

SUPERIOR COURT OF NEW JERSEY

BONNIE J. MIZDOL
Assignment Judge



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FACSIMILE TRANSMITTAL SHEET

FROM:

HON. BONNIE J. MIZDOL, A.J.S.C.
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RE:

Innisfree Foundation v. Wyckoff Public Schools, et al. Docket No.: L-4990-16

URGENT FOR REVIEW PLEASE COMMENT PLEASE REPLY PLEASE RECYCLE

NOTES/COMMENTS:

Please See Attached.

NUMBER OF PAGES INCLUDING COVER SHEET: _____

Prepared by the Court

INNISFREE FOUNDATION,
Plaintiff,

v.

BERGENFIELD BOARD OF EDUCATION
AND MARK HAYES, INTERIM SCHOOL
BUSINESS ADMINISTRATOR/BOARD
SECRETARY,

ALPINE BOARD OF EDUCATION AND
DANIEL HAUSER, SCHOOL BUSINESS
ADMINISTRATOR/BOARD SECRETARY,

NEW MILFORD BOARD OF EDUCATION
AND MICHAEL SAWICZ, SCHOOL
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CRESSKILL BOARD OF EDUCATION AND
ANTOINETTE KELLY, SCHOOL BUSINESS
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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: BERGEN COUNTY

Matters consolidated under:
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CIVIL ACTION

ORDER TO STAY PROCEEDINGS

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ADMINISTRATOR/BOARD SECRETARY,

WOODCLIFF LAKE BOARD OF
EDUCATION AND MATTHEW L.
LYNAUGH, SCHOOL BUSINESS
ADMINISTRATOR/BOARD SECRETARY,

Defendants.

THIS MATTER having come before the court on motion of Fogarty & Hara, Esqs., on behalf of the Defendants, Wyckoff Public Schools and Alan C. Reiffe, School Business Administrator/Board Secretary, Allendale Public Schools and Maria Engeleit, School Business Administrator/Board Secretary, Cresskill Board of Education and Antoinette Kelly, School Business Administrator/Board Secretary, Ho-Ho-Kus Public Schools and Joseph Amatuzzi, Interim School Business Administrator/Board Secretary, Hillsdale Board of Education and Lirca Garcia, School Business Administrator/Board Secretary, Oakland Public School, Rachel DeCarlo, School Business Administrator/Board Secretary, Paramus Board of Education and Steven Cea, School Business Administrator/Board Secretary;

Machado Law Group, (Christine Smith, Esq. appearing) on behalf of Defendants Westwood Board of Education and Keith A. Rosado, School Business Administrator/Board Secretary, Teaneck Board of Education and Dennis Frohnappel, Interim School Business Administrator/Board Secretary, and of behalf of newly named Defendants Saddle Brook Board of Education and Raymond G. Karaty, School Business Administrator/Board Secretary;

Weber Gallagher on behalf of Defendants Old Tappan Board of Education and Douglas Barret, School Business Administrator/Board Secretary, and of behalf of newly named Defendants Demarest Board of Education and Thomas Perez, School Business Administrator/Board Secretary;

Methfessel & Werbel, P.C., on behalf of Defendants North Arlington Board of Education and Kathleen McEwin-Marano, School Business Administrator/Board Secretary, Wood-Ridge Board of Education and Jenine Murray, School Business Administrator/Board Secretary, and Leonia Board of Education and Michael Leary, School Business Administrator/Board Secretary and of behalf of newly named Defendants Montvale Board of Education and Andrea Wasserman, School Business Administrator/Board Secretary, Ramsey Board of Education and Tom O'Hern, School Business Administrator/Board Secretary, Rutherford Board of Education and Joseph Kelly, School Business Administrator/Board Secretary, Hasbrouck Heights Board of Education and Dina Messery, School Business Administrator/Board Secretary;

