
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NUMBER A-001195-22

C.E. and B.E., individually and on behalf of, K.E., Plaintiffs/Appellants

-against-

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/Appellees

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ON APPEAL FROM AN ORDER ENTERED BY THE HONORABLE DANIEL R. LINDEMANN, JSC IN THE SUPERIOR COURT OF NEW JERSEY UNION COUNTY - CIVIL DIVISION DOCKET NUMBER UNN-L-002231-15

BRIEF of C.E. and B.E. o.b.o. K.E. - Pb1-Pb36

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I. PRELIMINARY STATEMENT

This case returns to this Court after it affirmed Judge Hely's 8/28/20 final order (8a) and held public school student records, not under a protective order, submitted in judicial proceedings, are subject to public access under the Open Public Records Act. *C.E. v. Elizabeth Public School Dist.*, 472 N.J. Super. 253 (App. Div. 2022)(21a). On this appeal, the parties' appellate positions are reversed, with Plaintiffs the Appellants (hereinafter "K.E.") and Defendants the Appellees (the "Board"). The errors addressed occurred after Judge Hely's final order was affirmed on 5/18/22 and K.E. sought enforcement. Judge Hely's replacement, Judge Lindemann, entered orders which: (1) denied K.E. access to all ordered records, (2) denied post-judgment interest on $78,646 awarded attorney's fees the Board held for over two years, (3) failed to award attorney's fees after granting the enforcement, and (4) failed to order an OPRA civil penalty.

Judge Lindemann first entered a 9/25/20 Stay Pending Appeal Order (10a) of Judge Hely's final order (8a). Yet, two months after the stay was dissolved by

this Court's 5/18/22 affirmance (22a), the Board had not complied with the final order (8a). From 7/18/22 to 11/25/22, K.E. filed multiple motions (1a, 68a, 187a, 194a) for enforcement, interest and sanctions. Of great concern was Judge Lindemann, in disregard of the inadequacy of the Board's alleged records search, held that the Board was excused from providing K.E. access to 9 of 33 of the affirmed order's records.

Judge Lindemann, in error, also held (64a) the Board was only required to pay $338.80 interest for 40 days instead of $4,964.53 interest on the additional 698 days the $78,646 attorney's fee award was stayed and was collecting interest in the Board's bank account (180a). Judge Lindemann, in error, also held, despite K.E. successfully enforcing the final order, K.E. was not entitled to prevailing party attorney's fees (249a). In error, he also refused to order an OPRA civil penalty against the Board (191a). Finally, Judge Lindemann, in error, granted the Board's motion for a Warrant in Satisfaction of Judgment(249a), despite the fact Judge Lindemann found the Board had not provided

access to all records ordered in the 8/28/20 final order (8a).

On this appeal, K.E. respectfully requests this Court find Judge Lindemann abused his discretion and remand for appropriate relief from his orders below:

1. The granted Warrant of Satisfaction of Judgment shall be vacated and further proceedings shall be held regarding the missing portions of the 11 students' records and in furtherance of compelling the Board fully comply with the affirmed 8/28/20 final order;

2. The denial of interest from 8/28/20 to 7/20/22 on the stayed $78,646 attorney's fee order is reversed and a new award of interest shall be entered on remand;

3. The denial of K.E.'s prevailing party attorney's fees for the enforcement is reversed and the amount of an award shall be determined on remand; and

4. A civil penalty shall be assessed against the Board on remand for failure to comply with the 8/20/20 final order after it was affirmed on 5/18/22.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. STATEMENT OF FACTS

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 to present, all settlements entered into by the school board in the New Jersey Office of Administrative Law EDS docketed cases. 2. Any final decisions incorporating or pertaining to item #1. 3. May 1, 2014, any purchase orders, vouchers, bills, invoices and canceled checks for payment(s) made for legal services rendered to the board in regards to an . . . OPRA request of May 17, 2014, and the subsequent civil action . . . . 4. Any board resolution(s) which refer(s) to item #1. (12a-13a, 5/18/22 A-0173-20 Opinion)

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 response to the third and fourth requests. (13a, 5/18/22 A-0173-20 Opinion)

B. PROCEDURAL HISTORY

1. PRE-FIRST APPEAL AND APPEAL[1]

On 12/18/15, the judge granted K.E.'s requested relief and prevailing party attorney's fees. (14a) On 8/7/15, the judge granted the Board's motion to stay pending the outcome in *L.R. v. Camden City Public School District (L.R. I)*, 452 N.J. Super. 56 (App. Div. 2017). (14a) This case was then further stayed by *L.R. v. Camden City Public School District (L.R. II)*, 238 N.J. 547 (2019)(14a) This case, like all the other consolidated *LR* cases, were then remanded to Camden Vicinage. However, this case because it was found to be distinguishable from the other cases, was then severed and sent back to Union County. (14a)

2. PRE-SECOND APPEAL

On 5/22/20, Judge Hely held K.E. was distinguished from *L.R.* and was entitled to access to the requested IDEA final administrative decisions incorporating

[1] 1T:8/26/22; 2T:11/10/22; 3T:12/16/22

settlement agreements not subject to a protective order. 34 *C.F.R.* § 300.513(d) and *Keddie v. Rutgers*, 148 N.J. 36, 689 A.2d 702 (1997) (15a) The Board maintained they were still entitled to a $105,000 special service charge to search their special education student's records for the requested records. (16a) However, K.E. obtained the case activity sheets from NJOAL for the Board which identified 11 students with final decisions responsive to the records sought in K.E.'s OPRA Request. (16a) Judge Hely (while expressing his disdain for the Board's conduct) denied the $105,000 special service charge after finding the Board's attorney not only knew which cases had the responsive records but held the litigation files. (17a) On 8/28/20, Judge Hely awarded K.E. Prevailing party attorney's fees and costs in the amount of $78,646. (17a)

C. SECOND APPEAL

This Court affirmed Judge Hely and held he correctly ruled the Office of Administrative Law IDEA Orders incorporating settlement agreements, sought by K.E. under the OPRA, were required to be made public.

34 *C.F.R.* § 300.513(d)(2). Furthermore, Judge Hely was also correct because the student records here were submitted to the tribunal without a protective order they were additionally public records pursuant to *Keddie v Rutgers,* 148 N.J. 36, 51 (1997). When the Board settled with parents or guardians pursuant to their IDEA claims in the OAL, and failed to obtain protective orders, these documents became judicial filings and were subject to public access. (20a-21a)

This Court next addressed the appeal of the Board's appeal of the 8/28/20 Order to pay K.E. $78,646 in attorney's fees. (22a) This Court affirmed stating Judge Hely did not err in determining K.E. was the prevailing party and awarding attorney's fees. This Court agreed, K.E. obtained a judgment against the Board on the merits requiring the Board to give access to the requested records and caused the Board to modify their denial of access behavior to directly benefit K.E. by giving K.E. access.

On 7/26/22, this Court granted K.E.'s motion (MOTION NO. M-005320-21) for attorney's fees on the appeal. N.J. Court Rules, R. 2:11-4

D. THIS APPEAL - PRE-APPEAL

This pre-appeal number three appeals activity that occurred from the date of K.E.'s 7/18/22 motion (1a) to enforce the affirmed 8/28/20 Order (8a) to the date of 12/16/22 final orders (246a, 249a). Despite the fact on 5/18/22, this Court's opinion (12a) affirmed the 8/28/20 final order (8a) and it was no longer stayed, another two months passed and the Board had still not complied with the final order (8a). Specifically, as per K.E.'s 7/18/22 motion to enforce (1a), the Board failed to give K.E. the affirmed ordered access to the decisions, settlements and Board Resolutions for each of the 11 students (4a, motion to enforce certification). Additionally, the Board failed to pay K.E. the affirmed 8/28/20 ordered $78,646 prevailing party attorney's fee.

On 7/18/22, K.E. brought a motion to enforce, for interest on the $78,646 the Board held for two years and sanctions (1a). Interest had accrued on attorney's fees totaling $4,964.53 broken down to 4 months in 2020 @ 4.5% = $1,179.69 interest; 12 months in 2021 @ 3.5 = $2,752.61 interest; and 2022 @ 2.25% = $4.84/day

interest.(78a) On 7/20/22, K.E. also filed a $78,646 judgment against the Board on the 8/28/20 final order. (43a) On 8/1/22, Defendants filed its opposition to K.E.' motion to enforce. (44a)

Judge Lindemann did not hear oral argument on K.E.'s motion until 8/26/22 over three months after the 8/28/20 order was affirmed by this Court. (21a) By the date of the hearing, the total interest accrued was $5,111.99. (1T5:14-17) At this hearing, the Board speciously asserted noncompliance occurred because of the need for a warrant to satisfy judgment. (1T6:17-18) Further the Board asserted that in addition to a warrant to satisfy judgment, the Board asked the court for W-9 statements to release funds and records. (1T8:12-15) On August 29, 2022, the lower court entered an order (60a) stating that the Board shall submit a certification as to their compliance with the August 28, 2020 order within seven days of this order. The Order denied most of K.E.'s relief they requested in their motion and proposed order. The lower court issued an opinion (61a), in support of its order.

Additionally the lower court ordered K.E. to submit a proposed order for post-judgment interest. (60a) On August 31, 2022, K.E. filed its amended proposed order under the Five Day Rule seeking payment of post-judgment interest in the amount of $5,111.99. (1T:8/26/22 4:17)(66a)

On 8/29/22, Judge Lindemann ordered (60a) the Board file a Certification confirming their compliance with the 8/28/20 Order (8a) and K.E. submit a proposed order (66a) for the amount of interest the Board owed K.E.. However, Judge Lindemann in his 8/29/22 Opinion (61a) and 9/16/22 Order (180a) held K.E. was not entitled to interest on the $78,646 stayed fee award held by the Board from 8/28/20 to 7/20/22, but only from 7/20/22 to 8/29/22. The Judge denied all the other requested enforcement relief.

Not until 9/6/22, almost four months after the final order was affirmed, did the Board finally begin to comply with the final order to give K.E. access to the OPRA records (74-75a). On said date, the Board gave K.E. access to 24 of the 33 ordered records (77a, ¶38). To said date, the Board also had neither paid the twice

ordered $78,646 attorney fee, nor the 8/29/22 ordered uncontested interest amount of $338.00 (77a,¶39).

