, 1.

<sup>51</sup> Defs.' Mot. to Dismiss, 2-3.

<sup>52</sup> Defs.' Answer, Certification of Raina M. Pitts, Esq., Ex. 2.

2020 OPRA request at the court's December 14, 2020 hearing,<sup>53</sup> arguing that plaintiffs never requested the records from Ms. Weathington,<sup>54</sup> nor did plaintiffs reach out to defendants' counsel to inform them of the outstanding request before filing suit.<sup>55</sup> Defendants basic argument is that plaintiffs sued first, when a conversation between the parties would have resulted in the production of the outstanding documents. Defendants do not dispute that the records were only provided after the filing of this suit, but argue that such action does not automatically render the lawsuit as a catalyst for their production, and thus, permitted fees.<sup>56</sup> Defendants argue that, although Mr. Luers' statement about the missing records at the December 14, 2020 hearing was instrumental in the production of same, such a statement could have been made to defendants without the need for litigation. Thus, this court is told, plaintiffs should not be entitled to fees because the filing of this suit was unnecessary and not a catalyst for the production of those records, whose production was never denied in the first place.<sup>57</sup>

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<sup>53</sup> Defs.' Mot. to Dismiss, 2.

<sup>54</sup> Defs.' Answer, Certification of Raina M. Pitts, Esq., Ex. 2.

I am responding to your OPRA request as follows: . . . (b) Special Education File(s), (c) health record file, (d) communication records pertaining to B.V.: your request seeks pupil records, which are exempt from disclosure under the Open Public Records Act. You should direct your request for these records to Ms. LaCoyya Weathington, Director of Pupil Services.

[Defs.' Answer, Certification of Raina M. Pitts, Esq., Ex. 2.]

<sup>55</sup> Defs.' Mot. to Dismiss, 2.

<sup>56</sup> Defs.' Mot. to Dismiss, 5.

<sup>57</sup> Defs.' Mot. to Dismiss, 3.

In response, plaintiffs argue that their OPRA request was indeed denied because defendants failed to provide all the records. Contrary to defendants' stated position, defendants' original pleadings indicate that the OPRA request was in fact "denied."<sup>58</sup> Only after plaintiffs filed this action did defendants produce the responsive documents.<sup>59</sup> Thus, plaintiffs claim that they are the prevailing party under the catalyst theory. Plaintiffs further argue that defendants knew of the request, which was denied and plaintiffs were referred to the Director of Pupil Services before filing suit, and were again put on notice of their failure to disclose the records upon the filing of the Verified Complaint and plaintiffs' Reply to defendants' Opposition.<sup>60</sup> Lastly, plaintiffs' argue that defendants' document production is still incomplete as no responsive text messages have been produced and request the court to order defendants to file an affidavit or certification detailing the efforts undertaken to search for these messages.<sup>61</sup>

OPRA's purpose is to "to maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." Mason v. City of Hoboken, 196 N.J. 51, 64-65 (2008) (citing to Asbury Park Press v. Ocean County Prosecutor's Office, 374 N.J. Super. 312, 329 (Law Div. 2004)). To further its purpose, OPRA

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<sup>58</sup> "As to the Plaintiffs' second request for B.V.'s student records under OPRA, **that request was again denied** pursuant to the same rationale previously espoused: that student records are not available for release under OPRA."; Defs.' Sur-reply, 12 (emphasis added).

<sup>59</sup> Pls.' January 14, 2021 Br., 2.

<sup>60</sup> Ibid.

<sup>61</sup> During the March 22, 2021 hearing, defendants stated that they could not find any responsive text messages despite their best search efforts. Defendants' statements are incorporated by reference herein. The court is satisfied with defendants' response and, accordingly, holds that plaintiffs' request for an affidavit or certification is moot. Thus, there is no outstanding, unanswered request; Pls.' January 14, 2021 Br., 2; Pls.' Opp'n to Mot. to Dismiss, 1.

declares that “government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, with certain exceptions, for the protection of the public interest, and any limitations on the right of access ... shall be construed in favor of the public's right of access.”<sup>62</sup> Mason, 196 N.J. at 65.

