

Hon. Alberto Rivas, A.J.S.C.
Middlesex County Superior Court
56 Paterson Street
New Brunswick, NJ 08903
(732) 645-4300 ext. 88230

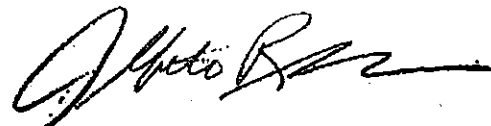
FILED
JUN 25 2019
HON. ALBERTO RIVAS, A.J.S.C.

S.B.,	:	SUPERIOR COURT OF NEW JERSEY
	:	MIDDLESEX COUNTY
Plaintiff,	:	CIVIL DIVISION
	:	
vs.	:	Docket No: MID-L-3133-17
	:	
RUTGERS, THE STATE UNIVERSITY	:	
OF NEW JERSEY, DANIEL FALTAS,	:	ORDER AND OPINION
IN HIS OFFICIAL CAPACITY AS THE	:	
OPRA ADMINISTRATOR AND	:	
RECORDS CUSTODIAN OF RUTGERS	:	
UNIVERSITY,	:	
Defendants.	:	

THIS MATTER comes before the court on a Motion for Reconsideration filed by Defendants' counsel; and the court having reviewed the documents submitted by counsel; and the court having heard oral arguments of counsel on May 7, 2018; and for the reasons contained in the attached Opinion; and for good cause being shown;

IT IS ON THIS 25TH DAY OF JUNE 2018, ORDERED AS FOLLOWS:

1. **ORDERED** that Defendants' Motion for Reconsideration is DENIED; and it is further
2. **ORDERED** that a copy of the within Order shall be served upon all parties within five (5) days from the date of this order.



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COURT'S OPINION

BACKGROUND

From September of 2012 to February of 2017, Plaintiff was a student at Rutgers University in a nurse practitioner doctorate program. Plaintiff received a grade of C+ in NURS 6030, Project Planning and Proposal Development, a class taken during spring 2016. Plaintiff filed a grievance related to that grade. A hearing was held on January 9, 2017.

On March 28, 2017, Plaintiff transmitted a written Open Public Records Act ("OPRA") request to Defendants asking for a copy of the hearing audio and all records kept by the panel in relation to the grievance hearing. On April 10, 2017, Defendants unilaterally denied Plaintiff's request as overbroad and informed Plaintiff of their options at the Superior Court.

On May 25, 2017, Plaintiff filed a verified complaint and a request for an Order to Show Cause in this matter. The court denied the Order to Show Cause as Plaintiff did not present sufficient justification for Plaintiff to proceed anonymously in accordance with A.A. v. Gramiccioni, 442 N.J. Super. 276 (App. Div. 2015). On October 20, 2017, Plaintiff filed an amended verified complaint with arguments as to why Plaintiff should be permitted to proceed anonymously. Upon reviewing these arguments, the court granted the Order to Show Cause.

Between October 2017 and April 2018, Plaintiff and Defendants were engaged in settlement negotiations regarding Plaintiff's OPRA request. On April 30, 2018, with the settlement negotiations having reached an impasse, Defendants filed an opposition to the Order to Show Cause.

On May 7, 2018, the court heard oral argument in this matter. The parties indicated that the documents had been produced, and the only outstanding issue was attorneys' fees. The court

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issued an Opinion and Order on May 8, 2018, declaring Plaintiff as the prevailing party and ordered Plaintiff to file a motion for attorneys' fees.

On May 28, 2018 Plaintiff filed a motion for attorneys' fees, requesting a total of \$14,047.32. On May 29, 2018, Defendants filed a motion for reconsideration of the Order issued on May 8, 2018. Both motions are before the court today.

LEGAL ANALYSIS

Defendants seek reconsideration under R. 4:49-2. R. 4:49-2 is not intended to provide a vehicle for new arguments, or to permit the movant to take a "proverbial second bite of the apple." State v. Fitzsimmons, 286 N.J. Super. 141, 147 (App. Div. 1993). R. 4:49-2 is appropriately applied in those situations where (1) the court has expressed its decision based upon a palpably incorrect or irrational basis, or (2) it is obvious that the Court did not consider or failed to appreciate the significance of probative, competent evidence. Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996).

Defendants' argument is that the court incorrectly found that defendants did not "contest that the requested documents are government records" in the court's May 8, 2018 Opinion. Defendants argue that it actually contested that they were government records. Defendants are correct in this regard as the court erred in referencing that in the previous opinion. However, the outcome of the case would not have changed, and Plaintiff would still be declared the prevailing party.

Defendants' argument is that the documents at issue are not government records because they are exempted under the "higher education" exemption for student records under N.J.S.A. 1A-1.1. The issue before the court is not whether the documents at issue are government records, since the requested documents were produced prior to the ordered production. Plaintiff is moving

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for attorneys' fees under the Catalyst Theory, which requires the following two prong analysis: (1) the lawsuit was causally related to securing the relief obtained" and (2) "the relief has some basis in law." Packard-Bamberger & Co. v. Collier, 167 N.J. 427, 444 (2001) (quoting North Bergen Rex Transp., Inc. v. Trailer Leasing Co., 158 N.J. 561, 569 (1999)).

The court found the first prong by examining the dates of production. It was only months after the verified complaint was initially filed that Defendants produced the documents. Thus, the court still finds that the filing and pursuit of the verified complaint was a "necessary and important" factor for relief.

Defendants' argument speaks more to the second prong of Packard-Bamberger, that the relief granted here has no basis in law. However, Packard-Bamberger does not require the court to adjudicate the question fully on the merits. Instead, a "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). Even if Defendants are right that certain education records under FERPA are exempted from disclosure, the fact that an exemption must apply to bar the production of the document alone is evidence that the litigation itself is not frivolous. If Plaintiff filed this suit against a nongovernmental entity or requested documents that were clearly not government records, that would be frivolous. This is before the court takes into account Plaintiff's arguments, which pit L.R. v. Camden City Public School District, 452 N.J. Super. 56 (App. Div. 2017) against FERPA's requirements. In short, L.R. holds that all public agencies must honor OPRA requests, including requests for a student's own records. This muddles the issue further enough for the court to conclude that the matter is not frivolous. Accordingly, the motion to reconsider is denied on substantive grounds.

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Even if Defendants met the elements required for a successful Motion to Reconsider, Defendants' motion is denied on procedural grounds as well. R. 4:49-2 reads, in relevant part, "a motion for rehearing or reconsideration seeking to alter or amend a judgment or order shall be served **not later than 20 days after service of the judgment.**" The court filed an Order and Opinion in this matter on May 8, 2018. Accounting for R. 1:3-1's calculation of time, any Motion for Reconsideration would have been due at the very latest on May 28, 2018. Defendants' motion was filed on May 29, 2018.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Reconsideration is DENIED.
Accordingly, a conforming Order is attached.

Yours truly,

A handwritten signature in black ink, appearing to read "Alberto Rivas", written over a horizontal line.

Hon. Alberto Rivas, A.J.S.C.