On September 13, 2022, K.E. filed their order to show cause (79a) due to the Board' failure to comply with the affirmed 8/28/20 (8a) and 8/29/22 (60a) court orders, imposition of monetary sanctions and civil penalty, and the omitted OPRA records.(68a-69a) Said monetary sanctions were now sought for defendant's failure to comply with the 8/29/22 Order (80a). Said civil penalty was sought for defendant's knowing and willful violation of N.J.S.A. 47:1A-11 (80a). Additionally, K.E. sought the filing of a certification from Defendant/Record Custodian Harold Kennedy, Jr. attesting to the Board compliance with the 8/28/20, 9/25/20, and 8/29/22 court orders. (74a)

On November 10, 2022, the lower court executed K.E.'s order to show cause (187a) and the lower court held oral argument. On November 10, 2022, the Court denied K.E.'s order to show cause. (191a) According to the transcript, the lower court denied the order to show cause because of procedural flaws pursuant to Rule 4:67-2(a). (2T:11/10/22 35:12-13)

On November 15, 2022, K.E. refiled their order to show cause as a motion (194a) as required by Judge Lindemann. Said motion sought to enforce the prior court orders and find that Plaintiffs were the prevailing party on their motions. (see proposed order, 195a) Further, K.E. motion correctly asserted that the Board failed to comply with the outstanding OPRA requests and August 29, 2022 order for Certification of compliance. (202a) As summarized by paragraph 38:

> In summary, Defendants have failed to give Plaintiffs access to the following 9 of 33 ordered records: EDS02980- 2013 Decision; EDS08395-2013 Decision; EDS13153-2013 Resolution; EDS14420-2013 Resolution; EDS15625-2013 Resolution; EDS16243-2013 Resolution; EDS11571-2014 Resolution; EDS12582-2014 Settlement and EDS12582-2014 Decision

On November 25, 2022, the Board filed its cross motion for a protective order quashing K.E.' deposition notice on Harold Kennedy, Jr. and an entry for satisfaction of judgment against Elizabeth Public School District (208a). The Board argued that their search resulted in no more documents or settlement agreements or decisions (215a). Additionally, the Board asserted that [untimely] payment of attorney's fees and interest had been submitted to K.E.' counsel (225a).

On 12/16/22, the Court entered an order denying K.E.' motion to enforce (246a) and granted the Board' cross motion (249a). According to the transcript, the lower court's noticed that it is undisputed that nine records requested by K.E. have not been received. (3T: 12/16/22 15:17-20) However, Judge Lindemann incorrectly found the reasons for denying the relief K.E.'s requested in their motion was based on his erronous assumption that the Board has shown a reasonable, good faith effort to be in compliance with all orders and that the record fails to demonstrate the requisite intent for purposes of the relief sought by K.E. for contumacious conduct and failure to comply with orders. (3T:12/16/22 15:15-17) (3T:12/16/22 16:2-6)

Judge Lindemann, in further error, stated the reason for granting defendant's relief they requested in their cross motion was that the requisite efforts and compliance presented were sufficient to grant the cross application for entry of the warrant and satisfaction. (3T:12/16/22 17:3-13).

On January 9, 2023, K.E. filed its amended notice of appeal with this Court seeking to reverse the three post-judgment orders. (251a)

ARGUMENT

A. STANDARD OF REVIEW

The policy of our State regarding access to public records is if there is any reasonable interpretation of the law that permits access, then access must be granted. N.J.S.A. 47:1A-1 (requiring that all restrictions on access to records beinterpreted narrowly and in favor of access).

A "trial court's determinations with respect to the applicability of OPRA are legal conclusions subject to *de novo* review." *K.L. v. Evesham Tp. Bd. of Educ.*, 423 N.J. Super. 337, 349 (App. Div. 2011), cert. denied, 210 N.J. 108 (2012). Thus, no deference is afforded to the trial court's findings. *Newark Morning Ledger Co v. N.J. Sports & Exposition Auth.*, 423 N.J. Super. 140, 159 (App. Div. 2011). This Court "also conduct[s] plenary review of the trial court's legal conclusion that a privilege exempts the requested records from disclosure." *K.L.*, 423 N.J Super. at 349.

The purpose of OPRA is to "maximize public knowledge about public affairs in order to ensure an informed citizenry and to minimize the evils inherent in a secluded process." *Asbury Park Press v. Ocean County Prosecutor's Office*, 374 N.J. Super. 312, 329 (Law Div. 2004); *See, N.J.S.A.* 47:1A-1. "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. "[W]ithout access to information contained in the records maintained by public agencies, citizens cannot monitor the operation of our government or hold public officials accountable for their actions." *Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities*, 208 N.J. 489, 501 (2011).

N.J.S.A. 47:1A-5(i) deems that a Custodian's failure to respond with all records compliant with a request as a denial of OPRA. OPRA explicitly puts the burden on the Custodian to prove that a denial is lawfully justified. *N.J.S.A.* 1A-6. Courts have repeatedly found that unlawfully providing redacted

documents can also result in a denial of OPRA and, in order to redact lawfully information, it must fall under one of the exceptions of OPRA. *Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth.*, 423 N.J. Super. 140, 148 (App. Div. 2011); *N.J.S.A.* 47:1A-5(g).

When attempting to utilize any exemption, "a public 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." *Courier News v. Hunterdon County Prosecutor's Office*, 358 N.J. Super. 373, 382-83 (App. Div. 2003). "The reasons for withholding documents must be specific." *Newark Morning Ledger Co.*, 423 N.J. Super. at 162. Courts will "simply no longer accept conclusory and generalized allegations of exemptions ... but will require a relatively detailed analysis in manageable segments." *Loigman v. Kimmelman*, 102 N.J. 98, 110 (1986) (internal quotation marks and citation omitted). "Absent such a showing, a citizen's right of access is **unfettered.**" *Courier News*, 358 N.J. at 383 (emphasis added).

Trial court judges are afforded wide discretion in deciding many of the issues that arise in civil cases (including relief to the litigant and decisions on sanctions). Appellate courts review those decisions for an abuse of discretion. "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" See *US Bank Nat. Ass'n v. Guillaume*, 209 N.J. 449, 38 A. 3d 570 at 467-68 (2012) quoting *Iliadis v. WalMart Stores,Inc.*, 191 *N.J.* 88,123 (2007)(quoting *Flagg v. Essex Cnty. Prosecutor*, 171 *N.J.* 561, 571 (2002)). *State v. Chavies*, 247 N.J. 245, 257 (2021). "[A] functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue." *State v. R.Y.*, 242 N.J. 48, 65 (2020) (quoting *Flagg v. Essex Cnty. Prosecutor*, 171 N.J. 561, 571 (2002)).

When reviewing a decision related to the relief to a litigant, *Rule* 1:10-3 provides in part that "notwithstanding that an act or omission may also constitute a contempt of court, a litigant in any

action may seek relief by application in the action." The Rule is "a device to enable a litigant to enforce his or her rights." I*n re Adoption of N.J.A.C. 5:96 & 5:97*, 221 N.J. 1, 17 (2015). It provides a "means for securing relief and allow[s] for judicial discretion in fashioning relief to litigants when a party does not comply with a judgment or order." *N. Jersey Media Grp., Inc. v. State, Off. of Governor*, 451 N.J. Super. 282, 296 (App. Div. 2017) (alteration in original) (quoting *In re Adoption of N.J.A.C. 5:96 & 5:97*, 221 N.J. 1, 17-18 (2015)).

The Appellate Division reviews an order entered under *Rule* 1:10-3 under an abuse of discretion standard. *N. Jersey Media Grp., Inc. v. State, Off. of Governor*, 451 N.J. Super. 282, 296 (App. Div. 2017). Similarly, decisions on sanctions imposed for violating a court order is addressed to the discretion of the trial judge. *Kornbleuth v. Westover*, 241 N.J. 289, 300 (2020); *Williams v. Am. Auto Logistics*, 226 N.J. 117, 128 (2016); *Gonzalez v. Safe & Sound Sec.*, 185 N.J. 100, 115 (2005); *State v. Wolfe*, 431 N.J. Super. 356, 363 (App. Div. 2013).

"Excusable neglect" may be found when the default was "attributable to an honest mistake that is compatible with due diligence or reasonable prudence." See *US Bank Nat. Ass'n v. Guillaume*, 209 N.J. 449, 38 A. 3d 570 at 468-69 (2012) quoting *Mancini, supra,* 132 *N.J.* At 335; *see also Baumann, supra,* 95 *N.J.* at 394(stating that "mere carelessness or lack of proper diligence on the part of an attorney is ordinarily not sufficient to entitle his clients to relief from an adverse judgment" (quotation omitted)).

Last, all error, including both plain error and harmful error, is tested by the standard set forth in *Rule* 2:10-2, that is, as set forth above, whether the error is "clearly capable of producing an unjust result." See *Pressler & Verniero, Current N.J. Court Rules*, cmt. 2.1 on R. 2:10-2 (2022). *Rule* 2:10-2 provides that "the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court." This means that even when no party to the appeal raises a particular issue, the appellate court may raise it "where upon the total scene it is manifest that justice

requires consideration of an issue central to a correct resolution of the controversy and the 21 lateness of the hour is not itself a source of countervailing prejudice." *Ctr. for Molecular Med. & Immunology v. Twp. of Belleville*, 357 N.J. Super. 41, 48 (App. Div. 2003) (quoting *In re Appeal of Howard D. Johnson Co.*, 36 N.J. 443, 446 (1962)). *See Fitzgerald v. Stanley Roberts, Inc.*, 186 N.J. 286, 318 (2006); *Morales-Hurtado v. Reinoso*, 457 N.J. Super. 170, 191 (App. Div. 2018), *aff'd o.b.*, 241 N.J. 590 (2020)

1. IT WAS ERROR TO GRANT THE BOARD'S CROSS-MOTION FOR A PROTECTIVE ORDER AGAINST DISCOVERY AND A WARRANT FOR SATISFACTION OF JUDGMENT BECAUSE THE BOARD FAILED TO COMPLY WITH THE 8/20/20 FINAL ORDER TO GIVE K.E. ACCESS TO ALL THE RECORDS. (THE ISSUE WAS RAISED IN 12/16/22 ORDER (249A) GRANTING THE BOARD'S CROSS-MOTION (208A))

On 11/25/22, the Board motioned (208a) for a Warrant of Satisfaction of the 8/20/20 final order. The Appellate Division reviews a *Rule* 1:10-3 Order under an abuse of discretion standard when reviewing the Court's granting or denying of a motion related to when a party does not comply with a judgment or order." *N. Jersey Media Grp., Inc. v. State, Off. of Governor*, 451 N.J. Super. 282, 296 (App. Div. 2017) (alteration in

original) (quoting *In re Adoption of N.J.A.C. 5:96 & 5:97*, 221 N.J. 1, 17-18 (2015).