Nirenberg & Verano LLP on behalf of newly named Defendants Elmwood Park Board of Education and John DiPaola School Business Administrator/Board Secretary, Cliffside Park Board of Education and Louis Alfano School Business Administrator/Board Secretary, School Business Administrator/Board Secretary, Paramus Board of Education and Steven Cea, School Business Administrator/Board Secretary;

Machado Law Group, on behalf of Defendants Westwood Board of Education and Keith A. Rosado, School Business Administrator/Board Secretary, Teaneck Board of Education and Dennis Frohnappel, Interim School Business Administrator/Board Secretary, and of behalf of newly named Defendants Saddle Brook Board of Education and Raymond G. Karaty, School Business Administrator/Board Secretary;

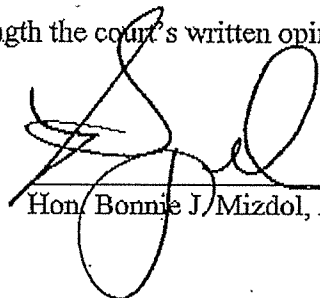
Weber Gallagher, on behalf of Defendants Old Tappan Board of Education and Douglas Barret, School Business Administrator/Board Secretary, and of behalf of newly named Defendants Demarest Board of Education and Thomas Perez, School Business Administrator/Board Secretary;

Nirenberg & Verano LLP on behalf of newly named Defendants Elmwood Park Board of Education and John DiPaola School Business Administrator/Board Secretary, Cliffside Park Board of Education and Louis Alfano School Business Administrator/Board Secretary, and

upon notice to John Rue & Associates, attorneys for Plaintiff, The Innisfree Foundation, and
for good cause shown;

IT IS on this 9th day of June, 2017, **ORDERED:**

Defendants' request for a stay of the hearing on the Order to Show Cause in the above-captioned matter, scheduled to commence on June 21st, 2017, pending Appellate Division review of four related cases¹, is granted, as set forth at length the court's written opinion attached hereto.



Hon. Bonnie J. Mizdol, A.J.S.C.

¹ L.R. v. Camden City Public School District, A-003972-14T2, L.R. v. Parsippany-Troy Hills Public School District, A-004214-14T2, Innisfree Foundation v. Hillsborough Twp. Board of Education, A-002387-15T4, and Innisfree Foundation v. Cherry Hill Board of Education, A-003066-15T2.

FILED

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NOT TO BE PUBLISHED WITHOUT
THE APPROVAL OF THE COMMITTEE ON OPINIONS

INNISFREE FOUNDATION,
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Defendants.

Introduction

On July 5, 2016, The Innisfree Foundation (“Innisfree” or “Plaintiff”) filed a Verified Complaint and an Order to Show Cause against the Wyckoff Public Schools and Alan C. Reiffe (referred to collectively as “Wyckoff”) alleging violations of N.J.S.A. 47:1A-1 et seq. (“OPRA”) and the common law right of access to public records. Plaintiff subsequently filed similar claims against forty-three (43) other Bergen County school districts. The matters were consolidated under BER-L-4990-16. Plaintiff withdrew its claims under the common law right of access, leaving only those claims alleged under OPRA. Plaintiff has similar claims against school districts across the State of New Jersey, pending at both trial and appellate division levels.

Plaintiff seeks to compel production of settlement agreements entered into by parents of children with disabilities and the various Bergen County Public Schools, as well as copies of all tuition contracts between various Bergen County Public School districts and receiving schools.

Facts/Procedural History

Plaintiff is a non-profit organization “that aims to assist New Jersey families, especially but not limited to the families of children with disabilities, to obtain the best possible educational services.” Verified Complaint at 6.

On June 14, 2016, John D. Rue, attorney for Plaintiff, sent letters to all counsel known to represent school districts regarding future OPRA requests Innisfree intended to submit to school districts in Bergen County. Plaintiff's Exhibit 1 to Verified Complaint. Attached to these letters

was a copy of the opinion issued by this Court in *The Innisfree Foundation v. Hackensack Board of Education, et al.*, Docket No. BER-L-2268-16 (Law Div. May 6, 2016).