If access to government records is denied, the requestor has the option of filing an action in the Superior Court or with the Government Records Counsel.<sup>63</sup> OPRA outlines that the public agency has the burden of proving that a denial of access is authorized by law and provides for attorney’s fees in certain circumstances. Mason, 196 N.J. at 66-67. N.J.S.A. 47:1A-6 states that:

[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may: institute a proceeding to challenge the custodian’s decision by filing an action in Superior Court . . . . The public agency shall have the burden of proving that the denial of access is authorized by law. If it is determined that access has been improperly denied, the court or agency head shall order that access be allowed.

[N.J.S.A. 47:1A-6.]

New Jersey generally follows the “American Rule,” under which the prevailing party cannot recover attorney’s fees from the losing party. Mason, 196 N.J. at 70; Rendine v. Pantzer, 141 N.J. 292, 322 (1995). However, fees may be awarded when a statute, court rule, or contractual agreement provide for them. Mason, 196 N.J. at 70. N.J.S.A. 47:1A-6 expressly provides for such fees: “[a] requestor who prevails in any proceeding shall be entitled to a reasonable attorney’s fee.” (emphasis added).

In many cases, it is easy to determine whether the requestor is a prevailing party. If the court finds the government entity in violation of OPRA, the requestor has prevailed. Grieco v.

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<sup>62</sup> N.J.S.A. 47:1A-1.

<sup>63</sup> N.J.S.A. 47:1A-6; N.J.S.A. 47:1A-7.

Borough of Haddon Heights, 449 N.J. Super. 513, 518-19 (Law Div. 2015); e.g., Gilleran v. Township of Bloomfield, 440 N.J. Super. 490, 494 (App. Div. 2015). However, it is more difficult to determine the prevailing party when the government entity voluntarily discloses records after a lawsuit is filed. To address this issue, New Jersey courts have long adopted the catalyst theory. “A plaintiff may qualify as a prevailing party by taking legal action that provides a ‘catalyst’ to induce a defendant’s compliance with the law.” Grieco, 449 N.J. Super. at 519; Smith v. Hudson County Register, 422 N.J. Super. 387, 394 (App. Div. 2011); see also Singer v. State, 95 N.J. 487, 495 (1984), *cert. denied*, New Jersey v. Singer, 469 U.S. 832, 105 S. Ct. 121, 83 L. Ed. 2d 64 (1984) (considering the term “prevailing party” within the context of the federal Civil Rights Attorney’s Fees Awards Act of 1976). In Singer, the Court articulated a two-part test to determine the prevailing party: (1) “there must be ‘a factual causal nexus between plaintiff’s litigation and the relief ultimately achieved;’ in other words, plaintiff’s efforts must be a ‘necessary and important factor in obtaining the relief;’” and (2) “it must be shown that the relief ultimately secured by plaintiffs had a basis in law.” Singer, 95 N.J. at 494-95; see also North Bergen Rex Transport v. TLC, 158 N.J. 561, 570-71 (1999). Requestors seeking fees carry the burden of proving they meet this test. Mason, 196 N.J. at 76.

The rationale behind fee-shifting is “to insure that plaintiffs are able to find lawyers to represent them; to attract competent counsel to seek redress of statutory rights; and to ‘even the fight’ when citizens challenge a public entity.” New Jerseyans for a Death Penalty Moratorium v. N.J. Department of Corrections, 185 N.J. 137, 153 (2005).

While New Jersey courts have adopted the catalyst theory under OPRA, our courts have declined to find a rebuttable presumption that a requestor has prevailed whenever a defendant discloses a requested record after filing an OPRA complaint. Mason, 196 N.J. at 77. Voluntary



disclosure of the records is not, in itself, sufficient to award plaintiff attorney's fees. Id. at 77. A litigant has to either prove the necessary factual, causal nexus between plaintiff's litigation and the relief ultimately achieved or the production of records has to occur pursuant to some form of court order or enforceable settlement. Id. at 77-78. OPRA's fee-shifting does not extend beyond the catalyst theory. Id. at 78. "The statute is designed to promote prompt access to government records and to encourage requestors and agencies to work together towards that end by accommodating one another. Ibid. A rebuttable presumption might upend this cooperative scheme envisioned by OPRA. Ibid. Under such a rule, plaintiffs would have an incentive to immediately file suit after a request for disclosure is denied or not responded to in a timely fashion and defendants would have no reason to voluntarily disclose documents after the filing of a lawsuit. Ibid. Thus, a "causal nexus between the litigation and the production of records" is required under the catalyst theory and trial courts are encouraged to conduct this fact-sensitive inquiry on a case-by-case basis, "evaluating the reasonableness of, and motivations for, an agency's decisions, and viewing each matter on its merits. Id. at 79.