Here, as of today, the Board has still not complied with the August 20, 2020 Final Order (8a). Despite their non-compliance, the Lower Court has issued an order granting the Board Motion for a warrant for satisfaction of judgment (249a). "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" See *US Bank Nat. Ass'n v. Guillaume*, 209 N.J. 449 at 467-68 (2012) quoting *Iliadis v. WalMartStores, Inc.*, 191 *N.J.* 88, 123 (2007)(quoting *Flagg v. Essex Cnty. Prosecutor,* 171 *N.J.* 561, 571 (2002)). *State v. Chavies*, 247 N.J. 245, 257 (2021). "[A] functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue." *State v. R.Y.*, 242 N.J. 48, 65 (2020) (quoting *Flagg v. Essex Cnty. Prosecutor*, 171 N.J. 561, 571 (2002)).

There are no rational explanations, or impermissible basis, or good reasons to support a

finding that the Board has complied with the August 20, 2020 Final Order because they have failed to provide the documents they were ordered to provide. This decision inexplicably departs from established policy and ignores the facts of this matter. It is an undisputed material fact the Board has failed to give K.E. access to the 11 student records as ordered on 8/28/20 and affirmed by this Court on 5/18/22. And Judge Lindemann so found (3T:12/16/22 15:17-20) As summarized by Plaintiffs' Certification paragraph 38 (202a):

> In summary, Defendants have failed to give Plaintiffs access to the following 9 of 33 ordered records: EDS02980- 2013 Decision; EDS08395-2013 Decision; EDS13153-2013 Resolution; EDS14420-2013 Resolution; EDS15625-2013 Resolution; EDS16243-2013 Resolution; EDS11571-2014 Resolution; EDS12582-2014 Settlement and EDS12582-2014 Decision

Furthermore, the Board, at no time prior to the entry of the 9/25/22 Order enforcing the 8/28/20 Order did the Board even care to disclose that 9 of the 33 records were unaccounted for. (3T:12/16/22 4:1-22) Nor did the Board comply with the Judge Lindemann's order to diligently search for the 9 missing records. Judge Lindemann's declined to order the Board to provide the

mandatory *Paff v Department of Labor*[2], record's search certification.(3T:12/16/22 5:3-16) In response to the Board's self serving allegation they could not locate the missing records (3T:12/16/22 5:25-6:16), K.E. requested to take discovery of the Board in general and the record custodian in particular. (3T:12/16/22 6:18-6:25) Furthermore, the Board failed to inquire of the New Jersey Department of Education, who because they achieve the final administrative decisions is an untapped source for the Board could to recover the missing records. (3T:12/16/22 7:13-25) Furthermore, the Board did not even search the very students' records who were the subject of the settlements that the OPRA was based on. This Court may remember in the prior appeal, the fact the Board had requested a

[2]. *Paff v. N.J. Dep't of Labor*, 392 N.J. Super. 334, 341 (App. Div. 2007)("With respect to future requests, however, the agency to which the request is made shall be required to produce sworn statements by agency personnel setting forth in detail the following information:(1)the search undertaken to satisfy the request;(2) the documents found that are responsive to the request; (3) the determination of whether the document or any part thereof is confidential *and* the source of the confidential information; (4) a statement of the agency's document retention/destruction policy *and* the last date on which documents that may have been responsive to the request were destroyed. The sworn statement shall have appended to it an index of all documents deemed by the agency to be confidential in whole or in part, with an accurate description of the documents deemed confidential.")

$105,000 service fee to search the students' records for the settlement records[3].

Judge Lindemann then proceeds to put his inadequate reasons for his findings on the record (3T:12/16/22 15:11-17:2). He makes no findings of fact at all and just makes excuses for the Board's failure to comply with the affirmed 8/28/20 Order of his predecessor, Judge Hely. Judge Lindemann states he is, "satisfied with the record presented by the defendant that the requisite efforts necessary, the diligence and efforts necessary to be in compliance have been presented". However, his findings of fact are severely deficient because he ignores the fact the Board failed to even search the student's records. Additionally, he makes no findings in support of his granting the Board's protective order (249a) and prohibiting any discovery regarding the missing 9 records.

[3]. "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 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]." *C.E. v. Elizabeth Pub. Sch. Dist.*, 472 N.J. Super. 253, 261 (App. Div. 2022)

This Court should vacate the 12/16/22 Order (249a) and permit K.E. to take discovery of the Board as to the whereabouts of missing 9 records.

2. IT WAS ERROR TO DENY K.E. PRE-JUDGMENT AND POST-JUDGMENT INTEREST FROM THE DATE OF THE 8/20/20 FINAL ORDER TO THE DATE OF THE 7/20/22 JUDGMENT AND INSTEAD ONLY ORDER INTEREST FROM THE DATE OF THE JUDGMENT TO DATE OF THE 8/29/22 FINAL ORDER. (THE ISSUE WAS PREVIOUSLY RAISED BY K.E.'S MOTION TO ENFORCE (1A) AND IN THE 9/16/22 EXECUTED ORDER (180A)

The 8/28/20 final order (8a) required the Board to pay K.E. $78,646. By Order of 9/25/20 (10a), the Board obtained a stay pending appeal of the 8/28/20 final order. On 5/18/22, this Court affirmed the lower court (12a) and the stay was dissolved. However, the Board failed to pay the ordered $78,646. On 7/18/22, Plaintiffs brought an enforcement action returnable 8/29/22 (1a) for the $78,646 plus interest. On 7/20/22, K.E. filed a $78,646 judgment (43a) against the Board. By Order of 8/29/22 (60a), the lower court ordered the Board comply with the 8/28/20 Order and to pay the $78,646 within 7 days (which the Board failed to do[4]). Regarding the K.E. motion for post-judgment interest on the $78,646 from the date of the 8/28/20 final order to the compliance date the lower court, in error, only

[4] See 9/13/22 certification (74a) at paragraph 13.

ordered interest from 7/20/22 to 8/29/22. In its decision (64a), the lower court, in error, held K.E. was only entitled to interest from the date the judgment was docketed and ignored the date the final order was entered on 8/28/20. The lower court somehow held as a matter of law the 7/20/22 filing of the $78,646 judgment somehow retroactively vacated the filing of the final order on 8/28/20 dissolved it being subject to post-judgment interest under *R.* 4:42-11(a).

The lower court, in error, relied on *Baker v. Nat'l State Bank*, 353 N.J. Super. 145, 173-174 (App. Div. 2002). But our case was a post-judgment interest case, unlike *Baker* which was a pre-judgment interest case. A pre-judgment interest case allows in "exceptional cases" the suspension of the pre-judgment interest which unlike post-judgment interest is awarded automatically. *Id.* 176 However, even *Baker* held the K.E. was entitled to pre-judgment interest from the date of the jury verdict, that pre-judgment interest accrues while a there is a stay pending appeal and that Defendant failed to show it would be unfair to assess pre-judgment interest against it. *Id.* 176-177

K.E. was entitled to interest from the date of 8/28/20 final order to 8/29/22 because the Board deprived K.E. of the use of the $78,646 for two years. In a case against these same the Board, this Court held the K.E. was entitled to interest because as in our case, "Here, it is undisputed that the [Elizabeth] Board's actions prevented Nelson from the use of $260,026.88." *Nelson v. Elizabeth Bd. of Educ.*, 466 N.J. Super. 325, 345 (App. Div. 2021).

The *N.J. Court Rules, R.* 4:42-11, which applies to "orders" states in relevant part:

> (a) Post Judgment Interest. Except as otherwise ordered by the court or provided by law, judgments, awards and **orders** for the payment of money, taxed costs and attorney's fees shall bear simple interest as follows:
> (ii) ..the annual rate of interest shall equal the average rate of return, to the nearest whole or one-half percent, for the corresponding preceding fiscal year terminating on June 30, of the State of New Jersey Cash Management Fund (State accounts) as reported by the Division of Investment in the Department of the Treasury
> (iii) For judgments exceeding the monetary limit of the Special Civil Part at the time of entry: in the manner provided for in subparagraph (a)(ii) of this Rule until September 1, 1996; thereafter, at the rate provided in subparagraph (a)(ii) plus 2% per annum.(emphasis added)

In this case, the Board have been unjustly enriched while holding K.E.' $78,646 attorney's fees award since

it was ordered on 8/28/20 (APX 1). The calculation of the applicable interest rates to the 8/28/22 Order are as follows:

> Post Judgment Interest of $4,964.53 interest has accrued on the 8/28/22 $78,646 Order (APX 1) increasing it to $83,610.53 based on the following calculations:
>
> a. for 4 months in 2020 @ 4.5% = $1,179.69 interest (78646 X .045 = 3539.07, 3539.07/12 = 294.92 X 4 = 1179.69);
>
> b. for 12 months in 2021 @ 3.5% = $2,752.61 interest (78646 X .035 = 2752.61); and
>
> c. for 7 months in 2022 @ 2.25% = $1,032.23 interest (78646 X .0225 = 1769.54, 1769.54/12 = 147.46 X 7 = 1032.22).

As matter of law, K.E. is entitled to an award of Post Judgment Interest of $4,964.53 which has accrued on the $78,646 as per the 8/28/20 Order (8a) It was error for the lower court to deny K.E. interest from the date of the 8/28/20 final order and fail to follow *R.* 4:42-11(a) This Court should not only order the the Board to pay the $4,964.53 interest denied minus the $338.80 interest granted ($4,625.73) but this Court should also remand for an award of interest on the $4,625.73 unpaid interest since the 8/29/22 Order was entered.

3. IT WAS ERROR TO DENY K.E.'S ATTORNEY'S FEES DUE TO THE BOARD'S VIOLATION OF LITIGANT'S RIGHTS FOR FAILURE TO COMPLY WITH THE 8/20/20 FINAL ORDER AFTER IT WAS AFFIRMED ON 5/18/22. (THE ISSUE WAS RAISED IN K.E.'S 7/18/22 MOTION TO ENFORCE (1A), 9/28/22 ORDER TO

SHOW CAUSE (187A) AND 11/15/22 MOTION TO ENFORCE (194A))

As mentioned above, decisions on non-compliance and sanctions imposed for violating a court order is addressed to the discretion of the trial judge. Here, K.E. is the prevailing party and the Court failed to award attorneys fees to be paid by the Board. It was abuse of discretion for the lower court to deny K.E. prevailing party attorney's fees (246a) after the lower court in its 8/29/22 Order (60a) granted K.E.'s 7/18/22 motion to enforce the 8/28/20 Order (8a). The Lower Court has presented no rational explanations, or permissible basis, or good reasons to support a finding that the Board should not be required to pay attorney's fees for the violation of litigants' rights for failure to comply with the August 2020 Final Order (8a) after it was affirmed by this Court on 5/18/22 until "7 days after the date of the 8/29/22 Order" (60a). Defendants, however, even violated the 8/29/22 Order and did not pay the 8/28/20 ordered attorney's fees until 9/13/22[5].

