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L.R., individually and on behalf of J.R., a minor, Plaintiffs-Appellants, v. CAMDEN CITY PUBLIC SCHOOL DISTRICT and JOHN C. OBERG in his official capacity as Interim School Business Administrator and Board Secretary, Defendants-Respondents. L.R., individually and on behalf of J.R., a minor, Plaintiffs-Respondents/ Cross-Appellants, v. PARSIPPANY-TROY HILLS TOWNSHIP PUBLIC SCHOOL DISTRICT and DAVID F. CORSO in his official capacity as Records Custodian of the Parsippany-Troy Hills Township Public School District, Defendants-Appellants/ Cross-Respondents. THE INNISFREE FOUNDATION, Plaintiff-Appellant, v. HILLSBOROUGH TOWNSHIP BOARD OF EDUCATION and AIMAN MAHMOUD, Records Custodian, Defendants-Respondents. THE INNISFREE FOUNDATION, Plaintiff-Respondent, v. CHERRY HILL BOARD OF EDUCATION and JAMES DEVEREAUX, Records Custodian, Defendants-Appellants.

DOCKET NO. A-3972-14T4, A-4214-14T4, A-2387-15T4, A-3066-15T4

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2017 N.J. Super. LEXIS 145

September 18, 2017, Argued
October 16, 2017, Decided

SUBSEQUENT HISTORY: **[*1]** Approved for Publication October 16, 2017.

PRIOR HISTORY: On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-2736-14 (A-3972-14).

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-3104-14 (A-4214-14).

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-1372-15 (A-2387-15).

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-3902-15 (A-3066-15).

COUNSEL: Walter M. Luers argued the cause for L.R., individually and on behalf of J.R., a minor, appellants in A-3972-14 and respondents/cross-appellants in A-4214-14 (Law Offices of Walter M. Luers, LLC, attorney; Mr. Luers, of counsel and on the briefs; Jamie Epstein, on the briefs).

Joseph D. Castellucci, Jr., argued the cause for Camden City Public School District and John C. Oberg, respondents in

A-3972-14 (Florio Perrucci Steinhardt & Fader, LLC, attorneys; Eric M. Wieghaus, on the brief).

Eric L. Harrison argued the cause for Parsippany-Troy Hills Township Public School District and David F. Corso, appellants/cross-respondents in A-4214-14 (Methfessel & Werbel, PC, attorneys; Mr. Harrison, of counsel and on the briefs; Kegan **[*2]** S. Andeskie, on the briefs; Emily H. Kornfeld, on the brief).

John D. Rue argued the cause for The Innisfree Foundation, appellant in A-2387-15 and respondent in A-3066-15 (John Rue & Associates, attorneys; Mr. Rue, of counsel and on the briefs; Krista Lynn Haley, on the briefs).

Vittorio S. LaPira argued the cause for Hillsborough Township Board of Education and Aiman Mahmoud, respondents in A-2387-15 (Fogarty & Hara, attorneys; Mr. LaPira, of counsel and on the brief; Robert D. Lorfink, on the brief).

Raina M. Pitts argued the cause for Cherry Hill Board of Education and James Devereaux, appellants in A-3066-15 (Methfessel & Werbel, PC, attorneys; Ms. Pitts and Vivian Lekkas, on the briefs).

Cynthia J. Jahn, General Counsel, argued the cause for amicus curiae New Jersey School Boards Association in A-3972-14, A-4214-14, A-2387-15, and A-3066-15.

Krista Lynn Haley argued the cause for amicus curiae The Innisfree Foundation in A-3972-14 and A-4214-14 (John Rue & Associates, attorneys; Ms. Haley, on the briefs).

Iris Bromberg argued the cause for amicus curiae American Civil Liberties Union of New Jersey in A-4214-14 (American Civil Liberties Union of New Jersey Foundation, attorneys; Ms. **[*3]** Bromberg, Edward L. Barocas, Jeanne LoCicero, and Krista Haley, on the brief).

JUDGES: Before Judges Sabatino, Ostrer and Whipple. The opinion of the court was delivered by SABATINO, P.J.A.D.

OPINION BY: SABATINO

OPINION

The opinion of the court was delivered by

SABATINO, P.J.A.D.

These four related appeals[1] concern efforts by plaintiffs (a nonprofit advocacy organization for disabled students, and the mother of a disabled student in the Camden City Public Schools) to obtain from several school districts copies of settlement agreements and records reflecting the provision of special services to other qualified students. In each of these cases, plaintiffs, with the assistance of counsel, requested copies of the documents. The respective school districts resisted disclosure, citing statutory and regulatory provisions that generally safeguard the privacy of students in their records, subject to certain specified exceptions and conditions.

1 The appeals, which have overlapping counsel, were argued on the same date, and we consolidate them for purposes of this opinion.

Plaintiffs' requests raise several novel issues of access under the *Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1 to - 13*, the *New Jersey Pupil Records Act ("NJPRA"), N.J.S.A. 18A:36-19*, and the *Federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C.A. § 1232g*. The requests also implicate administrative regulations **[*4]** adopted under both the NJPRA and FERPA.

Specifically, the four cases before us arise out of requests made to school district officials in Cherry Hill (A-3066-15), Hillsborough (A-2387-15), Parsippany-Troy Hills (A-4214-14), and Camden City (A-3972-14). The

lawsuits generated conflicting results in the trial courts.

The judge in the Hillsborough case concluded that the plaintiff advocacy organization's request must be disallowed under the regulations of the New Jersey Department of Education, *N.J.A.C. 6A:32-7.1 to -7.8*. That ruling was consistent with a prior administrative decision of the Government Records Council ("GRC") interpreting those regulations.

Conversely, the judges in the Cherry Hill and Parsippany-Troy Hills cases ruled that the applicable laws and regulations allow the plaintiff-requestors access to the records, provided that the disabled students' personally identifiable information was redacted from them. Those two judges disagreed with the GRC's legal interpretation of the state regulations in that prior case. As a caveat, the judge in the Parsippany-Troy Hills case upheld a special service charge of $96,815 calculated by the School Board to perform the review and redaction process before the **[*5]** records were turned over.

Finally, in the fourth case, Camden City, the trial judge dealt with the separate issues posed by a parent's access to her own child's records, "access logs" for those records, and other documents possessed by the school district that refer to her child. The judge ordered the school district to produce an unredacted copy of the child's own records and access logs, but not other records.

For the reasons that follow, we hold that the respective plaintiffs in the Hillsborough, Parsippany-Troy Hills, and Cherry Hill cases are entitled to appropriately-redacted copies of the requested records, provided that on remand those plaintiffs either: (1) establish 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)*.

In either event, the school districts shall not turn over the redacted records until they first provide reasonable advance notice to each affected student's parents or guardians. The parents and guardians must be afforded the opportunity to object and provide insight to the school district officials about what may comprise or reveal personally identifying information **[*6]** in their own child's records before the redactions are finalized.

We also remand the Camden City case for further proceedings with respect to documents naming plaintiff's child that also could refer to other students, but affirm the trial court's grant of access concerning records that exclusively mention plaintiff's child.

I.

All four of the appeals before us involve the Innisfree Foundation ("Innisfree"), either as a plaintiff or as *amicus curiae*. As described in its briefs, Innisfree is a non-profit organization that "assists families of children with disabilities who reside in New Jersey to advocate for their children's educational needs." Innisfree asserts that its interest in access to the school records it is requesting "arises out of its concern for the special education programs of the children of its constituents who are (or seek to be) classified as in need of special education services under the *Individuals with Disabilities Education Act ("IDEA")," 20 U.S.C.A. §§ 1400 to -1482*. Innisfree has been certified by the New Jersey Supreme Court as a "pro bono entity" under *Rule 1:21-11(b)*.

Innisfree's Records Requests and Lawsuits

In August 2015, Innisfree submitted substantially identical requests under OPRA to both **[*7]** the Cherry Hill and Hillsborough school districts. Those requests sought:

> All settlement agreements executed in the past two years and related to disputes between [the district] and parents of students related to the provision of special education services, where the counterparties were parents (or a single parent) of a child or children for whom special education services were or are

> either provided or sought. (Personally identifiable information may be redacted).

According to Innisfree, it has presented similar OPRA requests to many other school districts in this State. Its counsel represented to us at oral argument that it plans eventually to submit similar records requests to every New Jersey public school district.

