C.E. & B. v. Elizabeth Pub. Sch. Dist. & Harold E. Kennedy

Superior Court of New Jersey

May 18, 2022, Decided

DOCKET NO. A-0173-20

Reporter
2022 N.J. Super. LEXIS 68 *

C.E. and B.E., individually and on behalf of K.E., Plaintiffs Respondents, v. ELIZABETH PUBLIC SCHOOL DISTRICT and HAROLD E. KENNEDY, JR. in his official capacity as School Business Administrator Board Secretary of the Elizabeth Public School District, Defendants Appellants.

Opinion

[*1] APPELLATE DIVISIONAPPELLATE DIVISION

Argued May 5, 2022 - Decided May 18, 2022

Before Judges Haas,1 Mawla, and Mitterhoff.

On appeal from the Superior Court of New Jersey,

Law Division, Union County, Docket No. L-2231-15.

Robert F. Varady argued the cause for appellants (La

Corte, Bundy, Varady & Kinsella, attorneys; Robert F.

Varady, of counsel and on the briefs; Christina M.

DiPalo, on the briefs).

1 Judge Haas did not participate in oral argument. He joins the opinion with counsel's consent. R. 2:13-2(b).

Jamie Epstein argued the cause for respondents (Jamie Epstein and Cohn Lifland Pearlman Herrmann & Knopf LLP, attorneys; Walter M. Luers and Jamie Epstein, on the brief).

The opinion of the court was delivered by

MAWLA, J.A.D.

Defendants Elizabeth Public School District and Harold E. Kennedy, the district's business administrator and school board secretary, appeal from an August 28, 2020 order entered pursuant to the Open Public Records Act (***OPRA***), *N.J.S.A. 47:1A-1 to -13*, in favor of plaintiffs C.E. and B.E. and on behalf of their child K.E. We affirm.

This litigation began in April 2015 when plaintiffs filed a complaint and order to show cause to enforce their ***OPRA*** request, seeking the following information:

1. From [January 1, 2013] **[*2]** to present, all settlements entered into by the [school b]oard in [the New Jersey Office of Administrative Law (OAL)] EDS docketed cases.[2]

2. Any final decisions incorporating or pertaining to item #1.

2 EDS docketed cases involve petitions "filed by or on behalf of a student who is, or who may be as a result of a pending evaluation, subject to the provisions of an individualized education program . . . or an accommodation plan pursuant to Section 504 of the Rehabilitation Act" and are transmitted to the OAL for final determination. *N.J.A.C. 6A:3-1.3(e)(1)*.

3. [May 1, 2014], any purchase orders, vouchers, bills, invoices and canceled checks for payment(s) made for legal services rendered to the [b]oard in regards to [an] . . . ***OPRA*** [r]equest of [May 17, 2014,] and the subsequent civil action . . . .

4. Any [b]oard [r]esolution(s) which refer[(s)] to item[] #1.

Defendants denied the first request, alleging the documents were exempt from disclosure as confidential student records under *N.J.A.C. 6A:32-7.5*, and denied the second request, asserting it was "vague and does not seek identifiable government records." They produced redacted invoices and purchase orders and two board resolutions of special education settlements, redacting identities, in **[*3]** response to the third and fourth requests.

Plaintiffs' complaint was dismissed without prejudice for reasons unrelated to this appeal. They filed a second amended verified complaint containing one count alleging an ***OPRA*** violation and seeking a judgment ordering defendants to provide responses to the first and second requests and "unredacted copies of the requested invoices and vouchers" relating to the third request. The complaint also sought attorney's fees.

Defendants moved for a stay arguing we were considering an appeal that would bear on the outcome of this case. That appeal was *L.R. v. Camden CityPublic School District (L.R. I), 452 N.J. Super. 56 (App. Div. 2017)*.

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On December 18, 2015, the trial judge entered an order requiring defendants produce: "(1) all settlement agreements entered into by the [b]oard in . . . OAL EDS docketed cases from January 1, 2013 to April 2, 2015; and

(2) any final decisions incorporating or pertaining to those settlement agreements." He ordered defendants to redact the names and addresses of parents in the relevant records, and dismissed, with prejudice, plaintiffs' request for unredacted invoices and vouchers. The judge found plaintiffs were entitled to attorney's fees as a partially prevailing party for services rendered after **[*4]** August 7, 2015, and permitted defendants to file opposition to the fee request. He denied, without prejudice, defendants' request for a special service charge and stayed the order pending defendants' appeal.