"A trial court's award of attorney's fees is disturbed "only on the rarest of occasions, and then

[5] See 9/13/22 certification (74a) at paragraph 13.

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. Essex Cnty.* Prosecutor, 171 N.J. 561, 571 (2002) (quoting *Achacoso-Sanchez v.Immigr. & Naturalization Serv.*, 779 F.2d 1260, 1265 (7th Cir. 1985))."

The denial of an award of counsel fees to plaintiffs for successfully enforcing the affirmed final order (8a) was 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)). To correct this abuse of discretion, KE requests this Court reverse the denial of prevailing party attorney's fees for KE's successful enforcement mandate the lower court now enter an appropriate award.

4. IT WAS ERROR TO DENY A OPRA CIVIL PENALTY DUE TO THE BOARD'S INTENTIONAL VIOLATION OF OPRA FOR FAILURE TO COMPLY WITH THE 8/20/20 FINAL ORDER AFTER IT WAS AFFIRMED ON 5/18/22. (THE ISSUE WAS RAISED IN K.E.'S 7/18/22 MOTION TO ENFORCE (1A), 9/28/22 ORDER TO SHOW CAUSE (187A) AND 11/15/22 MOTION TO ENFORCE (194A))

The K.E. is entitled to the OPRA Civil Penalty, in accordance with N.J.S.A. 47:1A-11 and the Judge Lindemann's denial of such was an error and abuse of discretion. The Board presented no evidence that they did not "knowingly and intentionally" deny K.E. access to the requested OPRA records, in fact, all facts and procedural history support that the Board continuous knowingly and intentionally denied access to the requested records. The Board even failed to comply with the 8/29/22 Order (60a) requiring them to provide access to the requested records. The only possible rational explanation, inexplicably departed from established policies, or rested on an impermissible basis would be if there was some finding of excusable neglect, which is not evident here. The Board knew

exactly what records they were ordered to give K.E. access to since they were ordered to do so on 8/28/20 (8a).

"Excusable neglect" may be found when the default was "attributable to an honest mistake that is compatible with due diligence or reasonable prudence." *Mancini, supra,* 132 *N.J.* at 335; *see also, Baumann, supra,* 95 *N.J.* At 394 (stating that "mere carelessness or lack of proper diligence on the part of an attorney is ordinarily not sufficient to entitle his clients to relief from an adverse judgment". The Court has held excuses such as confusion or misinformation of "court process" requiring legal responses are not grounds for excusable neglect. See, *US Bank Nat. Ass'n v. Guillaume*, 209 N.J. 449 (2012). Here, there is no excuse for the Board's inaction and refusal to comply with the order and rules requiring them to provide access to the requested OPRA records. They have provided no examples or support to find that their continued refusal to comply with the prior Orders and rules were not intentional or consciously wrong. The Lower Court did not mention or consider the non-

compliance or offer any explanation on how it justifies the non-compliance in favor of the Board.

5. IT WAS ERROR TO DENY K.E. PREVAILING PARTY ATTORNEY'S FEES AFTER PREVAILING ON THE ENFORCEMENT MOTION AND AS THE CATALYST TO COMPEL THE BOARD TO COMPLY WITH 8/20/20 FINAL ORDER AND WITH THE 8/29/22 ENFORCEMENT ORDER. (THE ISSUE WAS RAISED IN K.E.'S 7/18/22 MOTION TO ENFORCE (1A))

OPRA allows a prevailing party to receive reasonable attorney's fees[6]. *N.J.S.A.* 47:1A-6. "The 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)).

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

[6] Argument 3 and 5 both argue it was error to deny K.E. attorney's fees. Argument 3 (pb29) argues an award was warranted as a sanction and Argument 5 argues an award was warranted as a catalyst to the Board's belated compliance.

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) (quoting *Teeters v. Div. of Youth & Fam. Servs.*, 387 N.J. Super. 423, 432 (App. Div. 2006)). Such action 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 (quoting *Warrington v. Vill. Supermarket, Inc.*, 328 N.J. Super. 410, 420 (App. Div. 2000)).

Here, it was error for the lower court to deny K.E. prevailing party attorney's fees because it was K.E.'s 7/18/22 motion (1a) to enforce resulted in the successful enforcement order (60a). The Lower Court abused its discretion when it denied the prevailing

party attorney's fees, as it denied such with out providing any rational explanation and it inexplicably departed from established policies. See *US Bank Nat. Ass'n v. Guillaume*, 209 N.J. 449, 38 A. 3d 570 at 467-68 (2012).

Here, the Board not only failed to comply with the 8/28/20 Order (8a) after it was affirmed on 5/18/22 (12a), but it continued to fail to comply after the 7/18/22 Motion to Enforce (1a) was filed two months later and then it failed to comply with the 8/29/22 Enforcement Order "within 7 days" (60a). It was only after the 9/13/22 Order to Show Cause was filed did the Board on 9/14/22 belatedly pay the $78,646 attorney fee award. (204a)

CONCLUSION

For all the foregoing reasons, K.E. requests that this Court reverse the orders of the lower court for: 1. denying a Paff Certification, further discovery and granting the satisfaction of judgment when the Board failed to comply with the 8/28/20 order and give K.E. access to the 9 records; 2. failing to order the Board to pay interest on the $78,646 ordered payment for all

but 40 days of the two years the Board held the $78,646; 3. failing to find the Board violated litigant's rights after granting K.E.'s motion to enforce the 8/28/20 Order; 4. failing to order a civil penalty after the Board failed to comply with the 8/28/20 after it was affirmed by this Court; and 5. failing to order to pay K.E.'s prevailing party attorney's fees after granting K.E.'s motion to enforce the 8/28/20 Order.

RESPECTFULLY SUBMITTED,
JAMIE EPSTEIN, ATTORNEY AT LAW

Jamie Epstein, Esq.

COHN LIFLAND PEARLMAN
HERRMANN & KNOPF LLP
BY: **/s/ Walter M. Luers**
Walter M. Luers, Esq.
A Member of the Firm

Attorneys for Plaintiffs/Appellants

C.E. AND B.E., INDIVIDUALLY AND ON BEHALF OF, K.E.,

Plaintiff,

v.

ELIZABETH PUBLIC SCHOOL DISTRICT AND HAROLD E. KENNEDY, IN HIS OFFICIAL CAPACITY AS SCHOOL BUSINESS ADMINISTRATOR/BOARD SECRETARY OF ELIZABETH PUBLIC SCHOOL DISTRICT,

Defendants.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-001195-22

Civil Action

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, UNION COUNTY

SAT BELOW:
HON. DANIEL R. LINDEMANN, J.S.C.
DOCKET NO.: UNN-L-2231-15

BRIEF IN OPPOSITION BY DEFENDANTS/RESPONDENTS ELIZABETH PUBLIC SCHOOL DISTRICT & HAROLD E. KENNEDY, JR.

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PRELIMINARY STATEMENT

This matter relates to an Open Public Records Act ("OPRA") request made to the Elizabeth Board of Education ("Board") in 2015 seeking special education records. At the time of the 2015 request, settlements of special education disputes, including those memorialized by an Administrative Law Judge, were considered confidential student records. The requested records were withheld by the Board as exempt from public disclosure requirements on that basis. In May 2022, the Appellate Division determined that settlement agreements resolving Individuals with Disabilities Education Act disputes that have been docketed in the Office of Administrative Law ("OAL") and final decisions incorporating or pertaining to those settlement agreements are subject to disclosure. The appellate court affirmed the 2020 trial court Order requiring production of the requested records and awarding attorney's fees.

Thereafter, the Defendants complied with all Orders entered in this matter. The Board disclosed all responsive records in its possession. While the Board did not produce a resolution, settlement agreement, and decision for each OAL docket number requested, the Records Custodian certified that he conducted a diligent search for the records. This included a thorough search of the Board's administrative offices and contacting outside counsel who represented the Board in special education OAL matters in 2013-2015. All responsive records which could be located

were provided to Plaintiffs. Plaintiffs are fully aware of the search undertaken for the records, which records were located, and which parts of the records were deemed confidential. There is simply no need for discovery and certainly no cause for the imposition of a civil penalty.

Moreover, Plaintiffs have been provided with all attorney's fees and interest awarded to them by the court. Therefore, the monetary judgment entered against the Defendants was properly satisfied. The Plaintiffs are not entitled to any additional award of attorney's fees or interest.

As all issues have been properly resolved, Plaintiffs' appeal is baseless. The trial court's Orders should be affirmed, and this matter should finally be closed.

COUNTERSTATEMENT OF PROCEDURAL HISTORY

The within matter was initiated by the Plaintiffs via Verified Complaint and Order to Show Cause on June 19, 2015 with respect to a request to Defendants pursuant to the Open Public Records Act (hereinafter referred to as "OPRA"), *N.J.S.A.* 47:1A-1 to -13, *et seq.* Specifically, the action sought access to copies of: "(1) all settlements entered into by the Board in NJOAL EDS docketed case from January 1, 2013 to present; (2) any final decisions incorporating or pertaining to item #1; (3) May 1, 2014, any purchase orders, vouchers, bills, invoices and canceled checks for payment(s) made for legal services rendered to the board in regards to LR

OPRA Request of 5/17/15 and the subsequent civil action of UNN-L-002585-14; and (4) any Board Resolution(s) which refers to items #1." Pa13.

After Plaintiffs initiated this action via Verified Complaint and Order to Show Cause, filed an Amended Complaint, and the parties briefed the matter, the Court dismissed Plaintiffs' Amended Complaint without prejudice for failure to have the Complaint verified by one of the Plaintiffs. Pa14. Following that dismissal without prejudice, on September 15, 2015, Plaintiffs filed a Second Amended Complaint that was properly verified pursuant to the court's October 23, 2015 Order. The Second Amended Complaint contains one count relating to OPRA. Pa14.

Defendants filed a motion to stay these proceedings because of other matters pending before the Appellate Division that the Defendants asserted were related to the legal issues raised in this case. Pa14. The trial court heard arguments on December 3, 2015. The trial court denied Defendants' motion to stay the proceedings and, in a formal Order filed on December 18, 2015, (1) ordered Defendants to produce all responsive settlement agreements and final decisions; (2) stayed disclosure of those documents pending appeal; (3) denied Plaintiff access to the requested unredacted attorney invoices; and (4) gave leave to Defendant to request a special service charge. The Court also held that Plaintiffs had partially prevailed but limited Plaintiffs' potential fee recovery to work performed after August 7, 2015, which was the date of the dismissal of this action without prejudice. Pa14.