Applying the above considerations, the court finds that this lawsuit was a factual, causal nexus for the production of the records. Defendants' argument that they were unaware of the outstanding records, which – according to Mr. Harrison – would have been voluntarily provided had opposing counsel informed him of such, finds no support in the record.

On the one hand, defendants responded to the request on June 23, 2020, expressly stating that "[the] request seeks pupil records, which are exempt from disclosure under [OPRA]" and referred plaintiffs to "direct [their] request for these records to Ms. LaCoyya Weathington, Director of Pupil Services."<sup>64</sup> After plaintiffs filed their Verified Complaint, defendants

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<sup>64</sup> Defs.' Answer, Certification of Raina M. Pitts, Esq., Ex. 2.

continued to plead that plaintiffs had no access to such records under OPRA.<sup>65</sup> On the other hand, defendants argue that the OPRA request was never denied, but simply referred elsewhere, and that they would have voluntarily provided the documents, but for the fact that defendants were unaware of any outstanding OPRA request since neither they, nor Ms. Weathington was ever contacted (even though plaintiffs were directed to do same).

In Grieco, the defendants inadvertently failed to provide certain records requested in the OPRA request. However, as soon as the defendants were notified of their oversight, through service of the OPRA complaint, the defendants immediately provided the documents. 449 N.J. Super. at 519-20. The matter presently before the court is distinguished from Grieco. Here, unlike in Grieco, the court is unpersuaded by defendants' argument that they were unaware of plaintiffs' outstanding OPRA request. On August 7, 2020, plaintiffs filed an OPRA complaint, which clearly and unambiguously stated that "the attorney invoices [and plaintiffs' medical records] have not been produced" and that "[t]he records requested by [p]laintiffs are subject to OPRA . . . because they are the parents and legal guardians of B.V."<sup>66</sup> Unlike Grieco, where the defendants were unaware of the pending request due to simple human error and oversight, the Board was clearly notified of plaintiffs' outstanding request as defendants replied to the OPRA complaint and took the unambiguous position that they were exempt from providing same.<sup>67</sup> Id. at 520. Accordingly, the argument that they were only notified of the pending request by Mr.

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<sup>65</sup> Defs.' Answer Br. 12-24; Defs.' Sur-reply 1-8.

<sup>66</sup> Pls.' Compl. ¶¶ 8, 10-11.

<sup>67</sup> Defs.' Answer Br. 12-24; Defs.' Sur-reply 1-8.

Luers' statement during the December 14, 2020 hearing is unpersuasive. Defendants knew of the request prior to suit being filed, and denied same, prior to suit being filed.

OPRA was designed to encourage requestors and agencies to work together to accommodate the requests. Mason, 196 N.J. at 78. Requestors are dissuaded from immediately filing suit as soon as a request for disclosure is denied or not responded to within the statutorily allotted time. Ibid. In Grieco, the requestor had made no attempts to cooperate with the defendants to acquire the documents and filed suit two weeks after receiving the defendants' response to the OPRA request. 449 N.J. Super. at 521. Stressing the importance of cooperation with the defendants, this court refused to find that the lawsuit was the catalyst for the production of the records as a simple phone call, letter, or email would have sufficed to notify the defendants of the pending request. Id. at 524. In this case, the Board is similarly arguing that plaintiffs filed suit first and asked questions later. Even assuming, arguendo, that plaintiffs reached out to Ms. Weathington or defendants' counsel prior to filing suit, the court fails to see how this would have led to the voluntary disclosure of the records under OPRA because defendants obstinately claimed that those records were exempt from disclosure and refused to provide same. If, a fortiori, the filing of plaintiffs' complaint did not – initially – lead to a change in defendants' position, the court is unpersuaded that a simple phone call or email would have resulted in the voluntary disclosure of the records. There was a June 23, 2020 denial stating that the records were exempt from OPRA, a referral to the Director of Pupil Services in furtherance of that denial, and counsel, through Ms. Pitts, argued that the records were OPRA exempt.<sup>68</sup>

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<sup>68</sup> Ibid.; Defs.' Answer, Certification of Raina M. Pitts, Esq., Ex. 2.