Anticipating that the school districts might want to redact the requested records for student privacy reasons, Innisfree added the following proviso to its requests:

> (1) To the extent that any such records contain personally identifiable information related to any individual student, please redact that personally identifiable information prior to disclosure.
>
> (2) To the extent that you assert that any requested records are exempted from disclosure under OPRA, and also unavailable **[*8]** under the common law right of access, please provide a complete Vaugh[n] index[.][2]

2 A "Vaughn index" is a submission "in which the custodian of records identifies responsive documents and the exemptions it claims warrant non-disclosure." *North Jersey Media Grp., Inc. v. Bergen Cty. Prosecutor's Office, 447 N.J. Super. 182, 199, 146 A.3d 656 (App. Div. 2016). See Vaughn v. Rosen, 484 F.2d 820, 826-27, 157 U.S. App. D.C. 340 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974).*

Both the Cherry Hill and Hillsborough school districts denied Innisfree's records requests. In Cherry Hill's denial, it cited a GRC decision, *Popkin v. Englewood Board of Education*, Complaint No. 2011-263 (Gov't Records Council Dec. 18, 2012) (slip op. at 8). The GRC in *Popkin* had exempted a special education settlement agreement from OPRA disclosure in its entirety, upon finding that the requestor was not authorized to obtain it under the NJPRA. Cherry Hill also declined to produce a Vaughn index, asserting that such indices are "something prepared by order of a court on matters which are questionably protected."

Hillsborough, meanwhile, asserted that the requested documents were FERPA "education records" protected from disclosure, *20 U.S.C.A. § 1232g*, and "student records" under *N.J.A.C. 6A:32-2.1*, a regulation promulgated in connection with the NJPRA.

In October 2015, Innisfree filed separate complaints in the Law Division in Camden County against the Cherry Hill district and its custodian of records, and in Somerset County against the Hillsborough district and its own custodian of records. The complaints each invoked a requestor's statutory **[*9]** rights to government records under OPRA, as well as under the common law. Cherry Hill and Hillsborough opposed the complaints, arguing that their conduct in withholding the documents was justified under the applicable laws and regulations governing student records.

The Trial Court's Ruling as to Cherry Hill

On February 9, 2016, the trial court in Camden County ordered the Cherry Hill district to produce the agreements "with the appropriate redactions" and to prepare and serve a Vaughn index. The judge rejected the district's reliance on *Popkin*, concluding that such GRC opinions lack precedential value and are non-binding on the court. The judge also ruled that Innisfree was a prevailing party under OPRA, granted its request for attorney's fees, and declined to entertain its common-law right to access claim. On March 16, 2016, the court entered final judgment in favor of Innisfree and stayed the judgment pending appeal.

The Trial Court's Ruling as to Hillsborough

An opposite result was reached in the Hillsborough litigation. On January 8, 2016, the trial court in Somerset County dismissed Innisfree's complaint with prejudice. The judge concluded that the NJPRA exempted the settlement agreements **[*10]** from OPRA disclosure in their entirety, even if those documents were redacted, because they were "student records" as defined in the NJPRA's regulations. The judge further noted in her oral opinion that Innisfree was not authorized to gain access to student records under the regulations contained in *N.J.A.C. 6A:32-7.5*. The judge did not address FERPA, or Innisfree's common-law right of access claim.

Innisfree has appealed the trial court's ruling in the Hillsborough case, and the school district has appealed the trial court's ruling in the Cherry Hill case.

L.R.'s Requests for Records and Her Two Cases

L.R.[3] is the parent of a minor child, J.R., who attends public school in the Camden City school district. In May 2014, an attorney named Jamie Epstein submitted an OPRA request to the Camden City district, seeking the "FERPA access log" for J.R.'s school records. A FERPA access log is a document maintained by a school district, which lists who has been given access to a particular student's school records. Through Epstein, L.R. also sought letters and emails sent to or received by Jonathan Ogbonna, a district staff member, since March 2, 2012, containing J.R.'s name "in the subject or body of the record." **[*11]** The request also sought certain other records.

3 At oral argument on the appeal, all counsel agreed that they had no objection to the use of the initials of L.R. and her child J.R. in this opinion, given the use of initials for them in the trial court below.

In May 2014, the Camden district's interim administrator, John C. Oberg, produced the access log for J.R., but redacted the document "to protect confidential information of the student and [J.R.'s] parents."[4] Epstein replied that the district's response was "improper because no redactions should be made, since, as indicated, the request is made on behalf of my client [J.R.]."

4 It appears that L.R. and J.R.'s names and home address were redacted from the documents.

The Camden school district's general counsel wrote to Epstein and addressed the access log redaction issue. He maintained that the district's actions were proper under state law, asserting that Epstein had "not presented the requisite written consent under *N.J.A.C. 6A:32-7.5(e)(13)*, authorizing the [d]istrict to produce J.R.'s student record information" to him. In response, Epstein "[w]ithout waiving any rights concerning [the district's] improper denial," emailed the district's counsel a self-drafted authorization form signed by L.R., which read:

> I, [L.R.], as parent and legal guardian of [J.R.], I hereby extend my *20 USCS § 1232g*. Family Educational and Privacy Act rights to my attorney, Jamie Epstein.

Oberg denied Epstein's request for the Ogbonna records, citing various concerns about student confidentiality, administrative **[*12]** burdens, and disruption. Oberg also noted that Epstein had not provided written consent in a sufficient form to divulge J.R.'s records.

Epstein then made a second request, seeking:

> 1. Letters, memos, correspondence and emails sent to or received by Clara West, Case Manager, since 7/1/12 to present which contain[s] the term [J.R.] aka JR. in the subject or body of the record.
>
> 2. All educational/special educational records created, received, kept or maintained by Clara West, Case Manager, since 7/1/12 to present which contains the term [J.R.] aka JR.

The Camden district, through Oberg, denied this request as well, citing confidentiality and overbreadth concerns.

During the same time period, in May 2014, Epstein wrote to Ogbonna directly and asked for "access [to J.R.'s] school records; including, but not limited to, [J.R.'s] special education, health, administrative, academic and disciplinary records." Ogbonna replied that the district was not able to grant such access to J.R.'s student records "unless and until it receives written consent from [J.R.'s] parent or legal guardian[.]" Ogbonna enclosed an "Authorization and Consent to Release Records" form, to be completed "before any records are produced." **[*13]** The district's authorization form included the following language:

> This consent and authorization is being made under State and federal law requiring parental consent as a prerequisite to obtaining student or health records. I hereby release the Camden City [s]chool [d]istrict, and its employees and agents, from any liability or responsibility in connection with producing the aforesaid records in connection with this request.

The district rejected Epstein's proposed waiver form as "vague" and noted that it did not contain a liability waiver.

This dispute initially came to a head in the Office of Administrative Law, after Epstein filed an administrative complaint with the New Jersey Department of Education against the district, alleging violations of federal and state law for withholding the requested documents. After both sides moved for summary decision, an Administrative Law Judge ("ALJ") decided that the district was required to provide J.R.'s own records to Epstein. Among other things, the ALJ concluded that Epstein's waiver was sufficient to reflect parental consent.

The Camden City Litigation

In July 2014, a different attorney representing L.R. filed an OPRA complaint in the Law Division in Camden **[*14]** County against the Camden City school district and Oberg. The complaint sought an order requiring the district to produce an unredacted access log for J.R.'s records, the Ogbonna documents, and the West documents, along with attorneys' fees and costs.

On October 20, 2014, the trial judge[5] ordered the district to produce the unredacted access log, but specifically noted that access to the FERPA access log was not being granted under the authority of OPRA. The judge denied L.R.'s request for the Ogbonna and West documents. The judge denied the Camden City district's ensuing motion for reconsideration.[6]

> 5 This was a different judge in the Camden vicinage than the judge who presided over the Cherry Hill matter. The judge in the Camden City case is now retired.
> 6 After additional proceedings were held involving other documents not at issue on appeal, the judge ordered the district to produce those other documents. The parties entered into a consent order calling for the district to pay L.R.'s attorney an agreed-upon sum in reasonable counsel fees and costs.

L.R. has appealed the judge's decision, asserting that the judge erred in ordering production of the unredacted access log by relying upon FERPA rather than OPRA. She also contends that the judge should have granted her access to the other documents relating to J.R. maintained by Ogbonna and West. The Camden City school district has not cross-appealed.