On January 7, 2016, Plaintiffs filed a motion for an award of counsel fees. On January 28, 2016, Defendants filed a notice of appeal. That appeal was flagged by the Appellate Division as interlocutory. As a result, on February 12, 2016, Defendants filed a motion for leave to file an interlocutory appeal. On February 23, 2016, Plaintiff filed a cross-motion to dismiss the appeal. By an Order dated March 14, 2016, the Court denied Defendant's motion for leave to appeal and granted Plaintiff's cross-motion to dismiss the appeal. Pa14.

On June 9, 2016, Plaintiff re-filed their motion for counsel fees for work performed by them before both the trial court and the Appellate Division. Defendants cross-moved for the imposition of a special service charge. These motions were then carried, and the case was informally stayed while related matters were pending the Appellate Division. Eventually, the Appellate Division decided the consolidated appeal of *L.R. v. Camden City Public School District*, 452 N.J. Super. 56 (2017). Pa14. The plaintiffs in *L.R.* filed a Petition for Certification, which was granted on April 17, 2018. Pa14. This case was then formally stayed by Order of August 31, 2018, while the Supreme Court case remained pending. On July 17, 2019, the Supreme Court issued its decision in *L.R. v. Camden City Public School District*, 238 N.J. 547 (2019). That decision, from an equally divided court, affirmed the appellate decision. Pa14.

This case was then consolidated with 50 related cases from across the state under docket CAM-L-3902-15. Pa14. This matter was subsequently severed from the consolidated action by Order dated December 6, 2019 and venue was returned to Union County. Pa15. The matter was returned to Union County at Plaintiffs' request because the instant case only presented issues arising under OPRA and not the common law. The consolidated action related solely to common law issues. Pa15.

Once venue was returned to Union County, the parties submitted supplemental briefing to the trial court. Defendants argued that the OPRA case must be dismissed given the recent Supreme Court opinion mentioned herein. Hearings were held before the trial court on May 15, 2020, June 12, 2020, August 10, 2020, and August 28, 2020. Following the May 15 hearing, the Court issued correspondence containing a tentative conclusion. Pa15. The Honorable James Hely, J.S.C., held that the Plaintiff's OPRA request was "narrow" and that it was not covered by the appellate decision in *L.R. v. Camden City Public School District*, 452 N.J. Super. 56 (App. Div. 2017). Judge Hely found that the aforementioned opinion did not address settlements that went to the Office of Administrative Law ("OAL"). Judge Hely found that these records were public records subject to access under OPRA. Pa15.

An omnibus Order was entered on August 28, 2020 which reflected Judge Hely's decisions in this matter. Pa16. The Order required the production of copies of all decisions with settlements entered in the NJOAL EDS cases between 1/1/13 to 4/2/15, the denial of an OPRA special service charge, and the award of attorneys' fees and costs in the amount of $78,646.00. Pa8.

The Defendants then sought a stay of the August 28, 2020 Order pending appeal. On September 25, 2020, the trial court stayed the Order. Pa10. Defendants filed an appeal on September 17, 2020. On May 18, 2022, the Appellate Division issued an opinion affirming Judge Hely's decision. Pa12.

In July 2022, Plaintiffs filed a motion requesting the Court to enforce the terms of Judge Hely's Order, declare Defendants knowingly and intentionally unreasonably denied access to OPRA records, award attorney fees, pay post judgment interest and assess a civil penalty against the Defendants. Pa1. The Defendants opposed the motion. Pa4. While this motion was pending, an Order for Judgment was entered in the Civil Judgment and Order Docket in the Superior Court's Clerk Office as J-088720-22 on July 20, 2022. Pa43.

On August 26, 2022, the trial court heard oral argument on Plaintiffs' motion to enforce. 1T. On August 29, 2022, the Court entered an Order requiring Defendants to submit a Certification within seven days as to their compliance with the August 28, 2020 Order. Pa60. The Court further ordered the Plaintiffs to submit a proposed

Order for post-judgment interest. Pa60. On September 16, 2022, the Court awarded Plaintiffs post-judgment interest from July 20, 2022 to August 29, 2022 in the amount of $338.80. Pa180.

On September 6, 2022, Defendants complied with the Court's August 29, 2022 Order by providing all responsive records in their possession with respect to the requested special education documents. Pa84. Nonetheless, Plaintiffs filed an Order to Show Cause on September 13, 2022. Pa68. In the Order to Show Cause, Plaintiffs asserted that they had not yet been paid the amount owed for attorney's fees plus interest. However, the checks for same were sent via overnight mail that same day. Pa239. Defendants opposed the Order Show Cause, and it was denied by the trial court on November 10, 2022 as being procedurally improper. Pa191, 2T 36:12-13. On that same date, Plaintiffs served a deposition notice for Harold E. Kennedy, Jr. Pa241.

On November 15, 2022, Plaintiff filed a motion to hold Defendants in contempt of court pursuant to Rule 1:10-3. Pa194. On November 25, 2022, Defendants opposed the motion and filed a cross-motion for a protective order quashing the deposition of Mr. Kennedy and to enter satisfaction of the monetary judgment. Pa208. On December 16, 2022, the court denied Plaintiffs' motion and granted the Defendants' cross-motion in total. Pa246, Pa249. An Order to Satisfy as to the open judgment was entered on January 6, 2023.

On December 20, 2022, Plaintiffs filed the instant appeal. An Amended Notice of Appeal was filed on January 9, 2023. Pa251. The appeal seeks relief from the Orders dated August 29, 2022, November 10, 2022, and December 16, 2022.

COUNTERSTATEMENT OF FACTS

Plaintiff K.E. is a resident of Burlington County, New Jersey. Plaintiffs C.E. and B.E. are the parents and guardians of K.E. K.E. is not a student of the Elizabeth School District and has no previous relationship with the Defendants.

The Elizabeth Public School District is the fourth largest school district in New Jersey, serving a population of over 27,000 students. There are 36 school communities. The District is comprised of 3 Early Childhood Centers, 26 PK/K-8 schools and 7 High Schools. The District provides a full range of educational services appropriate to grade levels Pre-K through 12, including regular and vocational as well as special education for handicapped youngsters. The District's main office is located at 500 North Broad Street in Elizabeth, New Jersey. Defendant Harold Kennedy, Jr., serves as the District's School Business Administrator/Board Secretary and the Records Custodian. Pa13.

On April 2, 2015, the instant OPRA request was submitted by attorney Jamie Epstein, Esq. The request sought: "(1) all settlements entered into by the Board in NJOAL EDS docketed case from January 1, 2013 to present; (2) any final decisions incorporating or pertaining to item #1; (3) May 1, 2014, any purchase orders,

vouchers, bills, invoices and canceled checks for payment(s) made for legal services rendered to the board in regards to LR OPRA Request of 5/17/15 and the subsequent civil action of UNN-L-002585-14; and (4) any Board Resolution(s) which refers to items #1." Pa13.

On May 5, 2015, Defendants provided a response to the request. Defendants denied the request for settlements as exempt from disclosure as confidential student records. Defendants also denied the request for final decisions incorporating settlements as vague and requiring research. Defendants provided redacted purchase orders, vouchers, bills, invoices and canceled checks for payments for legal services and resolutions. Pa14.

This lengthy litigation then ensued. Following the May 18, 2022 appellate decision which required disclosure of the special education records under OPRA, the Board and its counsel consulted as to whether to file a petition for certification before the Supreme Court of New Jersey. Pa50. The filing deadline for the petition was June 7, 2022. After long deliberations within the Board of Education, it was determined that the Board would not pursue a petition for certification. Pa51.

Thereafter, counsel in this case engaged in discussions regarding how to comply with the August 2020 Order. Pa51. On June 22, 2022, defense counsel conferred with Mr. Luers to work out the issues of complying with the Order and to effectuate the payment of counsel fees. Pa51. Defense counsel requested that

Plaintiffs' counsel provide W-9 tax information and a Warrant of Satisfaction to be filed once the judgment was satisfied. Pa51. Mr. Luers confirmed this conversation describing it as "settlement communication." Pa54. On July 6, 2022, defense counsel informed Plaintiffs' counsel that the subject records were being compiled. Pa54. It was also again requested that Plaintiffs' counsel provide the W-9 tax information and a Warrant of Satisfaction so the legal fees could be paid. Pa54. On July 12, 2022, defense counsel spoke with Mr. Luers advising that the fee checks were being drafted, documents were being gathered but that the Warrant to Satisfy Judgment was still needed. Pa51. This conversation was confirmed in writing on July 13, 2022. Pa49. During the course of the conversation, defense counsel was advised by Mr. Luers that Mr. Epstein refused to supply the Warrant of Satisfaction. In the July 13, 2022 correspondence, it was suggested that Mr. Luers could retain possession of the Warrant until Judgment was satisfied. Pa49. That suggestion was also rejected. Further attempts to comply with the terms of Judge Hely's Order were not responded to. Shortly thereafter, Plaintiffs filed a motion to enforce litigants rights.

In order to comply with the August 2020 Order requiring production of final decisions/settlement documents/resolutions, Mr. Kennedy performed a search of all records maintained by the Board of Education at its administrative office. Mr. Kennedy also contacted outside counsel who had been retained by the Board to represent it before the Office of Administrative Law in regard to the special

education matters at issue. Pa56, Pa215. As a result of Mr. Kennedy's efforts, Defendants provided the following records on September 6, 2022:

1. EDS 02980-2013 B.S. on behalf of D.S. v. Elizabeth BOE 2013-19251
   - Resolution and Settlement were provided
   - No Decision could be located

2. EDS BD 06031-2013 Elizabeth BOE v. L.H. on behalf of L.S. 2013-19459
   - Resolution, Decision, and Settlement were provided

3. EDS 08395-2013 L.D. & D.D. o/b/o J.D. v Elizabeth BOE 2013-19703
   - Resolution and Settlement were provided
   - No Decision could be located

4. EDS BD 13153-2013 Elizabeth BOE v S.G. o/b/o D.H. (C) 2014-20180
   - Decision and Settlement were provided
   - No Resolution could be located

5. EDS 14318-2013 B.S. and C.S. on behalf on M.S. v. Elizabeth BOE 2015-20366
   - Resolution, Settlement and Decision were provided

6. EDS 14420-2013 S.G. o/b/o D.H. v Elizabeth BOE 2014-20285
   - Decision and Settlement were provided
   - No Resolution could be located

7. EDS 15625-2013 M.C. on behalf of C.V. v. Elizabeth BOE 2014-20357
   - Decision and Settlement were provided
   - No Resolution could be located

8. EDS 16243-2013 Elizabeth BOE v. C.M. and E.M. on behalf of E.M. 2014-20171
   - Decision and Settlement were provided
   - No Resolution could be located

9. EDS 02394-2014 Y.H. and B.H. on behalf of S.H. v. Elizabeth BOE 2014 20500
   - Resolution, Decision, and Settlement were provided

10. EDS 11571-2014 T.C. on behalf of F.R. v. Elizabeth BOE 2015-21601
    - Decision and Settlement were provided
    - No Resolution could be located

11. EDS 12582-2014 L.H. and L.S. on behalf of L.S. v. Elizabeth BOE 2015-21669
    - Resolution was provided
    - No Decision or Settlement could be located

Pa217.