Defendants appealed and we subsequently dismissed it in March 2016. L.R. I was decided in October 2017 and in April 2018, the Supreme Court granted certification, which further stayed this case. In July 2019, an evenly divided Supreme Court decided *L.R. v. Camden City Public School District (L.R. II), 238 N.J. 547 (2019)* and remanded the matter to the trial court.

This case was consolidated with others and heard in the Camden Vicinage action, along with the L.R. II remand. In December 2019, the Camden Vicinage judge granted plaintiffs' request to sever this matter and return it to the Union Vicinage because plaintiffs were not asserting common

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law claims and only pursuing their ***OPRA*** claim. After a round of motion practice, the trial judge concluded additional hearings were necessary to determine the special service charge, attorney's fees, and other remaining issues.

On May 22, 2020, the judge issued a tentative decision, finding "plaintiffs have made a narrow request limited to only those cases . . . actually docketed in the [OAL] then settled, **[*5]** and those settlements then being incorporated into a termination of the formal OAL litigation." He noted the request was not adjudicated in either L.R. decision, and plaintiffs relied on *34 C.F.R. § 300.513(d)(2)*, a federal regulation, which "appears to mandatorily make such documents public records" and preempts state law on the subject. He found that pursuant to precedent, once a document is filed in court as a settlement, there is no longer an expectation of privacy. Citing *Keddie v.Rutgers, 148 N.J. 36 (1997)*, he stated: "[T]he fact that the records may be available from the OAL does not relieve the public office from providing the record under ***OPRA***." He requested defendants estimate the number of cases fitting plaintiffs' narrow criteria.

Defendants' response argued the judge erred because he relied on the dissent in L.R. II, and the case was not binding precedent because it was decided by an evenly divided Supreme Court. Defendants asserted our holding

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in L.R. I controlled, and the settlement agreements entered in the OAL are confidential student records. They argued the judge improperly applied the preemption doctrine in concluding *34 C.F.R. § 300.513(d)(2)* mandated release of the documents.

Plaintiffs claimed defendants had not met their burden to establish **[*6]** the documents were lawfully withheld because defendants estimated there were less than five settlements since 2016, despite claiming a search would be unduly burdensome. Further, because defendants failed to address *Keddie* and L.R. I's so-called "court order" pathway, *N.J.A.C. 6A:32-7.5(e)(15)*, requiring production of documents, their argument was waived, and they were required to disclose the documents. They claimed the judge's reliance on L.R. II was appropriate because the New Jersey Department of Education (NJDOE) participated as amicus and took the position that de-identified student records are subject to public access under FERPA3 or ***OPRA***.

At a June 12, 2020 hearing, the trial judge reiterated his tentative decision that L.R. I did not apply because it did not address cases adjudicated before the OAL. He noted the NJDOE's position in L.R. II and that it did not participate in L.R. I and concluded:

3Federal Family Educational Rights and Privacy Act of 1974, *20 U.S.C. § 1232g*.

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[B]ased on that, [I] do not find that there is required

. . . notice to the people whose . . . files . . . may ultimately be produced because they're already public documents. And certainly we can screen out any identification because the plaintiffs are not interested in the individual names and whatever **[*7]** special needs they had. . . .

The student's right of privacy is not at issue in this case . . . .

[T]his case is about . . . leveling the playing field so that parents of special needs children can know . . .

what has been provided in similar cases so that [their] child can be protected.

The judge concluded the records were public records subject to ***OPRA*** and

must be produced.

On June 15, 2020, plaintiffs filed an ***OPRA*** request with the OAL

seeking: "Each case activity sheet or docket sheet that shows an entry of

activity in cases in which Elizabeth [BOE] . . . is a party between [January 1,

2013] and [April 2, 2015]." The OAL identified twenty special education

cases for the relevant time period and provided a caption of the case, a docket

number, and a notation of the matter's disposition. Eleven of these cases were

marked "FS-Final Decision/Settlement-EDS," indicating the case was settled

and the settlement approved by the OAL.4

4 Two of these cases were previously provided by defendants in response to the initial ***OPRA*** request.

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The judge held a hearing on August 10, 2020, to address defendants' special service charge. Defendants asserted they would incur the charge by parsing through **[*8]** 2,800 special education students' records. The judge denied the request, concluding "it would not

be that difficult to find this limited number of cases that had actually been presented to the [OAL]."