The Parsippany-Troy Hills Case

Meanwhile, L.R. and J.R. pursued a separate records request and litigation with the Parsippany-Troy Hills school district in Morris County. In November 2014, Epstein, on behalf of J.R., served an OPRA request upon **[*15]** Parsippany-Troy Hills seeking:

> (1) All requests made on behalf of [disabled] students for independent educational evaluations ["IEE"] and all responses to those requests.

> (2) All requests made on behalf of [disabled] students for independent evaluations ["IE"] and all responses to those requests[.]

The request sought such records for the period from July 1, 2012 to November 4, 2014, with "personal identifiers of students and their parents or guardians" redacted, "leaving only initials[.]"

Parsippany-Troy Hills's records custodian denied the request as overbroad. The custodian noted in part that the request would require the district to perform "a wholesale search of records" pertaining to its current students, along with those who no longer attend, and that "OPRA does not contemplate such [research]." The custodian also asserted that the requested records were pupil records exempt from OPRA disclosure.

In December 2014, L.R., through the same attorney who had represented her in the Camden City litigation, filed a complaint in the Law Division in Morris County, alleging that the Parsippany-Troy Hills district had violated OPRA by failing to produce redacted documents responsive to her request. **[*16]** The complaint sought an order requiring the district to provide redacted documents, "leaving only initials[.]" Parsippany-Troy Hills moved for summary judgment, asserting that the records were confidential student records exempt from OPRA disclosure under FERPA and the NJPRA. In the alternative, the district asserted that the production of the records would require an overly burdensome search of student files not contemplated by OPRA.

During the ensuing motion proceedings before the Morris County judge, the Parsippany-Troy Hills Director of Special Services submitted a certification detailing the substantial administrative efforts that would be required to respond to L.R.'s request and to make appropriate redactions. The Director certified that approximately 1,200 district students were "classified as eligible for special education services" out of 6,934 total students enrolled. Additionally, 180 students "either graduated or aged out," and 65 once-classified students were "declassified" between September 1, 2012, and November [5], 2014. Thus, according to the Director, 1,445 student files could contain documents responsive to plaintiff's request.

The Director further explained that **[*17]** the documents sought were "not housed in any central repository[,]" nor stored or compiled electronically, but that hard copies were kept in student files, either at the central office or in "school-level files" at each school "maintained by the students' respective case managers."[7] He estimated that it would take the district's "licensed special education professionals" ("LSEPs") approximately one hour per student to review the appropriate files, redact, and produce the requested documents. He noted that LSEPs earn, at a minimum, $67 per hour.

> 7 As of March 2015, the district employed twenty-seven case managers.

L.R. objected to the district's special service charge estimate, and sought discovery (including a deposition of the director), a plenary hearing, and the opportunity to retain an expert to address the issue. She disputed the district's claims that none of the responsive documents were maintained electronically, that it would take one hour to review, retrieve, and redact responses from each student file, and that only LSEPs could perform such a review.

On April 7, 2015, the Morris County judge, *sua sponte*, dismissed L.R. and J.R. from the complaint, substituted Epstein as plaintiff, and granted the request for the IEE and IE requests and responses, **[*18]** "subject to redaction of all student personal identifiers, including initials[.]" Based upon the certifications, the court ordered Epstein to pay a $96,815 special service charge to the district, with 50% to be paid in advance of any document production.[8] Epstein declined to pay the special service charge and the district has not produced the records. The Morris County judge further awarded Epstein attorneys' fees and costs as the prevailing party.

> 8 This total represents 1,445 hours of review (one hour per file) times the quoted $67 per hour rate for staff time.

Parsippany-Troy Hills appealed the trial court's orders. Meanwhile, L.R. cross-appealed from portions of the court's decisions. In particular, L.R. challenges the substitution of Epstein for her as the real party in interest and the court's

holding that the district was required to redact student initials before disclosing the documents.

The Amici

We have granted the participation as *amicus curiae* of two additional organizations: the New Jersey School Boards Association ("The Association") and the American Civil Liberties Union of New Jersey ("ACLU-NJ"). The Association supports the school districts' legal arguments in these appeals, and the ACLU-NJ, conversely, supports the arguments of plaintiffs. In addition, as we have already noted, Innisfree **[*19]** has been granted *amicus* status in the two appeals involving L.R.

Other Related Appeals and The Global Appellate Stay

Innisfree and others have made similar requests for records to other school districts around the State. As a result of trial court orders entered in those various cases, more than a dozen other appeals are pending before this court in various stages of briefing. Following a global case management conference with a retired appellate judge serving on recall, counsel agreed that the present four appeals were suitable "test cases" the disposition of which might provide guidance in the other pending matters. In the meantime, a global order staying the other appeals has been entered.

II.

Since as early as 1944, the laws of our State have governed the terms for inspection of records relating to children enrolled in our public schools. *See L.* 1944, *c.* 217 (directing the State Board of Education to "prescribe rules and regulations governing the public inspection of pupil records and the furnishing of any other information relating to the pupils and former pupils of any school district."). The 1944 statute, ultimately codified at *N.J.S.A. 18:2-4.1*, did not specifically address the privacy or other **[*20]** interests at stake. Nor did the 1944 enactment provide the State Board with explicit guidance in developing the mandated regulations. *Ibid.*

The 1944 provision was amplified in 1967 with the passage of what is now known as the NJPRA. *See L.* 1967, *c.* 271. This development occurred four years after OPRA's predecessor, the Right to Know Law, *L.* 1963, *c.* 73, took effect.

The Right to Know Law, a general statute encompassing the terms of access to a variety of governmental records, required that:

> all records which are required by law to be made, maintained or kept on file by any board, body, agency, department, commission or official of the State or . . . by any public board, body, commission or authority created pursuant to law by the State . . . shall, for the purposes of this act, be deemed to be public records.
>
> [*N.J.S.A. 47:1A-2* (repealed by *L.* 2001, *c.* 404, § 17, effective July 7, 2002).]

The Right to Know Law further stated, in relevant part, that records were exempt from disclosure if:

> provided in this act or by any other statute, resolution . . . of the Legislature, executive order of the Governor, rule of court, any Federal Law, regulation or order, or by any regulation promulgated under the authority of **[*21]** any statute or executive order of the Governor[.][9]
>
> [*Ibid.*]

9 The substance of this Right to Know Law provision was retained in OPRA. *See N.J.S.A. 47:1A-9.*

Subsequently, the 1967 version of the NJPRA allowed for the public inspection of pupil records, subject to State Board regulations:

> Public inspection of pupil records may be permitted and any other information relating to the pupils or former pupils of any school district may be furnished in accordance with rules prescribed by the state board, and no liability shall attach to any member, officer or employee of any board of education permitting or furnishing the same accordingly.
>
> [*L.* 1967, *c.* 271, codified at *N.J.S.A. 18A:36-19* (amended later at *L.* 1977, *c.* 346, § 1).]

The corresponding regulations then in effect allowed four categories of requestors to inspect pupil records, at the discretion of local boards of education: (1) authorized representatives of the Selective Service System, Federal Bureau of Investigation, United States Army, and United States Navy; (2) persons who had "a legitimate interest in the records for purposes of systematic educational research, guidance, and social service"; (3) parents, guardians, and adult students; and (4) employers and higher education institutions. *See N.J.A.C. 6:3-1.3(a) to -1.3(d)* (1969). Additionally, the 1969-vintage regulations **[*22]** gave local boards and their employees the discretion "to withhold items . . . of a confidential nature or in which the applicant for such information has no legitimate interest." *N.J.A.C. 6:3-1.3(e)* (1969).

About ten years later, the NJPRA was amended by the Legislature to its current form, in "response to the problem of the maintenance and confidentiality of pupil records." *Senate Educ. Comm., Statement to S. 260* (Mar. 29, 1976). The new language, which replaced the prior statute virtually in its entirety, requires local boards of education to protect the "reasonable privacy" interests of both students and parents:

> The State Board of Education shall provide by regulation for the creation, maintenance and retention of pupil records and for the security thereof and access thereto, to provide general protection for the right of the pupil to be supplied with necessary information about herself or himself, the right of the parent or guardian and the adult pupil to be supplied with full information about the pupil, except as may be inconsistent with reasonable protection of the persons involved, *the right of both pupil and parent or guardian to reasonable privacy as against other persons* and the opportunity **[*23]** for the public schools to have the data necessary to provide a thorough and efficient educational system for all pupils.
>
> [*L.* 1967, *c.* 271, codified at *N.J.S.A. 18A:36-19* (emphasis added).]