Furthermore, defendants' conceded in their papers, and in their own words, that they denied plaintiffs' second OPRA request: "[a]s to the Plaintiffs' second request for B.V.'s student records under OPRA, that request was again denied pursuant to the same rationale previously espoused: that student records are not available for release under OPRA."<sup>69</sup> (emphasis added). Plaintiffs' first and second OPRA request sought identical records, but both dealt with a different timeframe. The same reasoning to deny the second OPRA request – which defendants concede was a denial – was used to respond to the first OPRA request as well.<sup>70</sup> Thus, plaintiffs' first OPRA request was denied by defendants and, pursuant to N.J.S.A. 47:1A-6, plaintiffs were entitled to institute a proceeding to challenge this denial in the Superior Court, which they did on August 7, 2020.

In Teeters v. Division of Youth and Family Services, the plaintiff requested records from the defendant under OPRA, which the defendant declined to release. 387 N.J. Super. 423, 424 (App. Div. 2006). After filing a complaint with the Government Records Counsel, the parties reached a settlement agreement leaving open the question whether the plaintiff was the prevailing party under N.J.S.A. 47:1A-6. Id. at 426-27. The Appellate Division held that the plaintiff was the prevailing party, in line with the catalyst theory, because the plaintiff's complaint changed the defendant's position and resulted in the production of the records through the settlement agreement. Id. at 431-34. Here, defendants eventually abandoned the argument that the documents were exempt and conceded, long after the complaint was filed, that plaintiffs

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<sup>69</sup> Defs.' Sur-reply, 12.

<sup>70</sup> Defs.' Answer, Ex. 2.

were entitled to the records.<sup>71</sup> While defendants' concession was not memorialized in a settlement agreement, this lawsuit spurred defendants to change their position in providing the documents and, thus, was a "necessary and important factor" in obtaining the records. Singer, 95 N.J. at 494-95; Mason, 196 N.J. at 73.

In order for plaintiffs to prevail under the catalyst theory, they must also prove "that the relief ultimately secured by plaintiffs had a basis in law." Singer, 95 N.J. at 494-95; Mason, 196 N.J. at 73. In cases where a defendant ceases the contested behavior before a final judicial determination on the merits is made, the "basis in law" prong should be construed as "providing a check against groundless or harassing litigation. The trial court must be satisfied that the underlying suit was not frivolous or unreasonable." Jones v. Hayman, 418 N.J. Super. 291, 308 (App. Div. 2011).

One of the issues in L.R. v. Camden City Public School District was whether the defendant had lawfully denied a parent's OPRA request for their own child's student records. 452 N.J. Super. 56, 63 (App. Div. 2017), aff'd, 238 N.J. 547 (2019). The Appellate Division, on October 16, 2017, held that "a student or his or her parent, guardian, or authorized legal representative is entitled . . . to reasonable and prompt access to unredacted copies of his or her own records . . ." 452 N.J. Super. at 95. Here, plaintiffs, B.V.'s parents and legal guardians, also sought access to their own child's student records but defendants improperly claimed those records exempt from OPRA.

Under Mason, when deciding the issue of prevailing party, a court should "evaluate the reasonableness of, and motivations for, an agency's decision" in denying the OPRA request. 196

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<sup>71</sup> At the December 14, 2020 hearing, Mr. Harrison conceded that plaintiffs, as the parents and legal guardians, are entitled to their child's student records under OPRA.