As to the issue of attorney's fees awarded in the August 2020 Order, said fees were to be paid to both Plaintiffs' counsel, Mr. Luers and Mr. Epstein. However, the trial court's original Order did not allocate the fee award to each attorney but rather awarded a lump sum. Pa8. Mr. Kennedy could not issue one check to two attorneys at separate law firms but instead had to issue two checks. Pa218.On September 6, 2022, Defendants were informed that the breakdown of the checks was $36,175.10 to Mr. Luers and $42,809.70 to Mr. Epstein. The checks were then forwarded on September 13, 2022. Pa218.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT'S ORDERS DENYING PLAINTFFS' REQUESTS FOR RELIEF UNDER RULE 1:10-3 & N.J.S.A. 47:1A-11(a) SHOULD BE AFFIRMED

Rule 1:10-3 provides a "means for securing relief and allows[s] for judicial discretion in fashioning relief to litigants when a party does not comply with a judgment or order*." In re Adoption of N.J.A.C. 5:96 & 5:97*, 221 N.J. 1, 17 (2015).

"Relief under *Rule* 1:10-3 . . . is not for the purpose of punishment, but as a coercive measure to facilitate the enforcement of a Court order." *Ridley v. Dennison*, 298 N.J. Super. 373, 381 (App. Div. 1997). The particular manner in which compliance is sought is left to the Court's sound discretion. *Board of Education of Middletown v. Middletown Township Education Ass'n.*, 352 N.J. Super. 501, 509 (Ch. Div. 2001). The Appellate Division reviews an order entered under Rule 1:10-3 under an abuse of discretion standard. *N. Jersey Media Grp., Inc. v. State, Off. of Governor*, 451 N.J. Super. 282, 296 (App. Div. 2017).

In this matter, Defendants did not violate any Court Orders. In fact, Defendants complied with the Court's Orders by disclosing all responsive records in their possession. The subject records in this case are final decisions, settlement agreements, and resolutions for 11 special education matters filed in the Office of Administrative Law from 2013 to 2015. Accordingly, there are 33 records at issue. It is admitted that the Board did not produce a resolution, settlement agreement, and decision for each docket number requested. However, Mr. Kennedy certified that he conducted a diligent search for the documents, which included a thorough search of the Board's administrative offices and contacting outside counsel who represented the Board in IDEA matters in 2013-2015. All responsive records which could be located were provided.

The following records were timely provided to Plaintiffs' counsel on September 6, 2022:

1. EDS 02980-2013 B.S. on behalf of D.S. v. Elizabeth BOE 2013-19251
   - Resolution and Settlement were provided
   - No Decision could be located

2. EDS BD 06031-2013 Elizabeth BOE v. L.H. on behalf of L.S. 2013-19459
   - Resolution, Decision, and Settlement were provided

3. EDS 08395-2013 L.D. & D.D. o/b/o J.D. v Elizabeth BOE 2013-19703
   - Resolution and Settlement were provided
   - No Decision could be located

4. EDS BD 13153-2013 Elizabeth BOE v S.G. o/b/o D.H. (C) 2014-20180
   - Decision and Settlement were provided
   - No Resolution could be located

5. EDS 14318-2013 B.S. and C.S. on behalf on M.S. v. Elizabeth BOE 2015-20366
   - Resolution, Settlement and Decision were provided

6. EDS 14420-2013 S.G. o/b/o D.H. v Elizabeth BOE 2014-20285
   - Decision and Settlement were provided
   - No Resolution could be located

7. EDS 15625-2013 M.C. on behalf of C.V. v. Elizabeth BOE 2014-20357
   - Decision and Settlement were provided
   - No Resolution could be located

8. EDS 16243-2013 Elizabeth BOE v. C.M. and E.M. on behalf of E.M. 2014-20171
   - Decision and Settlement were provided
   - No Resolution could be located

9. EDS 02394-2014 Y.H. and B.H. on behalf of S.H. v. Elizabeth BOE 2014 20500
   - Resolution, Decision, and Settlement were provided

10. EDS 11571-2014 T.C. on behalf of F.R. v. Elizabeth BOE 2015-21601
    - Decision and Settlement were provided
    - No Resolution could be located

11. EDS 12582-2014 L.H. and L.S. on behalf of L.S. v. Elizabeth BOE 2015-21669
    - Resolution was provided
    - No Decision or Settlement could be located

As noted above, for five of the 11 cases, no resolution approving the settlement could be located. If such resolutions existed, they would be located in the Board's administrative office as they would be part of the Board of Education's official meeting agendas and minutes. Mr. Kennedy certified that he performed a diligent search of his office, and no resolutions for these cases were found. Pa215.

For three of the 11 cases, no final decisions could be located. For one case, no settlement agreement could be located. When Mr. Kennedy did not find these documents in the Board's possession, he contacted outside counsel who had represented the Board in these special education OAL matters. Pa215. Nonetheless, these three final decisions and one settlement agreement could not be found by counsel. Pa215.

Accordingly, the Defendants provided the Plaintiffs with all responsive records in their possession. It is therefore clear that there was no reason to hold Harold E. Kennedy, Jr. in contempt of court. There was also no basis to issue an

arrest warrant pursuant to *R.* 1:10-2. The trial court did not abuse its discretion when it found no reason in the law or facts to award such extreme relief.

Moreover, the trial court was right when it refused to assess a civil penalty pursuant to *N.J.S.A.* 47:1A-11. In order to impose a civil penalty under *N.J.S.A.* 47:1A-11(a), the Court must determine there was a *knowing and willful* violation of OPRA and access to records has been unreasonably denied under the circumstances. *North Jersey Media Group. Inc. v. State Office of Governor*, 451 *N.J. Super.* 282 (App. Div. 2017). Additionally, civil penalties can only be imposed if the custodian had actual knowledge that his actions were wrongful and there must be a positive element of conscious wrongdoing. *Bart v. City of Paterson Housing Authority*, 403 *N.J. Super.* 609 (App. Div. 2008). Here, Mr. Kennedy did not knowingly and willfully violate OPRA as he did not intentionally deprive Plaintiffs of the records Plaintiffs sought.

In this case, there was no refusal to produce the records in issue. As set forth herein, all retrievable records in the possession of the Defendants were timely produced after a diligent search was undertaken by the Custodian. It is unclear what more Plaintiffs reasonably want from the Defendants. The Records Custodian has certified that all retrievable records in the possession of the Defendants and their outside counsel have been provided to Plaintiffs. Mr. Kennedy cannot provide a document that nobody has. Moreover, the Certifications provided in connection with

this matter contain the same information as the certification as set forth in the *Paff v. N.J. Dept. of Labor*, 392 N.J. Super. 334, 341 (App. Div. 2007). Plaintiffs are fully aware of the search undertaken for the records, which records were located, and which parts of the records were deemed confidential.

For these reasons, the trial court Orders denying relief under *R.* 1:10-3 and *N.J.S.A.* 47:1A-11 should be affirmed.

POINT II

THE TRIAL COURT CORRECTLY GRANTED DEFENDANTS' CROSS-MOTION FOR ENTRY OF SATISFACTION OF THE OPEN MONETARY JUDGMENT AND A PROTECTIVE ORDER AS TO THE DEPOSITION OF HAROLD E. KENNEDY, JR.

A. An Order to Satisfy J-088720-22 Was Properly Entered

The trial court was correct when it granted Defendants' cross-motion to enter on the record satisfaction of the open judgment against Defendants. *Rule* 4:101-2 provides for the Clerk of the Superior Court to make entry upon the Court Docket of every monetary judgment and order. In this case, the amount of $78,646.00 was docketed in J-088720-22 against the Elizabeth Public School District and Harold E. Kennedy, Jr.

Rule 4:48-1 requires the party in whose favor the judgment is entered to provide a warrant of satisfaction. See *N.J.S.A.* 2A: 16-46. Further, *R.* 4:101-5 allows a person who has judgment entered against him/her/it provides for the entry of

satisfaction of the judgment on the Civil Judgment and Order Docket. Defendants previously requested an executed Warrant to Satisfy Judgment from Plaintiffs, but the Plaintiffs' counsel refused to provide the same despite receiving the amount owed. The satisfied judgment inappropriately remained docketed against the Board and Mr. Kennedy. As a result, Defendants were forced to file a motion to remove the judgment.

R. 4:48-2(b) provides "If a party receiving full satisfaction of a judgment fails to enter satisfaction on the record or deliver a warrant to satisfy, the court may on motion by the party making satisfaction, order satisfaction of the judgment to be entered of record." Here, Plaintiffs' counsel has acknowledged receipt of the $78,984.80 from Defendants. Defendants requested that the Court enter an Order entering the Satisfaction of Judgment for J-88720-22. On December 16, 2022, the trial court agreed with the Defendants, finding that "…the record demonstrat[es] that the judgment, …, the amount of post-judgment interest, …, has been satisfied." 3T, 17:8-13. The trial court was correct in making this finding and entering satisfaction.

Plaintiffs have not put forth any cogent reason to support reversal of the trial court's Order entering satisfaction of the monetary judgment. In this appeal, Plaintiffs again do not dispute that they have been paid in full all monies ordered by the court. Accordingly, they have not sustained their burden to support the reversal of the trial court's December 16, 2022 Order.

B. A Protective Order Was Rightly Entered Barring the Deposition of Harold E. Kennedy, Jr.

Plaintiffs also argue that the trial court erred in granting Defendants cross-motion for a protective order quashing the deposition notice of Harold E. Kennedy, Jr. Generally, "[a] trial court's resolution of a discovery issue is entitled to substantial deference and will not be overturned absent an abuse of discretion." *State v. Stein*, 225 N.J. 582, 593 (2016). An appellate court defers to the trial court's decision so long as it is not "so wide [of] the mark that a manifest denial of justice resulted," *Rowe v. Bell & Gossett Co*., 239 N.J. 531, 551-52 (2019) (alteration in original) (quoting *Green v. N.J. Mfrs. Ins. Co*., 160 N.J. 480, 492 (1999)), or is not "based on a mistaken understanding of the applicable law," *State in Int. of A.B*., 219 N.J. 542, 554 (2014) (quoting *Pomerantz Paper Corp. v. New Cmty. Corp*., 207 N.J. 344, 371 (2011)).