A final hearing was held on August 28, 2020, to address plaintiffs' attorney's fee request. After analyzing the RPC 1.5 factors, the judge granted plaintiffs $78,646 in attorney's fees. He entered an order the same day denying defendants' ***OPRA*** service charge and ordering defendants to provide plaintiffs with "copies of all decisions with settlements, with non-exempt portions redacted, entered into by the [b]oard in the [OAL] EDS cases dated between [January 1, 2013 and April 2, 2015.]" The judge stayed the order on September 25, 2020, pending this appeal.

Defendants raise the following points on appeal:

I. PLAINTIFFS['] ***OPRA*** REQUEST SHOULD

HAVE BEEN DENIED DUE TO DECISIONS IN . . .

[L.R. I].

II. THE TRIAL COURT DID NOT FIND THAT

PLAINTIFFS WERE ENTITLED TO ACCESS

UNDER *N.J.A.C. 6A:32-7.5(e)(15)* [AND] INDEED

COULD NOT DO SO AS THIS IS SOLELY AN ***OPRA*** CASE.

III. THE COUNSEL FEE AWARD SHOULD BE

REVERSED AS THE TRIAL COURT SHOULD

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NOT HAVE FOUND THAT PLAINTIFFS WERE THE PREVAILING PARTY UNDER ***OPRA***.

We address these arguments **[*9]** in turn.

I.

We review a trial court's interpretation of ***OPRA*** de novo. *O'Boyle v.Borough of Longport, 426 N.J. Super. 1, 8 (App. Div. 2012)*. "Findings of fact, however, are reviewed deferentially." Ibid. (citing *Rova Farms Resort,Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)*).

A trial court's award of attorney's fees is disturbed "only on the rarest of occasions, and then only because of a clear abuse of discretion." *Litton Indus.,Inc. v. IMO Indus., Inc., 200 N.J. 372, 386 (2009)* (quoting *Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001)*). This is because a "trial court [is] in the best position to weigh the equities and arguments of the parties." *Packard-Bamberger & Co., 167 N.J. at 447*. We reverse only if the award is "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." *Flagg v. EssexCnty. Prosecutor, 171 N.J. 561, 571 (2002)* (quoting *Achacoso-Sanchez v.Immigr. & Naturalization Serv., 779 F.2d 1260, 1265 (7th Cir. 1985)*).

II.

OPRA requests are "construed in favor of the public's right of access." *N.J.S.A. 47:1A-1*. When a public agency denies an ***OPRA*** request, it bears the

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burden of proving the denial was lawful. *Doe v. Rutgers, State Univ. of N.J., 466 N.J. Super. 14, 26 (App. Div. 2021)*; see *N.J.S.A. 47:1A-6*. ***OPRA*** "exempts from disclosure any information that is protected by any other state or federal statute, regulation, or executive order." *Brennan v. Bergen Cnty.Prosecutor's Off., 233 N.J. 330, 338 (2018)*). In L.R. II, the Court stated: "In its findings and declarations of public policy, the Legislature required public agencies subject to ***OPRA*** 'to safeguard from public access a citizen's personal information' when 'disclosure thereof would violate the citizen's reasonable expectation of privacy.'" **[*10]** *238 N.J. at 559* (quoting *In re N.J. Firemen's Ass'nObligation, 230 N.J. 258, 277 (2017)*). "An agency 'seeking to restrict the public's right of access to government records must produce specific reliable evidence sufficient to meet a statutorily recognized basis for confidentiality. '" *Doe, 466 N.J. Super. at 26-27* (quoting *Courier News v. Hunterdon Cnty.Prosecutor's Off., 358 N.J. Super. 373, 382-83 (App. Div. 2003)*).

The *Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 to -1482*, was enacted by Congress to provide all children with disabilities "a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *20 U.S.C. § 1400(d)(1)(A)*. To that end, federal funding is provided to state and local

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agencies to assist in educating disabled children, subject to federal requirements. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy , 548 U.S. 291, 295-96 (2006)*. New Jersey has

enacted legislation and regulations to comply with the IDEA. *N.J.S.A. 18A:46-1 to -55* and *N.J.A.C. 6A:14-1.1 to - 10.2*.

In *L.R. I, 452 N.J. Super. at 61-62*, an advocacy organization for disabled students and the parents of a disabled student in four separate matters requested settlement agreements and records concerning special services given to other qualified students from various school districts. The matters produced different responses, either resisting disclosure citing statutory and regulatory authority, granting access and redacting personally identifiable information (PII), or granting a parent unredacted **[*11]** copies of their child's own records. *Id. at 62-63*.