N.J. at 79. The record is unclear why defendants argued that the records were exempt, which they are not, and which was clear on October 16, 2017. Furthermore, although not at issue in this case, defendants did in fact fully comply with plaintiffs' second OPRA request, which sought access to the same records, but for a different time period. Defendants argued they complied with this second OPRA request because they were provided with 'parent permission.'<sup>72</sup> However, it is undisputed that defendants were aware that B.V.'s parents were the requestors behind the first OPRA request as they were named as such in both the OPRA request itself under "Record Requestor Information"<sup>73</sup> and in plaintiffs' Verified Complaint.<sup>74</sup> Nonetheless, B.V.'s parents were not provided with the requested documents until after suit was filed and argument conducted.

Plaintiffs' underlying lawsuit is neither frivolous, nor unreasonable. Jones, 418 N.J. Super. at 308. In fact, plaintiffs' position that the records should have been provided finds ample support under L.R. v. Camden City Public School District. 452 N.J. Super. at 60, 95. Thus, the relief achieved by plaintiffs has "a basis in law." Mason, 196 N.J. at 76.

Thus, the court finds that plaintiffs have met their burden of proof necessary for prevailing in this matter.

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<sup>72</sup> Defs.' Answer, ¶ 31.

<sup>73</sup> Defs.' Answer, Ex. 1.

<sup>74</sup> Pls.' Compl. Br. 4.

**CONCLUSION**

For the reasons stated above, the court finds that (1) there is a factual, causal nexus between this suit and the production of the outstanding records, and (2) the relief achieved has a basis in law. Accordingly, plaintiffs' request for fees pursuant to N.J.S.A. 47:1A-6 is **GRANTED** conditioned upon the receipt of counsel' certification detailing the reasonable attorneys' fees and costs. Defendants' Motion to Dismiss is **DENIED**. The court will issue an order consistent with this decision.

  
DEBORAH SILVERMAN KATZ, A.J.S.C.

Dated: April 12, 2021

**ORDER PREPARED BY THE COURT**

M.A. and D.A., individually and on behalf of  
B.V.,

*Plaintiffs,*

v.

CHERRY HILL BOARD OF EDUCATION  
and LYNN E. SHUGARS in her official  
capacity as Business Administrator/Board  
Secretary and Records Custodian of the Cherry  
Hill Board of Education,

*Defendants.*

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION, CIVIL PART  
CAMDEN COUNTY

DOCKET NO: CAM-L-2682-20

Civil Action

**ORDER GRANTING PLAINTIFFS'  
REQUEST FOR REASONABLE  
ATTORNEYS' FEES AND COSTS**

**THIS MATTER** having been brought before the Court by way of Verified Complaint and Order to Show Cause by Plaintiffs, by and through counsel, Walter M. Luers, Esq. of the Law Offices of Walter M. Luers, and Jamie Epstein, Esq., of Jamie Epstein Law, against Defendants, Cherry Hill Board of Education and Lynn E. Shugars, by and through counsel, Eric Harrison, Esq.; and the Court having considered all pleadings and submissions of the parties and having heard arguments on March 22, 2021, and for good cause having been shown;

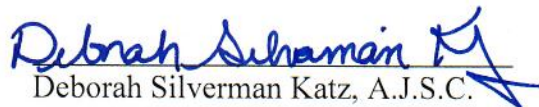
**IT IS** on this 12<sup>th</sup> day of April, 2021:

1. **ORDERED** that Defendants' Motion to Dismiss is hereby DENIED; and
2. **IT IS FURTHER ORDERED** that Plaintiffs' request for reasonable attorneys' fees and costs is GRANTED; and
3. **IT IS FURTHER ORDERED** that Plaintiffs' counsel shall file and serve with the Court a certification detailing the reasonable attorneys' fees and costs sought on or before April 30, 2021; and



4. **IT IS FURTHER ORDERED** that Defendants have fourteen (14) days thereafter to object to the reasonableness of the fees, but not the fees themselves, pursuant to the Court's opinion of the same date; and
5. **IT IS FURTHER ORDERED** that the Court shall evaluate the fees, any argument as to their reasonableness, and shall thereafter grant same; and
6. **IT IS FURTHER ORDERED** that a copy of this Order shall be served upon all parties within seven (7) days of the date of this Order.

BY THE COURT:

  
Deborah Silverman Katz, A.J.S.C.

Dated: April 12, 2021