It is axiomatic that "[t]he discovery rights provided by our court rules are not instruments with which to annoy, harass or burden a litigant . . . ." *Gensollen v. Pareja*, 416 N.J. Super. 585, 591 (App. Div. 2010) (citing *R.* 4:10-3; *Hickman v. Taylor*, 329 U.S. 495, 507–08 (1947)). "The principles that guide our courts in pretrial discovery matters . . . strive to avoid placing undue burdens upon litigants . . . ." *In re Pelvic Mesh/Gynecare Litig*., 426 N.J. Super. 167, 196 (App. Div. 2012). As such, the range of pretrial discovery "is not limitless. Meandering expeditions which seek irrelevant, duplicative, oppressive or burdensome discovery are not

permitted." *HD Supply Waterworks Grp., Inc. v. Dir., Div. of Taxation*, 29 N.J. Tax 573, 583 (2017). Rule 4:10-3 "allows a party from whom discovery is sought to obtain relief from the court to limit that discovery in appropriate situations." *Serrano v. Underground Utils. Corp*., 407 N.J. Super. 253, 267 (App. Div. 2009). The rule authorizes trial courts to "make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ." *R.* 4:10-3.

This matter is a public records case. Plaintiffs were provided with all retrievable records. Moreover, Plaintiffs were paid all monies ordered by the Court. There was no legitimate reason to depose Mr. Kennedy. The purpose of the deposition notice was simply to annoy and harass the Defendants.

Furthermore, proceedings under OPRA are to be conducted in a "summary or expedited manner." *N.J.S.A.* 47:1A-6; *Courier News v. Hunterdon County Prosecutor's Office*, 358 N.J. Super. 373, 378 (App. Div. 2003). *Rule* 4:67-2(a), which governs OPRA actions, does not permit the record to be supplemented by depositions or other forms of discovery. "[S]uch protracted discovery is simply not suitable, and, absent legitimate need, is not permissible in actions, like OPRA proceedings, that are inherently summary by nature and expedited in manner." *MAG Entm't, LLC v. Div. of Alcoholic Beverage Control*, 375 N.J. Super. 534, 552 (App. Div. 2005).

For these reasons, the trial court did not abuse its discretion when it entered an Order barring the deposition of Mr. Kennedy.

POINT III

PLAINTIFFS' REQUEST FOR ADDITIONAL FEES AND INTEREST WAS PROPERLY DENIED

Plaintiffs were awarded attorney's fees in the amount of $78,646.00 with respect to the work done in the trial court. The trial court also awarded Plaintiffs post-judgment interest from July 20, 2022 to August 29, 2022 in the amount of $338.80. In this appeal, Plaintiffs argue that they are entitled to additional monies. Plaintiffs argue that they are entitled to attorney's fees related to their motions to enforce litigant's rights. They further argue that they are entitled to attorney's fees as a prevailing party pursuant to *Mason v. City of Hoboken*, 196 N.J. 51 (2008). Finally, they argue that the trial court did not award enough post-judgment interest.

Plaintiffs' 2022 motion practice was completely avoidable and solely served to unnecessarily protract this case. Plaintiffs should not be rewarded for this behavior. It is the inaction on Plaintiffs' counsel's part that prevented this matter from coming to a final resolution. The Appellate Division issued its decision on May 18, 2022. Under *Rule* 2:12-3, the Defendants had the opportunity to move for certification to have the New Jersey Supreme Court consider the Appellate Division decision. If certification is sought to review a final judgment of the Appellate Division, the petitioner has twenty (20) days to file such a petition after entry of the

final judgment of the Appellate Division. Thus, in the case at bar, the Defendants had until June 7, 2022 to file for certification to the Supreme Court. After long deliberations within the Board of Education, it was decided not to file for certification.

Judge Hely's Order set forth a specific procedure of contacting parents and guardians prior to the release of the records in issue. On June 22, 2022, defense counsel conferred with Mr. Luers to work out the issues of complying with the Order and to effectuate the payment of counsel fees. Plaintiffs were asked to provide W-9 tax information and a Warrant to Satisfy Judgment, which was to be held in escrow until the Judgment was fully satisfied. Mr. Luers confirmed this conversation describing it as "settlement communication." On July 6, 2022, defense counsel wrote to Mr. Luers to inform him that the Board was in the process of attempting to retrieve the documents and again asked for tax documents and the Warrant. On July 12, 2022, defense counsel spoke with Mr. Luers advising that the fee checks had been drafted, documents were being gathered and that the Warrant to Satisfy was still needed. This conversation was confirmed in writing on July 13, 2022. During the course of the conversation, Mr. Luers advised that Mr. Epstein refused to supply the Warrant of Satisfaction. In the July 13, 2022 correspondence, defense counsel suggested that Mr. Luers could retain possession of the Warrant until Judgment was satisfied. That suggestion was also rejected. Further attempts to comply with the terms of Judge

Hely's Order were not responded to, and Plaintiffs filed the motion to enforce litigant's rights.

The records in issue dated back to nearly a decade ago. All special education cases were handled by outside counsel and several law firms had to be contacted to obtain the documents. Once the documents were obtained, they then had to be reviewed for redaction. The Defendants made reasonable efforts to comply with the Order and kept Plaintiffs' counsel abreast of those efforts.

Additionally, the August 2020 Order set forth a procedure to contact parents or guardians of the students who are the subject of these documents. Efforts by defense counsel to come to an agreement with Plaintiffs' counsel to request a modification of the Order to conform with the Appellate Division decision were met with resistance from Plaintiffs' counsel. This court cannot equate the public entity's decision to consult with its counsel to make sure it complies with an Order and also protect the rights of its students with a knowing and willful violation of the statutes. *Bart v. City of Paterson Housing Authority*, 403 *N.J. Super.* 609 (*App. Div.* 2008); *Fielder v. Stonack*, 141 *N.J.* 101 (1995); *Berg v. Reaction Motors Division*, 37 *N.J.* 396 (1962). It is the failure of Plaintiffs' counsel to agree to seek modification of the Court's Order and to provide a Warrant to Satisfy Judgment that caused the deadlock during the summer of 2022.

"[A] reviewing court will disturb a trial court's award of counsel fees '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)). Here, the trial court did not abuse its discretion when it denied Plaintiffs additional attorney's fees related to their unnecessary summer 2022 motion practice.

For these same reasons, the trial court was correct in declining to award additional attorney's fees under the catalyst theory. The OPRA statute provides that "[a] person who is denied access to a government record by the custodian of the record, at the option of the requestor, may [ ] institute a proceeding to challenge the custodian's decision by filing an action in Superior Court." *N.J.S.A.* 47:1A-6. The statute further provides that "[a] requester who prevails in any proceeding shall be entitled to a reasonable attorney's fee." *Ibid*. In *Mason v. City of Hoboken*, the Court found that the plaintiff was not considered a prevailing party simply because the agency produced documents after an OPRA suit was filed. 196 N.J. 51, 78 (2008). Rather, a complainant is a "prevailing party if he or she achieves the desired result because the complaint brought about change (voluntary or otherwise) in the custodian's conduct." *Teeters v. Division of Youth and Family Services*, 378 N.J. Super. 423, 432 (App. Div. 2006).

As set forth above, Plaintiffs' motion practice was not the catalyst for the disclosure of the records or payment of the monies owed. Defendants were attempting to comply with the Appellate Division decision, but Plaintiffs' counsel would not cooperate. Instead, Plaintiffs engaged in legal chicanery, which was rejected several times by the trial court. Additionally, attorney's fees and costs awarded under OPRA must be "reasonable." Plaintiffs' excessive motion practice was not reasonable or necessary.

Finally, the trial court did not abuse its discretion in awarding post-judgment interest from July 20, 2022 until the August 29, 2022 Order. The trial court held that post-judgment interest runs from when the judgment has been entered, not when all the appeals have been disposed of. *Baker v. National State Bank*, 353 N.J. Super. 145, 173-74 (App. Div. 2022). *Rule* 4:42-11(a) provides for post-judgment interest as follows: 'Except as otherwise ordered by the court or provided by law, judgments, awards and orders for the payment of money, taxed costs and counsel fees shall bear simple interest. . . .' The rule also provides a trial court with the discretion to vary the award, in the interests of equity. See, e.g., *Interchange State Bank v. Rinaldi*, 303 N.J. Super. 239, 264 (App. Div. 1997). Given this, the court did not abuse its discretion in ordering interest to accrue only from the date of the docketed judgment.

Plaintiffs' appeal as to any additional attorney's fees and interest should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the trial court's Orders in this matter be affirmed.

Respectfully Submitted,

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December 4, 2023

Via eCourts
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RE: C.E. AND B.E., INDIVIDUALLY AND ON BEHALF OF, K.E. V. ELIZABETH PUBLIC SCHOOL DISTRICT AND HAROLD E. KENNEDY, IN HIS OFFICIAL CAPACITY AS SCHOOL BUSINESS ADMINISTRATOR/BOARD SECRETARY OF ELIZABETH PUBLIC SCHOOL DISTRICT

Docket No. A-000173-20 TEAM 02

On Appeal from Superior Court of New Jersey, Union County, Law Division

SAT BELOW: HON. DANIEL R. LINDEMANN, J.S.C., DOCKET NO.: UNN-L-2231-15

Dear Honorable Judges:

On behalf of Plaintiffs/Appellants C.E. and B.E. on behalf of K.E., the undersigned hereby respectfully submit this letter brief in reply to the brief in opposition filed by Defendants to Plaintiffs' appeal seeking reversal of Judge Lindemann's three post-judgment decisions.

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LEGAL ARGUMENT

THIS COURT SHOULD GRANT THE PLAINTIFFS' APPEAL AND REVERSE/REMAND THE ORDERS ISSUED BY JUDGE LINDEMANN.

A cursory reading of Defendants' brief reveals the facts and proceedings are undisputed. Defendants do not dispute they failed to comply with Judge Hely's 8/20/20 Order (8a), even after it was affirmed by this Court on 5/18/22 (12a). Defendants concede only after Plaintiffs filed their 7/18/22 motion (1a) did Defendants: a) provide 24 of the 33 ordered records; and b) pay the $78,646 attorney fee award. Defendants opposition fails to overcome Plaintiffs' arguments that Judge Lindemann committed reversible error when his Orders (241a, 459a and 472a) denied Plaintiffs: a) successful enforcement attorney's fees and a civil penalty; b) interest on 24 of the 26 months Defendants held the $78,646; and c) discovery regarding the missing 9 of 33 records.

Accordingly, the orders on appeal should be vacated and reversed/remanded.