The 1975 definition of "pupil record" adopted in the corresponding regulations closely resembled the current definition of "student record," now found at *N.J.A.C. 6A:32-2.1*. The 1975 version read:

> information related to an individual pupil gathered within or without the school system and maintained within the school system, regardless of the physical form in which it is maintained. This information includes that which is manually recorded, electronically recorded, mechanically recorded or filmed.
>
> [*N.J.A.C. 6:3-2.2* (1975); *6 N.J.R. 465* (Dec. 5, 1974) (proposed); *7 N.J.R. 251* (June 5, 1975) (adopted).]

As part of the Senate's consideration of amendments to the NJPRA, its Education Committee referred to "general agreement that the current statutes, rules and regulations should be revised to afford *greater protection* to both parents and students." *Senate Educ. Comm., Statement to S. 260* (Mar. 29, 1976) (emphasis added). The Committee explicitly noted in that regard that it had "carefully considered" two timely developments regarding pupil records, including the enactment of FERPA **[*24]** in 1974, and significant revisions to the New Jersey Administrative Code at *N.J.A.C.*

6:3-2.1 to -2.8. Ibid.

FERPA

FERPA "prohibit[s] the federal funding of educational institutions that have a policy or practice of releasing education records to unauthorized persons." *Gonzaga Univ. v. Doe, 536 U.S. 273, 276, 122 S. Ct. 2268, 2271, 153 L. Ed. 2d 309, 316 (2002)*. No funding is provided to educational agencies that "release . . . education[al] records (or personally identifiable information contained therein . . .) of students without the written consent of their parents" subject to certain exceptions. *20 U.S.C.A. § 1232g(b)(1) (2017)*; *see 34 C.F.R. § 99.30 (2017)*.

"Education records" under FERPA are considered to be:

> "records, files, documents, and other materials" containing information directly related to a student, which "are maintained by an educational agency or institution or by a person acting for such agency or institution."
>
> [*Owasso Indep. Sch. Dist. No. I-011 v. Falvo, 534 U.S. 426, 429, 122 S. Ct. 934, 937, 151 L. Ed. 2d 896, 902 (2002)* (quoting *20 U.S.C.A. § 1232g(a)(4)(A)*).]

The critical concept of "personally identifiable information" (commonly referred to as "PII") under FERPA includes, but is not limited to:

> (a) The student's name; (b) The name of the student's parent or other family members; (c) The address of the student or student's family; (d) A personal identifier, such as the student's social security number, student number, or biometric record; (e) Other indirect identifiers, such **[*25]** as the student's date of birth, place of birth, and mother's maiden name; (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or (g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates.
>
> [*34 C.F.R. § 99.3 (2017)*.]

Parental consent is not required under FERPA when records are shared with authorized persons, including school officials, select state and local officials, accrediting organizations, and others, for a legitimate purpose. *20 U.S.C.A. § 1232g(b)(1)(A) through (L) (2017)*.

Additionally, within the federal regulations enacted pursuant to FERPA, *34 C.F.R. § 99.31(b)(1)* contains an important exception to the parental consent requirement for "de-identified" or redacted education records:

> An educational agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by *§ 99.30* after the removal of all personally **[*26]** identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.
>
> [*34 C.F.R. § 99.31(b)(1)*.]

The 1977 Revision of the NJPRA In Light of FERPA and Then-Existing State Regulations

When enacting the NJPRA amendments in light of FERPA, the Senate Committee noted that third-party access to "official records directly related to the student" under FERPA was "strictly limited and require[d] written consent of the parents, or in the event of subpena [sic] or transfer of records to another school, advance notification of release to the parents or adult pupil." *Senate Educ. Comm., Statement to S. 260* (Mar. 29, 1976).

The Senate Committee also found instructive the then-current version of state regulations. The Committee noted that the regulations "provide[d] for . . . confidentiality of pupil records." *Ibid.* The regulations that existed at the time stated that "[o]nly authorized organizations, agencies, or persons shall have access to pupil records." *N.J.A.C. 6:3-2.6* (1975). The prior list of designated parties who had been allowed access **[*27]** at *N.J.A.C. 6:3-1.3* had been expanded by that point to include, in relevant part: (1) organizations, agencies and persons from outside the school with written consent from parents, guardians, or adult pupils, or upon presentation of a court order; (2) bona fide researchers, with assurances that the records "will be used under strict conditions of anonymity and confidentiality"; and (3) other school officials in the event of a student transfer outside the district. *N.J.A.C. 6:3-2.6(a)* (1975). The Committee's Statement did not address, however, the relationship, if any, between the NJPRA and the Right to Know Law.

On the topic of notice, the revised regulations that were in effect in 1977 required local school boards to give parents notice before disclosing pupil records pursuant to a court order, or to other school officials if a student was transferring outside of the district. *N.J.A.C. 6:3-2.7(a)(4)* (1975). Once the parent was placed on such notice, *N.J.A.C. 6:3-2.8* permitted him or her to request an immediate stay of the release of records, and to appeal the proposed disclosure to the Commissioner of Education. The regulations did not require such notice, however, before the disclosure of pupil records to a bona fide researcher.

In 2005, *Title* 6, Chapter **[*28]** 3 of the governing regulations was repealed and replaced by *Title* 6A, Chapter 32. *See 37 N.J.R. 1982* (June 6, 2005) (proposed), *37 N.J.R. 3322* (Sept. 6, 2005) (adopted). As discussed below, at that time, the State Department of Education also added *N.J.A.C. 6A:32-7.5(g)*, a provision which requires districts to "adhere to" OPRA and FERPA. In addition, the *Title* 6 authorization provisions discussed above were incorporated and expanded at *N.J.A.C. 6A:32-7.5*. Among other things, the notice and appeal rights provisions in former *Title* 6 were incorporated at *N.J.A.C. 6A:32-7.6* and *-7.7*.

A decade later, *Title* 6A, Chapter 32 was readopted by the Department of Education in 2015, without significant amendment to the pertinent regulations. *See 46 N.J.R. 1775* (Aug. 18, 2014) (proposed); *47 N.J.R. 464* (Feb. 17, 2015) (adopted).

The Current Regulations under the NJPRA

Several key facets of the current State regulations critically bear upon the legal issues before us. To begin with, the regulations broadly define the term "student record" as

> information related to an individual student gathered within or outside the school district and maintained within the school district, regardless of the physical form in which it is maintained. Essential in this definition is the idea that any information that is maintained **[*29]** for the purpose of second-party review is considered a student record. Therefore, information recorded by certified school personnel solely as a memory aid and not for the use of a second party is excluded from this definition.
>
> [*N.J.A.C. 6A:32-2.1*.]

The regulations further proclaim that school districts must "regulate access, disclosure, or communication of information contained in educational records in a manner that assures [their] security." *N.J.A.C. 6A:32-7.1(b)*. Chief school administrators, or their designees, are "responsible for the security of student records maintained in the school

district" and must "devise procedures for assuring that access to such records is limited to authorized persons." *N.J.A.C. 6A:32-7.4(a)*.

In addition, *N.J.A.C. 6A:32-7.5(a)* prescribes that "[o]nly authorized organizations, agencies or persons as defined in this section shall have access to student records[.]" In that regard, subsection 7.5(e) of the regulations lists sixteen categories of authorized organizations, agencies, and persons, including parents, students, certified educational personnel, clerical personnel, boards of education, accrediting organizations, state and federal educational officials, child welfare caseworkers, and bona fide researchers. *N.J.A.C. 6A:32-7.5(e)*.

Organizations, agencies, **[*30]** or persons who are not otherwise specified in the regulations can only obtain access to student records upon written parental consent or "the presentation of a court order." *N.J.A.C. 6A:32-7.5(e)*. As we discuss in more depth below, the regulations are silent with respect to the processes and standards by which such court orders are to be requested and adjudicated.

Also significantly, *N.J.A.C. 6A:32-7.5(g)* provides:

> In complying with this section, individuals shall adhere to requirements pursuant to *N.J.S.A. 47:1A-1 et seq.*, the Open Public Records Act (OPRA) and *20 U.S.C. § 1232g*; *34 CFR Part 99*, the Family Educational Rights and Privacy Act (FERPA).

This cross-reference leads us to now address pertinent facets of OPRA, the main statute relied upon by plaintiffs in their quest for access.