We "attempt[ed] to construe and harmonize . . . various provisions under the NJPRA,5FERPA, ***OPRA***, and the associated regulations, particularly the detailed set of student record access provisions set forth in *N.J.A.C. 6A:32 -7.1 to -7.8*" to determine whether the plaintiffs in four related appeals could obtain copies of students' settlement agreements and records from school districts. *Id. at 61-62, 80*. We held the plaintiffs were "entitled to appropriately-

5 The *New Jersey Pupil Records Act, N.J.S.A. 18A:36-19*.

redacted copies of the requested records, provided that on remand those plaintiffs either: (1) establish that they have the status of '[b]ona fide researcher[s]' within the intended scope of *N.J.A.C. 6A:32 -7.5(e)(16)*; or (2) obtain from the Law Division a court order authorizing such access pursuant to *N.J.A.C. 6A:32-7.5(e)(15)*." *Id. at 63* (alterations in original). We concluded student records, even when redacted to remove PII, are still subject to disclosure restrictions under *N.J.A.C. 6A:32-2.1*. Id. at 83.

The Supreme Court affirmed. *L.R. II, 238 N.J. at 548*. It stated a student record "retains its protected status under New Jersey law notwithstanding the school district's redaction from that record of '[PII]' . . . ." *Id. at 550*. Further, "*N.J.A.C. 6A:32-2.1* includes in the definition of a 'student record' a document containing **[*12]** information relating to an individual student, even if that document has been stripped of [PII] that might identify the student in compliance with federal law." Ibid.

The NJDOE participated in L.R. II as amicus curiae. *Id. at 550-51*. The dissent referenced NJDOE's view that "[a] record . . . that is so thoroughly scrubbed that the student cannot be identified in the record raises no privacy concerns." *Id. at 578* (Albin, J., dissenting). The dissent concluded a scrubbed document would not "endanger[] the privacy rights of pupils but allow[]

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members of the public to gather information through ***OPRA*** requests that will shed light on matters of significant public importance." *Id. at 578*.

With this background, we conclude the trial judge did not err in declining to follow either L.R. I or L.R. II because those cases did not concern settlements before the OAL and because the legal framework here is different. Indeed, the IDEA was not at issue in L.R. I. *N.J.A.C. 6A:14-2.7* designates the OAL to hear special education complaints under the IDEA. The regulation states a due process hearing may be requested on behalf of a student "when there is a disagreement regarding identification, evaluation, reevaluation, classification, **[*13]** educational placement, the provision of a free appropriate public education, or disciplinary action." *N.J.A.C. 6A:14-2.7(a)*. Settlement decisions are then incorporated into an initial decision approving the settlement. *N.J.A.C. 1:1-19.1(b)*. Under federal law, "[t]he public agency, after deleting any [PII], must . . . make those findings and decisions available to the public." *34 C.F.R. § 300.513(d)(2)*.6

New Jersey special education rules "are established in implementation of [f]ederal law" and "[i]n any case where these rules could be construed as conflicting with [f]ederal requirements, the [f]ederal requirements shall apply." *N.J.A.C. 1:6A-1.1*. *20 U.S.C. § 1415(h)(4)(A)* provides that findings of fact

6 *34 C.F.R. § 300.507* is the federal regulation implementing the IDEA.

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and decisions under IDEA "shall be made available to the public consistent with the requirements of section 617(b) [*20 U .S.C. § 1417(b)*] . . . ."

We are unpersuaded by defendants' contention that L.R. I controls. There, we stated: "Although the federal regulations, specifically *34 C.F.R. § 99.31(b)*, permit disclosure of redacted education records to third parties without parental consent when all PII is removed, FERPA does not mandate such disclosure." However, *34 C.F.R. § 99.31(b)(1)* and (2) provide that "[a]n educational agency or institution, or a party that has received education records or information **[*14]** from education records . . . may release the records or information without . . . consent" and "may release de-identified student level data from education records for the purpose of education research . . . ." (emphasis added). *20 U.S.C. § 1415(h)(4)(A)*, which controls here, does not contain the permissive "may" but uses "shall" in requiring the disclosure of de-identified records.

III.

L.R. Irecognized the "court order" pathway to obtaining student records under N.J.A.C. 6A:32-7.5E in instances where "[o]rganizations, agencies, or persons . . . not otherwise specified in the regulations can only obtain access to student records" subject to written parental consent or a court order. *L.R. I, 452 N.J. Super. at 78* (quoting N.J.A.C. 6A:37-7.5(e)). We enumerated a two-

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step process to analyze whether a requestor is entitled to access, requiring the requestor demonstrate 1) an interest in the public record and 2) that their interest outweighs the State's non-disclosure interest. *Id. at 89*. The L.R. II Court affirmed the court order pathway and further enumerated a non - exhaustive list of factors to consider in analyzing such requests. *238 N.J. at 575*. We discern no reversible error here because even though the trial judge analyzed the holdings in L.R. I and L.R. II, he did not decide the **[*15]** case based on the court order pathway methodology.