POINT I

THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' REQUEST FOR RELIEF AFTER THE BOARD INTENTIONALLY VIOLATED OPRA BY FAILING TO COMPLY WITH THE 8/28/20 FINAL ORDER AFTER IT WAS AFFIRMED ON 5/18/22

Defendants failed to comply with the 8/20/20 Final Order (8a) after it was affirmed by this Court on 5/18/22. On 12/16/22, Judge Lindemann abused his discretion when he improperly denied Plaintiffs' proposed Final Order (246a) for

an OPRA civil penalty to be assessed against Defendants. The amount sought of $1000 was in accordance with N.J.S.A. 47:1A-11(a) and the Penalty Enforcement Law, P.L. 199, c 274.

The point of contention between parties which bears the most decisive weight in this matter is whether the Board and Harold E. Kennedy Jr., in his official capacity as the School Business Administrator and Board Secretary, violated Judge Hely's 8/20/20 Final Order and this Court's 5/18/22 affirmation (12a). Yet, it is undisputed Defendants only produced some of the records that were requested in 2015 and ordered to turn over on 8/20/20. Those records included NJOAL Decisions, Settlements and Board Resolutions for each of the 11 students identified in Plaintiffs' original 2015 OPRA Request.

To date, of the 33 records Defendants were compelled to produce, only 24 have been supplied, the rest of which the Board facetiously claims do not exist, else they would "be part of the Board of Education's official meeting agendas and minutes" (Db-15). Defendants are correct to contend that "Plaintiffs are fully aware of the search undertaken for the records, which records were located, and which parts of the records were deemed confidential" (Db-17). Defendants do not account, however, for the insufficiency of said search. Defendants' contention that the Certification provided by Mr. Kennedy (56a) absolves the Board of responsibility for locating the records is misguided. There is no indication in Mr.

Kennedy's account that the Board made any attempt to inquire of the New Jersey Department of Education. The Department of Education, because of its instrumental role in archiving the final administrative decisions is an untapped source for the Board from which to recover the missing records. Similarly, as per Mr. Kennedy's Certification, the Board failed to search even within the very students' records who were the subject of the settlement records included in the initial OPRA request. Mr. Kennedy admitted that he had not even contacted the parents of the students in question advising them that they could object to the production of their records by the time this matter had begun the process of appeal (57a), despite two years having passed.

To date, Defendants have yet to disclose whether either of these courses were pursued in the search for the missing records. Defendants' 11/6/23 Brief in Opposition conveniently failed to address either their (lack of a) search of the students' records or inquiry to the NJDOE. Defendants' willful obstruction to Plaintiffs' ordered access to the missing records throughout this matter been consistently demonstrated. This Court may recall from its first opinion, in particular, these Defendants previously demanded an exorbitant $105,000 special service charge as a deterrent to search the students' records for the settlement records.

Given the Boards' and Mr. Kennedy's abject refusal to complete the requisite responsibilities of fulfilling Plaintiffs' OPRA request, despite being compelled to do so both by the trial and appellate courts, another measure is requisite to compel the production of the missing records. Accordingly, Plaintiffs entered a motion to assess a civil penalty pursuant to *N.J.S.A.* 47:1A-11, which requires a determination on behalf of the Court of a *knowing a willful* violation of OPRA and subsequently unreasonable denial of access to records. *North Jersey Media Group. Inc. v. State Office of Governor*, 451 *N.J. Super.* 282 (App. Div. 2017).

The undisputed sequence of proceedings demonstrates the fact that the Board knowingly and willfully refused to conduct a faithful search for the records as was ordered, given that Judge Hely's 8/28/20 Final Order specifically delineated the methods by which Defendants should complete their search. As previously argued, where there exists an OPRA violation, Defendants' conduct may be characterized either as *knowing and willful* or excusable neglect. In Defendants' Brief in Opposition, they neither successfully present a case that all available sources were searched, thus satisfying their claim that no OPRA violation was committed, nor stake a claim of excusable neglect. In the absence of evidence to supply either of these two possible defenses, it is evident that Defendants' violation of OPRA fulfills *N.J.S.A.* 47:1A-11 requirements to impose a civil penalty.

It was error for Judge Lindemann to deny Plaintiffs' Proposed Order (246a) to assess a civil penalty against Defendants.

POINT II

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' CROSS-MOTION FOR ENTRY OF SATISFACTION OF JUDGMENT AND A PROTECTIVE ORDER AS TO THE DEPOSITION OF HARDOLD E. KENNEDY, JR.

a. SATISFACTION OF JUDGMENT WAS INCORRECTLY ENTERED

At the time Defendants motioned in November of 2022 (249a) for a Warrant of Satisfaction of the open monetary judgment derived from the 8/28/20 Final Order, they had not satisfied the conditions of judgment requisite in *Rule* 4:101-2 and *Rule* 4:48-3(a) because the amount paid failed to account for the interest accrued in the two years that payment with withheld. *Rule* 4:48-3(a) provides in part that an entry of satisfaction may be ordered if it appears upon the motion that "A tender of the amount due thereon, **with interests and costs**, has been made to the holder thereof, who refuses to accept the tender or to execute a satisfaction or warrant in satisfaction therefor". *Rule* 4:48-3(a) (emphasis added).

In this case, the amount originally docketed in August of 2020 against Elizabeth Public School District and Harold E. Kennedy, Jr. was $78,646.00. The Board failed to pay the ordered amount for two years, during which time the principal amount was accruing interest. Plaintiffs were unable to execute Defendants' requested Order of Satisfaction when the initial amount was paid

because it was not paid in full; it did not encompass the interests which had accrued since 2020[1]. For the simple reason that the Board failed to pay the amount docketed against them *with interests,* the trial court's 12/16/22 Order granting Defendants' cross-motion for a Warrant of Satisfaction must be reversed.

The amount of interest accrued has been contested, and on 8/29/22, Judge Lindemann erroneously denied Plaintiffs' interest from the date of the 8/28/20 Final Order, disregarding *R.* 4:42-11(a), which provides that interests begins accruing on the day an order is entered; in this case, on 8/28/20. Defendants do not contest that post-judgment interest runs from when the judgment has been entered, not from when all the appeals have been disposed of. *Baker v. National State Bank*, 353 N.J. Super. 145, 173-74 (App. Div. 2022). Similarly, Defendants provide no evidence that an exception is apparent in this case according to *R.* 4:42-11(a). Given Defendants' abject lack of rationale to support the claim that post-judgment interest in the amount offered by Plaintiff is not applicable, this Court should not only order that the Board pay the $4,964.53 interest denied minus the $338.80 interest granted ($4,625.73), but this Court should also remand for an award of interest on the $4,625.73 unpaid interest since the 8/29/22 Order was entered.

[1] Defendants improperly present purported *N.J.R.E.* 408 settlement communications with Plaintiffs (Db22), without citing to the record, regarding Defendants failure to comply with the 8/28/20 final order (8a) after this Court's affirmance on 5/18/22. Plaintiffs object to Defendants inclusion of said unsupported communications which have no effect on the fact Defendants refused to comply with the final affirmed order until Plaintiffs' enforced it.

As set forth in previous arguments, Plaintiffs are also entitled to attorney's fees associated with motions brought against the Boards' violations of litigant's rights, again for failure to comply with the 8/28/20 Final Order after it was affirmed on 5/18/22. Defendants argument that Plaintiffs' motion practice was "completely avoidable" and "solely served to unnecessarily protract this case" (Db-21) is an attempt to make a mockery of Plaintiffs' legitimate exercise in enforcing litigant's rights after the Board had failed to comply with Judge Hely's 8/28/20 Order after two years. There is no cause to say that Plaintiffs unduly delayed the proceedings of the case by withholding an Order of Satisfaction if Plaintiff could not, for reasons stated above, do so without being paid in full. Defendants rather than Plaintiffs were protracting the settlement of this matter by refusing to pay the amount ordered on 8/28/20 with interest. The trial court abused its discretion in refusing to award Plaintiff with attorney's fees associated with motions brought to enforce litigant's rights.

Plaintiffs were also entitled to prevailing party attorney's fees after prevailing on the enforcement motion because it was Plaintiffs' 7/18/22 motion (1a) to enforce that acted as a catalyst in the successful enforcement order. Defendants contest this fact under the guise that they had been all along attempting to comply with this Court's 5/18/22 affirmation of the 8/28/20 Order, though this is a mischaracterization of the proceedings. Defendants do not contest, and in fact confirm in their counter-statement of facts (Db-1), that following the oral

arguments spurred by Plaintiffs' 7/18/22 enforcement motion, on 9/6/22, "Defendants complied with the Court's August 29, 2022 Order by providing all responsive records in their possession with respect to the requested special education documents" (Db-7). This causal sequence of events unopposed by Defendants affirms that Plaintiff is the prevailing party in accordance with *Mason v. City of Hoboken*, 196 N.J. 51 (2008), and is therefore entitled prevailing attorney's fees.

b. IT WAS ERROR TO GRANT DEFENDANTS' PROTECTIVE ORDER PROHIBITING ANY DISCOVERY OF THE MISSING RECORDS

In the absence of a thorough search conducted by the records custodian, Plaintiffs sought on 12/16/22 to take discovery of the Board in general and Mr. Kennedy in particular. In error, this request was denied and further discovery prohibited, and Defendants' requested protective order as to the deposition of Mr. Kennedy was granted.

While Defendants have contended that Plaintiffs' motions for the purpose of discovery have been put forth in bad faith, in a burdensome and harassing manner, they ignore the simple fact that the pursuit would not be necessary if the Board conducted a search in good faith of the records they were compelled to deliver. Protracting the discovery period in an OPRA case is not permissible *absent legitimate need*. *MAG Entm't, LLC v. Div. of Alcoholic Beverage Control,* 375 N.J. Super. 534, 552 (App. Div. 2005). In this case, Plaintiffs have no alternative but to

compel a deposition of Mr. Kennedy for his failure to properly conduct the requisite search, given that three court orders to provide the records have thus been ignored or otherwise unfulfilled.

CONCLUSION

For all the foregoing reasons, K.E. requests that this Court reverse the orders of the lower court for: 1. denying a Paff Certification, further discovery and granting the satisfaction of judgment when the Board failed to comply with the 8/28/20 order and give K.E. access to the 9 records as ordered; 2. failing to order the Board to pay interest on the $78,646 ordered payment for all but 40 days of the two years the Board held the $78,646; 3. failing to find the Board violated litigant's rights after granting K.E.'s motion to enforce the 8/28/20 Order; 4. failing to order a civil penalty after the Board failed to comply with the 8/28/20 after it was affirmed by this Court; and 5. failing to order to pay K.E.'s prevailing party attorney's fees after granting K.E.'s motion to enforce the 8/28/20 Order.

RESPECTFULLY SUBMITTED,

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