OPRA

OPRA is sweeping legislation intended "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, 951 A.2d 1017 (2008)* (quoting *Asbury Park Press v. Ocean Cty. Prosecutor's Office, 374 N.J. Super. 312, 329, 864 A.2d 446 (Law Div. 2004))*. "With broad public access to information about how state and local governments operate, citizens . . . can play a watchful role in curbing wasteful government spending and guarding against corruption and misconduct." *Burnett v. Cty. of Bergen, 198 N.J. 408, 414, 968 A.2d 1151 (2009)*.

To that end, *N.J.S.A. 47:1A-1* provides that "government records shall be readily accessible . **[*31]** . . by the citizens of this State, with certain exceptions, for the protection of the public interest[.]" Moreover, "any limitations on the right of access . . . shall be construed in favor of the public's right of access[.]" *N.J.S.A. 47:1A-1*.

"Government records" are broadly defined under OPRA to include any document "made, maintained or kept on file in the course of . . . official business by any officer, commission, agency or authority of the State or of any political subdivision thereof[.]" *N.J.S.A. 47:1A-1.1*. However, *N.J.S.A. 47:1A-1.1* expressly "excludes twenty-one categories of information" from its expansive definition of a government record; "[t]he public's right of access [is] not absolute." *Educ. Law Ctr. v. State Dep't of Educ., 198 N.J. 274, 284, 966 A.2d 1054 (2009)*.

Examples of information exempted by OPRA from disclosure under *N.J.S.A. 47:1A-1.1* include such items as legislative memoranda, records subject to the attorney-client privilege, crime victim records, trade secrets, security/surveillance information, and Social Security numbers. *N.J.S.A. 47:1A-1* also contains an exemption limited to "public institution[s] of *higher education*" only, which protects "information concerning student records or grievance or disciplinary proceedings against a student to the extent disclosure would reveal the identity of the student." *N.J.S.A. 47:1A-1.1* (emphasis added). No such comparable **[*32]** exemption exists within OPRA for public elementary or secondary educational institutions.

Notably for the present cases, *N.J.S.A. 47:1A-9(a)* provides that OPRA "shall not abrogate any exemption of a public record or government record from public access" contained in other federal or state statutes or regulations. *See*

O'Boyle v. Borough of Longport, 218 N.J. 168, 185, 94 A.3d 299 (2014) (recognizing that "[a] government record may be excluded from disclosure by other statutory provisions").

OPRA also contains a privacy clause requiring public agencies "to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy[.]" *N.J.S.A. 47:1A-1*; *Asbury Park Press v. Cty. of Monmouth, 201 N.J. 5, 7, 986 A.2d 678 (2010)*; *Burnett, supra, 198 N.J. at 414, 968 A.2d 1151*. In applying the privacy clause, our courts consider the following factors to assess whether the government records at issue must be withheld or require redaction, in the interest of privacy, prior to disclosure under OPRA:

> "(1) the type of record requested; (2) the information it does or might contain; (3) the potential for harm in any subsequent nonconsensual disclosure; (4) the injury from disclosure to the relationship in which the record was generated; (5) the adequacy of safeguards to prevent unauthorized disclosure; (6) the degree **[*33]** of need for access; and (7) whether there is an express statutory mandate, articulated public policy, or other recognized public interest militating toward access."
>
> [*Burnett, supra, 198 N.J. at 427, 968 A.2d 1151* (quoting *Doe v. Poritz, 142 N.J. 1, 88, 662 A.2d 367 (1995)).*]

III.

A.

Our fundamental analytic task is to attempt to construe and harmonize these various provisions under the NJPRA, FERPA, OPRA, and the associated regulations, particularly the detailed set of student record access provisions set forth at *N.J.A.C. 6A:32-7.1 to -7.8*.

In undertaking this difficult task, we are guided by well-established principles of statutory and regulatory interpretation. Ultimately, "[a] court's responsibility 'is to give effect to the intent of the Legislature.'" *State v. Harper, 229 N.J. 228, 237, 160 A.3d 1281 (2017)* (quoting *State v. Morrison, 227 N.J. 295, 308, 151 A.3d 561 (2016))*. "To do so, we start with the plain language of the statute. If it clearly reveals the Legislature's intent, the inquiry is over." *Ibid.* (citing *DiProspero v. Penn, 183 N.J. 477, 492, 874 A.2d 1039 (2005))*. On the other hand, "[i]f a law is ambiguous, we may consider extrinsic sources including legislative history." *Ibid.* (citing *Parsons ex rel. Parsons v. Mullica Twp. Bd. of Educ., 226 N.J. 297, 308, 142 A.3d 715 (2016))*. "We also look to extrinsic aids if a literal reading of the law would lead to absurd results." *Ibid.* (citing *Burnett, supra, 198 N.J. at 425, 968 A.2d 1151*).

As is the case here, where a court is reviewing multiple, but related, statutory provisions, "the goal is to harmonize the statutes in light of their purposes." *American Fire & Cas. Co. v. N.J. Div. of Taxation, 189 N.J. 65, 79-80, 912 A.2d 126 (2006)* (citations **[*34]** omitted); *see also Town of Kearny v. Brandt, 214 N.J. 76, 98, 67 A.3d 601 (2013)*. Reviewing courts "presume that the Legislature was aware of its own enactments and did not intend to create intentional conflict between . . . statutory schemes without expressly overriding provisions." *Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 449, 55 A.3d 65 (2012)*. Also, "[w]e must presume that every word in a statute has meaning and is not mere surplusage, and therefore we must give those words effect and not render them a nullity." *In re Attorney General's "Directive on Exit Polling: Media & Non-Partisan Pub. Interest Grps.", 200 N.J. 283, 297-98, 981 A.2d 64 (2009)* (citations omitted).

These same principles apply when we interpret the meaning of duly-adopted administrative regulations. Generally, a "strong presumption of reasonableness must be accorded [to an] agency's exercise of its statutorily delegated duties." *In re Certificate of Need Granted to the Harborage, 300 N.J. Super. 363, 380, 693 A.2d 133 (App. Div. 1997)* (citations omitted). "We interpret a regulation in the same manner that we would interpret a statute." *U.S. Bank, N.A. v. Hough,*

210 N.J. 187, 199, 42 A.3d 870 (2012). The "paramount goal" is to determine the regulation drafter's intent. *Ibid.* Ordinarily, that intent "is found in the actual language of the enactment." *Ibid.* Courts are not to "rearrange the wording of the regulation, if it is otherwise unambiguous, or engage in conjecture that will subvert its plain meaning." *Ibid.* (citations omitted). Even so, if **[*35]** a regulation's literal wording yields "more than one plausible interpretation," "a reviewing court may consider extrinsic sources[.]" *In re Eastwick Coll. LPN-to-RN Bridge Program, 225 N.J. 533, 542, 139 A.3d 1146 (2016)*.

As an appellate court, we review the trial courts' decisions on statutory and regulatory legal issues de novo. *See, e.g., Harper, supra, 229 N.J. at 237, 160 A.3d 1281* (with reference to the meaning of a statute); *U.S. Bank, supra, 210 N.J. at 198-99, 42 A.3d 870* (with reference to the meaning of a regulation). *See also K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337, 349, 32 A.3d 1136 (App. Div. 2011)* (applying de novo review in the specific context of legal issues concerning student records access), *certif. denied, 210 N.J. 108, 40 A.3d 732 (2012)*. "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378, 658 A.2d 1230 (1995)* (citations omitted). Indeed, according total deference to the trial court would be impossible in the context of these four consolidated appeals, which involve conflicting and disparate interpretations of the law made by different judges in different counties.

B.

As a starting point to our de novo legal analysis, we note it is clear and essentially undisputed that the school records sought here are within the scope of OPRA's broad definition of "government record[s.]" *N.J.S.A. 47:1A-1.1*. They are not "higher education" records exempted from OPRA under *N.J.S.A. 47:1A-1.1*. Moreover, it is not disputed that **[*36]** the documents sought by plaintiffs comprise "education records" under FERPA because they contain "information directly related to a student" and are maintained by the school districts. *20 U.S.C.A. § 1232g(a)(4)(A)*.

A more difficult related question is whether the documents sought, if they are redacted to remove personally identifiable information, still comprise "student records" governed by the disclosure restrictions prescribed by the regulations in the New Jersey Administrative Code. Absent their redaction, the settlement agreements, access logs, and other documents being sought by plaintiffs indisputably are "student record[s]" within the definition set forth in *N.J.A.C. 6A:32-2.1*, because they contain "information *related to an individual student* gathered within or outside the school district, . . . *regardless of the physical form* in which it is maintained." *Ibid.* (emphasis added). The provision stresses that "[e]ssential in this definition is the idea that *any* information that is maintained for the purpose of second-party review is considered a student record." *Ibid.* (emphasis added). Hence, the regulation's definition is broad and clearly aimed at promoting the substantial public policy to protect student privacy, as articulated within the **[*37]** enabling statute. *See N.J.S.A. 18A:36-19*.