We further reject defendants' argument the judge improperly relied on *Keddie*. That case analyzed "whether a taxpaying citizen of this State who is also a professor at Rutgers, . . . has either a statutory or common-law right to access 'public records' . . . in which Rutgers is or has recently been a party." *148 N.J. at 40*. The *Keddie* Court analyzed the issue under ***OPRA***'s predecessor and granted the plaintiff access to the documents, holding Rutgers had no expectation of confidentiality in "records and documents . . . filed with courts, agencies, and arbitral forums without being sealed . . . ." *Id. at 51*.

As a general principle, "[t]here is . . . a 'presumption' of public access to documents filed with the court in connection with civil litigation." *Est. ofFrankl v. Goodyear Tire & Rubber Co., 373 N.J. Super. 509, 511 (App. Div. 2003)* (quoting Hammock by Hammock v. Hoffman-Laroche Inc., 142 N.J.

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356, 375 (1995)). Settlement agreements qualify as accessible government records under ***OPRA***. *Burnett v. Cnty. of Gloucester, 415 N.J. Super. 506, 512 (App. Div. 2010)*. Public interest in settlement agreements are strong, "since such settlements may provide valuable information regarding the conduct of governmental officials . . . ." *Id. at 517*.

We conclude *Keddie* was applicable and distinguishable from L.R. I and L.R. II. As we noted, L.R. I did not address student records already filed in court proceedings. **[*16]** The student records here were submitted as part of legal filings without a protective order in proceedings before the OAL, an "agenc[y], or arbitral forum" as described in *Keddie*. *148 N.J. at 51*. When defendants settled with parents or guardians pursuant to their IDEA

claims in the OAL, these documents became judicial filings and are subject to a "presumption" of public access.

IV.

Finally, the award of counsel fees to plaintiffs was not error. ***OPRA*** allows a prevailing party to receive reasonable attorney's fees. *N.J.S.A. 47:1A-6*. "[T]he phrase 'prevailing party' is a legal term of art that refers to a 'party in whose favor a judgment is rendered.'" *Mason v. City of Hoboken, 196 N.J. 51, 72 (2008)* (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va.Dep't of Health & Hum. Res., 532 U.S. 598, 603 (2001)*).

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In *Mason*, the Court held "requestors are entitled to attorney's fees under ***OPRA***, absent a judgment or an enforceable consent decree, when they can demonstrate: (1) 'a factual causal nexus between plaintiff's litigation and the relief ultimately achieved'; and (2) 'that the relief ultimately secured by plaintiffs had a basis in law.'" *Id. at 76* (quoting *Singer v. State, 95 N.J. 487, 494-96 (1984)*). "The party does not need to obtain all relief sought, but there must be a resolution that 'affect[s] the defendant's behavior towards the prevailing plaintiff.'" *Smith v. Hudson Cnty. Reg., 422 N.J. Super. 387, 394 (App. Div. 2011)* (alteration in original) (quoting *Teeters v. Div. of Youth &Fam. Servs., 387 N.J. Super. 423, 432 (App. Div. 2006)*). Such action **[*17]** includes a "change (voluntary or otherwise) in the custodian's conduct." *Spectraserv,Inc. v. Middlesex Cnty. Utils. Auth., 416 N.J. Super. 565, 583 (App. Div. 2010)*. "A plaintiff is considered a prevailing party 'when the actual relief on the merits of [the] claim materially alters the relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Teeters, 387 N.J. Super. at 432* (alteration in original) (quoting *Warrington v. Vill. Supermarket, Inc., 328 N.J. Super. 410, 420 (App. Div. 2000)*).

The trial judge did not err in determining plaintiffs were the prevailing party and awarding attorney's fees. Plaintiffs obtained a judgment against

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defendants on the merits requiring defendants to release the requested documents caused by the initiation of legal proceedings to enforce their ***OPRA*** request. The fact that plaintiff subsequently obtained records from the ***OPRA*** request issued to the OAL did not negate that the ***OPRA*** request made defendants modify their behavior to directly benefit plaintiffs.

Affirmed.

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