The trial judge in the Cherry Hill case reasoned that documents held by school districts are no longer "student records" once personally identifiable information is removed from those documents through redaction. We respectfully disagree.

The adjective "related," as used within the definition of a student record in *N.J.A.C. 6A:32-2.1* is a sweeping concept. The primary dictionary definition published for the term "related" in Webster's Dictionary is "connected" or "associated." *See Webster's II New College Dictionary* 934 (1999 ed.). Other definitions of the term "related" include "allied by nature [or] origin," and "having [a] relationship to or with something else[.]" *The Random House College Dictionary* 1113 (Revised ed. 1982), *Black's Law Dictionary* 1479 (10th ed. 2014). Similar broad concepts are conveyed by the term "relevance" in our Rules of Evidence, which treat "relevant" evidence as proof that has "any" tendency to prove or disprove a fact of consequence. *See N.J.R.E. 401*.

We decline to read the term "related" in the Department of Education's definition of a "student record" artificially or narrowly, especially given the regulation's express statement that a record's actual "physical **[*38]** form" does not

matter. *N.J.A.C. 6A:32-2.1*.

For example, a document reflecting a school district's settlement of claims for special services by a hypothetical disabled student, Mary Jones, remains a "student record," even if her name and other personal identifiers are removed from the settlement agreement. The record still "relates" to Mary Jones and discusses aspects of her life. The document does not cease becoming a "student record," or change its fundamental character, even if, say, a redacting employee took an extra-wide marker to mask the child's name, address, Social Security number, and other demographic information, or replaced the actual names within it with fictitious names. *Jane Eyre* surely was Charlotte Bronte's novel even though it bore the pen name of "Currier Bell"; likewise the works of Samuel Clemens were no less his own despite being issued under the pseudonym of "Mark Twain."

Given this premise, we then must consider the specific limitations on access to student records expressed within *N.J.A.C. 6A:32-7.1 through -7.8*. We are mindful that those regulations, at least as they existed in 1975, were accorded the positive imprimatur of the Legislature, as explicitly stated in the Senate Committee's 1976 Report. *Senate* **[*39]** *Educ. Comm., Statement to S. 260* (Mar. 29, 1976). Moreover, as a matter of law, those duly-enacted regulations are entitled to a presumption of validity, even if they did not have the Senate's endorsement. *See, e.g., N.J. State League of Muns. v. Dep't of Cmty. Affairs, 158 N.J. 211, 222, 729 A.2d 21 (1999)* (noting the presumption of validity afforded to regulations); *In re Twp. of Warren, 132 N.J. 1, 26, 622 A.2d 1257 (1993)*.

We do not read the language in *N.J.A.C. 6A:32-7.5(g)*, which cross-references OPRA and FERPA, to signify that those other two statutes allow courts to disregard the access limitations within our State's regulations concerning student records. Subsection 7.5(g) of *N.J.A.C. 6A:32* merely states that, "[i]n complying with [the Section 7.5 access provisions], individuals shall adhere to requirements pursuant to . . . [OPRA and FERPA.]" *Id.* Yet, no provisions within OPRA or FERPA explicitly "require" school districts to turn over records that are protected under state law. Consequently, we must strive to harmonize those enactments.

The language within the NJPRA adopted by the Legislature in 1977 assures pupils, parents, and guardians the statutory right of "reasonable privacy as against other persons[.]" *N.J.S.A. 18A:36-19*. The regulatory history reflects the deliberate adoption of specific provisions restricting student records access to a limited group of authorized persons or organizations. **[*40]** On the whole, these provisions limiting access to only parties on the authorized list serve to protect the privacy of students and parents from intrusion by random third parties, except where there is written parental consent or a court order requiring such disclosure. These limitations on public access have remained a key feature of the regulations, even in the wake of OPRA's enactment and the replacement of *Title* 6, Chapter 3 of the Administrative Code with *Title* 6A, Chapter 32.

The first historical mention of OPRA or FERPA in the NJPRA's regulations occurred in 2005, when the Department of Education added *N.J.A.C. 6A:32-7.5(g)*, requiring districts to "adhere to" OPRA and FERPA. Notably, *N.J.A.C. 6A:32-7.5(g)*'s plain language does not expressly incorporate FERPA's provisions for the redaction of PII into the NJPRA or its regulations. Moreover, nothing in the NJPRA or its regulations states that sufficiently anonymized documents, with all PII removed, are no longer "student records" under *N.J.A.C. 6A:32-2.1*.

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 disclosures. Nor does FERPA preclude individual **[*41]** states from adopting stricter privacy protections. *See 20 U.S.C.A. § 1232g*; *34 C.F.R. § 99.31(b), (d)*. *See also* James Rapp, *Education Law § 13.04[5]* (Matthew Bender & Co. 2017) ("States may impose additional or, perhaps, more restrictive requirements, but they cannot preempt FERPA.").

Here in New Jersey, the 1977 amendments to the NJPRA reflected the Legislature's heightened concern, post-FERPA, to safeguard the reasonable privacy interests of parents and students against the opposing interests of third parties who may seek access to their student records. The limitations appearing in the NJPRA's regulations were in place in their initial form even before OPRA was enacted. The overall regulatory history shows that the Department of

Education has consistently administered the NJPRA to allow public access to student records to only a finite group of individuals and organizations, absent parental consent or a court order, in the interest of maintaining the privacy and confidentiality of those records.

The language within *N.J.A.C. 6A:32-7.5(g)* added in 2005 does not undermine that analysis. It is reasonable to conclude that *N.J.A.C. 6A:32-7.5(g)* centrally concerns functionality - a district's *processing* of student record requests from an authorized person or organization. *See K.L., supra, 423 N.J. Super. at 350* ("In **[*42]** providing access to school records in accordance with *N.J.A.C. 6A:32-7.5*, school districts must also comply with the requirements of OPRA and FERPA, *N.J.A.C. 6A:32-7.5(g)*."). For instance, if a school district receives an OPRA request from an authorized person or organization listed under *N.J.A.C. 6A:32-7.5(e)*, then it must process that request in compliance with OPRA and FERPA requirements. Nothing in the plain language of *N.J.A.C. 6A:32-7.5(g)*, however, supersedes or nullifies the limitations of "authorized" parties, as set forth at *N.J.A.C. 6A:32-7.5(a)* and (e). Hence, we agree with the judge in the Hillsborough case that a requestor cannot gain access to a student record unless the requestor satisfies one of the "[a]uthorized" categories listed in *N.J.A.C. 6A:32-7.5(e)(1)* through (16).

C.

The next analytical query we face is whether Innisfree and L.R. may nonetheless be able to obtain the requested records by relying on other portions of the State regulations. Two possibilities exist in that regard.

1.

First, it is at least conceivable that Innisfree might be appropriately categorized under *N.J.A.C. 6A:32-7.5(e)(16)* as a "[b]ona fide researcher" capable of justifying "the nature of [its] research project and the relevance of the records sought." *Ibid.* Such access to student records for research purposes must be predicated on "strict conditions of **[*43]** anonymity and confidentiality." *Ibid.*

Although the record in the four cases before us is sparse on this subject and was not specifically adjudicated, at least one dimension of Innisfree's activities as a non-profit organization appears to involve gathering information about the services provided to disabled students in various school districts. That information, in turn, presumably will assist Innisfree in conducting a comparative analysis of the level of services provided to comparably-situated disabled students, both within a school district and between districts. Such information could yield trends or practices that could inform policy-making, academic studies, grants, and other related endeavors. Although we recognize that one of Innisfree's activities is participating in or supporting litigation to vindicate the rights of disabled students, we do not believe that facet per se eliminates its arguable status as a bona fide research organization. Nor would it for the many other public interest groups and organizations that both participate in litigation and disseminate public policy-related research.

We discern offhand no sensible reason for the regulatory scheme in *N.J.A.C. 6A:32-7.5(e)(16)* to permit access **[*44]** to records by, say, university Ph.D. candidates, but not researchers employed at think tanks and public interest advocacy organizations. The potential incursion on individual student privacy interests in either context would be the same, regardless of the identity of the researcher requesting the records. That said, the trial court record supplied in these appeals is inadequate to resolve this issue concerning Innisfree's status conclusively.[10] The subject instead should be litigated on remand, with evidentiary hearings if necessary. The court's status determination presumably would provide general guidance for other pending records disputes involving Innisfree.

> 10 Offhand, it is not readily apparent that L.R., as a parent of a disabled student, is likely to hold the status of a "[b]ona fide researcher." Even so, we do not foreclose L.R. from attempting to make such a showing on remand. On a related point, we reverse the trial court's erroneous decision in the Parsippany-Troy Hills case to substitute Attorney Epstein for L.R. as the plaintiff. L.R., as the parent of J.R., is clearly the "real party in interest" seeking the records on her child's behalf. L.R.'s attorney was simply acting as her representative when making the

records requests.

2.

A second potential pathway for plaintiffs to gain access to appropriately-redacted versions of the records may be under *N.J.A.C. 6A:32-7.5(e)(15)*, which confers such access rights upon non-qualifying organizations and persons "upon the presentation of a court order[.]" Unfortunately, *N.J.S.A. 6A:32-7.5(e)(15)* does not specify what standards or procedures are to govern requests to obtain such court orders. Presumably, the process would be guided by the balancing of competing interests that courts typically employ in resolving common-law access requests.

More specifically, if **[*45]** the records sought qualify as common-law public records, then a court must conduct a two-step analysis to determine whether a requestor is entitled to access. *Educ. Law Ctr., supra, 198 N.J. at 302, 966 A.2d 1054* (citations omitted). First, the court must determine whether the requestor has established "an interest in the public record." *Ibid.* That interest may be "a wholesome public interest or a legitimate private interest." *Ibid.* Second, the court must determine whether the requestor has demonstrated that its interest in the public records sought "outweigh[s] the State's interest in non-disclosure." *Id. at 303, 966 A.2d 1054* (citations omitted).

With respect to the first prong of the common-law test, a court may consider legitimate concerns, such as the expenditure of public funds, or citizen concerns about how public institutions carry out decisions. *See, e.g., Home News v. State, Dep't of Health, 144 N.J. 446, 454, 677 A.2d 195 (1996)* (observing that "a citizen's concern about a public problem is a sufficient interest").

In analyzing the second step, courts typically apply and weigh the factors identified by the Supreme Court in *Loigman v. Kimmelman, 102 N.J. 98, 113, 505 A.2d 958 (1986)*. *See also Educ. Law Ctr., supra, 198 N.J. at 303, 966 A.2d 1054*. Those factors are:

> (1) the extent to which disclosure will impede agency functions by discouraging citizens from providing information to the government; (2) the effect disclosure may have upon persons **[*46]** who have given such information, and whether they did so in reliance that their identities would not be disclosed; (3) the extent to which agency self-evaluation, program improvement, or other decisionmaking will be chilled by disclosure; (4) the degree to which the information sought includes factual data as opposed to evaluative reports of policymakers; (5) whether any findings of public misconduct have been insufficiently corrected by remedial measures instituted by the investigative agency; and (6) whether any agency disciplinary or investigatory proceedings have arisen that may circumscribe the individual's asserted need for the materials.
>
> [*Loigman, supra, 102 N.J. at 113, 505 A.2d 958* (citations omitted).]

"Generally, the public's interest in nondisclosure is based on the need to keep the information confidential." *Keddie v. Rutgers, 148 N.J. 36, 51, 689 A.2d 702 (1997)*. To that end, courts may perform an *in camera* inspection of the requested records as they balance the relevant factors. *Id. at 53-54, 689 A.2d 702*. *See also K.L., supra, 423 N.J. Super. at 359-60, 32 A.3d 1136* (holding that "whether the requestor should be granted access to the records [under common law] requires a case-by-case, and in fact, document-by-document balancing of the requestor's interest against the public agency's interest in confidentiality") (citations omitted). While conducting **[*47]** such an *in camera* inspection, courts are authorized to require the redaction of the records to maintain confidentiality. *S. Jersey Publ'g Co. v. N.J. Expressway Auth., 124 N.J. 478, 499, 591 A.2d 921 (1991)*.

In this context of the weighing of competing interests, "administrative regulations bestowing confidentiality upon an otherwise public document, although not dispositive of whether there is a common law right to inspect a public record, should, nevertheless, weigh 'very heavily' in the balancing process, as a determination by the Executive Branch

of the importance of confidentiality." *Bergen Cty. Improvement Auth. v. N. Jersey Media Grp., Inc., 370 N.J. Super. 504, 521, 851 A.2d 731 (2004)* (quoting *Home News, supra, 144 N.J. at 455, 677 A.2d 195*) (citations omitted). In this regard, the Legislature's declaration of public policy within the NJPRA at *N.J.S.A. 18A:36-19* to safeguard the "reasonable privacy" of students, and their parents and guardians, must therefore be given strong consideration.

This leads us to underscore the vital importance of a careful redaction process, and the functional benefits of allowing parental input into that process. As Innisfree's counsel frankly acknowledged at oral argument on appeal, the mere use of a student's initials in redacting his or her records might not be enough to protect that student's identity and privacy. Mere initials would be insufficient protection in a smaller school district in which **[*48]** there may be few or no other of children having similar initials or similar disabilities. Indeed, the federal regulations adopted under FERPA recognize that the use of initials will be inadequate to mask a student's identity in many instances.

Under certain circumstances, even the redaction of all personally identifiable information would not prevent reasonable persons "in the school community" who lack personal knowledge of the parties involved from identifying the student "with reasonable certainty." *34 C.F.R. § 99.3(f) (2017)*. The federal scheme anticipates such a scenario at *34 C.F.R. § 99.31(b)(1)*, by requiring the redacting party to reasonably determine, once all PII is removed, "that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information."

Instructively, student initials can be considered PII under FERPA, in situations where:

> (f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty.
>
> [*34 C.F.R. § 99.3 (2017)*.]

[*49] When it amended the definition of PII in 2008, the United States Department of Education offered the following explanation:

> [R]ecords that identify a student by initials, nicknames, or personal characteristics are [PII] if, alone or combined with other information, the initials are linked or linkable to a specific student and would allow a reasonable person in the school community who does not have personal knowledge about the situation to identify the student with reasonable certainty. For example, if teachers and other individuals in the school community generally would not be able to identify a specific student based on the student's initials, nickname, or personal characteristics contained in the record, then the information is not considered personally identifiable and may be released without consent. *Experience has shown, however, that initials, nicknames, and personal characteristics are often sufficiently unique in a school community that a reasonable person can identify the student from this kind of information even without access to any personal knowledge*, such as a key that *specifically links the initials, nickname, or personal characteristics to the student*.
>
> . . . .
>
> [Under] *Paragraph (f)* . . . the **[*50]** agency or institution must make a determination about whether information is [PII] not with regard to what someone with personal knowledge of the relevant circumstances would know, . . . but *with regard to what a reasonable person in the school or its community would know*, i.e., based on local publicity, communications, and other ordinary conditions.
>
> *[73 Fed. Reg. 74806, 74831-32 (Dec. 9, 2008)* (emphasis added).]

Similar considerations should be applied here in dealing with access requests for student records under our state's laws and regulations. The review of such requests should be conducted on a case-by-case basis, depending on the specific nature of the request and particular kind(s) of records sought. Because none of the trial courts in the present appeals addressed these common-law balancing issues, we do not resolve them here.[11] Instead, the balancing of interests should be adjudicated in the first instance in the trial court on remand.[12]

11 We recognize that L.R.'s verified complaints in the Parsippany-Troy Hills and Camden City cases invoked OPRA, but do not contain separate counts under the common law. However, as our opinion has shown, a common-law balancing of interests is implicated here under the "court order" pathway for access at *N.J.A.C. 6A:32-7.5(e)(15)*. In light of our clarification of the governing laws, L.R. is free to amend her complaints on remand to include common-law claims.

12 We discern no immediate necessity on remand for the defendant school boards to provide a "Vaughn index," and defer that question to the sound discretion of the trial court as the remand proceedings develop.

D.

As a key procedural facet of the redaction process, we hold that school districts must afford parents and guardians a reasonable opportunity to comment upon the proposed redactions of records relating to their own child. A parent or guardian may possess background and contextual information **[*51]** that could show how his or her child might be readily identified within the community, despite good faith efforts by school employees to perform effective and thorough redactions of the child's records. Their voices should be heard in the process.

In this regard, the three-day parental notice mandated in *N.J.A.C. 6A:32-7.6(a)(4)* for situations where a court order for disclosure is sought should be scrupulously observed.[13] The three-day period has been codified in the regulations since at least 1974, and clearly remains an important ingredient. *See 6 N.J.R. 466* (Dec. 5, 1974) (reflecting the genesis of the notice requirement in the earlier version of the regulation, *N.J.A.C. 6:3-2.7(a)(4)*).

13 We acknowledge the sensible exception in *N.J.A.C. 6A:32-7.6(a)(4)(i)* exempting notice where the parent is a party to a court proceeding involving child abuse or dependency matters. *See also 20 U.S.C.A. § 1232g(b)(2)(B)*.

Although the three-day parental notice period is not mentioned within the other portions of the *Title* 6A regulations where access may be provided to authorized requestors such as bona fide researchers, we conclude that such notice should be supplied in all situations. Doing so would carry out the objectives of the NJPRA to achieve "reasonable privacy" and help avoid the inadvertent disclosure of a child's identity.

To be sure, it is not our role in this appellate opinion to micro-manage the precise manner in which the redaction process is conducted. **[*52]** In particular, we do not resolve at this time whether the substantial special services charge quoted by the Parsippany-Troy Hills district of nearly six figures is reasonable and justified. Instead, if any right of access is established, an evidentiary hearing must be conducted on remand in the trial court to develop the record further on that issue, and to enable that court[14] to make a more informed ruling.

14 We recognize that the Morris County judge who approved the special services charge is now retired.

E.

The GRC's administrative decision in *Popkin, supra*, is partially but not fully consistent with our overall analysis. The complainant in *Popkin* filed an OPRA request with a school board, seeking records that would reveal the dollar amount that the school district paid in public funds to settle a disabled student's claim for services. The school board declined to turn over the requested documents, deeming them confidential "student records" protected under the NJPRA and its associated regulations. The school board also asserted that disclosing a redacted version of the documents containing only the settlement amount, but not the specifics of the student's disability and the services the student

needed, could be misconstrued and hamper the board's ability to settle future cases.

The GRC agreed with **[*53]** the school board's position in *Popkin*, concluding that the requested documents were "student records" within the definition of *N.J.A.C. 6A:32-2.1*, because the documents "related to" an individual student and had been "gathered" and "maintained" by the district. The GRC also held that the complainant, who was apparently not the parent or guardian of the student whose case had settled, was not an "authorized person" listed in the subsections *N.J.A.C. 6A:32-7.5(e)(1)* through (16) entitled to access the records. The GRC further pointed out that OPRA expressly states that it "shall not abrogate any exception of a public record or government record from public access . . . pursuant to . . . [a] regulation promulgated under the authority of any [other] statute." *See N.J.S.A. 47:1A-9(a)*.

For the reasons we have already stated, we concur with the GRC's reasoning in *Popkin* that copies of a school district's settlement agreements with disabled students, even if redacted, nonetheless comprise "student record[s]" under *N.J.A.C. 6A:32-2.1* and protected under the NJPRA. However, the GRC was not asked in *Popkin* to consider, as here with respect to Innisfree, whether the requestor was a bona fide researcher. Nor did the GRC address whether the "court order" pathway under *N.J.A.C. 6A:32-7.5(e)(15)* could make the **[*54]** document available to a requestor who chooses the procedural option under OPRA of litigating a record request dispute in the Superior Court rather than before the GRC, an administrative tribunal. *See N.J.S.A. 47:1A-7*. Moreover, the GRC is confined to the terms of the OPRA statute and has no jurisdiction over common-law claims of a right of access. *Ciesla v. N.J. Dep't of Health & Senior Servs., 429 N.J. Super. 127, 146-48, 57 A.3d 40 (App. Div. 2012)*. Hence, those two discrete legal issues, which we are remanding to the trial court, were not addressed in *Popkin*.

F.

We need not resolve at this time the outstanding issues of counsel fees and costs. For one thing, plaintiffs' status as the ultimate prevailing parties in the Cherry Hill, Hillsborough, and Parsippany-Troy Hills cases has not been established. Moreover, additional legal work will no doubt be performed by counsel on remand. Consequently, it is premature to decide fee-shifting issues on these appeals.

We are satisfied, however, that a student or his or her parent, guardian, or authorized legal representative is entitled, subject to the child abuse and dependency caveats in *N.J.A.C. 6A:32-7.6(a)(4)(i)*, to reasonable and prompt access to unredacted copies of his or her own records and access logs, assuming they do not incidentally mention or identify other students. In that **[*55]** regard, we agree with the trial court in Camden City that attorney Epstein sufficiently exhibited his status as L.R.'s representative in seeking her child's records. The district's insistence that Epstein sign its own self-created release form containing a liability release was excessive and unreasonable.

We therefore affirm the Camden County judge's decision relating to J.R.'s own records and access logs, consistent with the terms of the NJPRA, OPRA, and FERPA. However, the balance of the issues posed in that case, which concern efforts by L.R. to obtain letters, memos, correspondence, emails, and other documents that refer to J.R., but which conceivably could also refer to or identify other students,[15] must be reexamined on remand, in light of the generic guidance we have provided in this opinion on substantive issues and in interpreting the regulatory framework.

> 15 For instance, the school district files might contain a memo that lists the special-needs children, including J.R., who take the same designated bus to and from school or perhaps to an outside activity. Or perhaps the district's records may include a narrative of J.R.'s activities in the classroom on a particular day and J.R.'s interactions with other named children. The realistic possibility that personal identifying information about such other students might be disclosed in the records, absent meticulous redaction, requires close scrutiny on remand, with appropriate notice given to the parents or guardians of such other children that may be mentioned in the records. In light of the time and effort such redaction could entail, L.R. is free on remand to withdraw or modify her outstanding requests in the Camden City case.

G.

As a parting subject, we encourage the New Jersey Department of Education to consider formulating "best practices" guidance - perhaps expanding or revising the existing regulations - to address the myriad issues of implementation that have been presented by these four cases. We rejected Innisfree's eleventh-hour contention **[*56]** it raised on the eve of the scheduled appellate oral argument that the Department was an indispensable party, and that these appeals should have been re-calendared with a mandate for the Department's (or Attorney General's) participation.[16] Even so, we presume the Department, which we were advised by Innisfree's counsel had been supplied with courtesy notice of these appeals and did not thereafter move to intervene or participate, will be guided by this precedential opinion accordingly.

16 We note that no pleading or brief in this case has challenged the Department of Education's records access regulations as *ultra vires* or otherwise invalid, an argument that would have required service of a formal notice upon the Attorney General much earlier in the litigation. *See R. 4:28-4(a)(1)*; *see also R. 2:5-1(h)* (requiring such notice to be served five days after the filing of the notice of appeal).

IV.

For these various reasons, the order compelling turnover in Cherry Hill (A-3066-15) is vacated and remanded for further proceedings, and the order denying turnover in Hillsborough (A-4214-14) is affirmed in part, but without prejudice to Innisfree establishing access rights on remand on the alternative grounds that we have suggested under *N.J.A.C. 6A:32-7.5(e)(15)* or (16). The order granting access to L.R. in Parsippany-Troy Hills (A-4214-14) is also vacated and remanded for further proceedings, including, if access is approved, an evidentiary hearing on the projected reasonable costs of redaction.

The orders in Camden City (A-3972-14) are affirmed in part, solely as to the release of J.R.'s own records, **[*57]** but that case is remanded for further proceedings regarding access to records that mention or could identify other students.

To achieve consistency, we direct that venue for all four remanded cases be transferred to the Camden vicinage, where two of these four cases originated. We realize that doing so may pose some inconvenience to some of the litigants from the Somerset County and Morris County cases. Nonetheless, consolidation of all four "test" cases within the same vicinage before a single judge will have the advantages of efficiency and uniformity.

Lastly, because we readily appreciate that one or more parties may pursue Supreme Court review of our decision, we stay this opinion, *sua sponte*, for thirty days. If a petition for certification or motion for leave to appeal is filed with the Supreme Court by any party in any of these four cases before that thirty-day period lapses, the automatic stay shall remain in force until such time as the Supreme Court may otherwise direct. We hope that preserving the status quo in such a manner, pending the Court's anticipated review, will minimize disruption and avoid the harmful consequences of any improvident interim disclosures.

All four appeals **[*58]** are consequently remanded, in accordance with the terms of this opinion. We do not retain jurisdiction.