On June 21, 2016, Plaintiff submitted to Wyckoff three (3) requests for government records (“the requests”) pursuant to OPRA and the common law. Plaintiff sought records concerning insurance policies that reimburse Defendants for the cost of litigation (“insurance request”), and, pertinent to the instant application:

All settlement agreements related to formally initiated disputes between Wyckoff School District and parents of students (i.e., pursuant to a mediation request, due process petition, or judicial or administrative complaint) related to the provision of special education services that were executed in the past five years, where the counterparties were parents (or a single parent) of a child or children for whom special education services were or are either provided or sought (Personally identifiable information may be redacted).

[Verified Complaint at 2-3.]

A copy of all contracts with receiving schools (i.e. private schools or public schools) that accept students from Wyckoff at Wyckoff’s expense that have been effective within the past five years. That is, if a contract was executed longer than five years ago, but was effective within the past five years, it is intended to be included in this request.

[Verified Complaint at 3.]

Plaintiff included limiting instructions with its requests, providing:

- (1) To the extent that any such records contain personally identifiable information related to any individual student, please redact that personally identifiable information prior to disclosure.
- (2) To the extent that you assert that any requested records are exempted from disclosure under OPRA, and also unavailable under the common law right of access, please provide a complete *Vaughn* index of all such records, disclosing “sufficient detail to [provide] the requestor ‘with as much information as possible to use in presenting his case’ and to enable the ‘decision-maker’s review of governmental records to determine whether they contain privileged material.’” Paff v. Division of Law, 412 N.J. Super. 140, 161 (App. Div. 2010).

(3) If any [*sic*] these records are stored offsite or are archived, we understand that you may request an extension. However, if so, please respond as soon as you can to each individual request, without waiting to respond to [*sic*] all at once. We will cooperate with you if you request an extension, but only within reason. Therefore, if you request an extension of the statutory deadline, please provide sufficient facts so that we can determine whether we agree that your requested extension is reasonable. In particular, please (a) state whether any of the records are in storage or archived; and, (b) to the extent that you [*sic*] asking for an extension in order to perform redactions, please provide the following information, broken down by request: (i) the number of responsive records requiring redactions that you have identified, (ii) a ballpark estimate of the average length of each record (in pages); and (iii) the number of person-hours you expect redaction to require as to each request.

[Verified Complaint at 3-4.]

Plaintiff subsequently submitted virtually identical requests to the other defendant school districts in the present matter, seeking the same categories of documents. Of the documents sought, two are at issue in the present case: (1) all settlement agreements executed in the past five (5) years related to disputes between each defendant school district and the parents of students related to the provision of special education services; and (2) copies of all contracts with receiving schools (i.e. private schools or public schools) that accept students from defendant school districts at the school district's expense, effective within the past five (5) years.

School districts across New Jersey and within Bergen County have adopted differing approaches to disclosure of student records under OPRA, citing in various degrees student privacy concerns under the Family Education Rights and Privacy Act, 20 U.S.C. § 1232g ("FERPA") and the New Jersey Pupil Records Act, N.J.A.C. 6A:32-7 et seq. ("Pupil Records Act")¹. Some districts

¹While OPRA does not contain any express language exempting primary and secondary school student records from disclosure, the Act does limit public access to any information exempted from disclosure by any other federal or state statute. "[A]ll government records shall be subject to public access unless exempt from such access by: P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented; *any other statute*; resolution of either or both houses of the Legislature; regulation promulgated under the authority of any statute or Executive Order of the

have denied the requests in their entirety as exempt under OPRA. Some districts have provided redacted copies of the requested documents after receiving parental consent. Others simply provided redacted copies.

On October 28, 2016 and March 3, 2017, by way of case management order, the court consolidated the districts into sub-groups, as a way to promote judicial efficiency, conserve party resources, and simultaneously address the varied approaches of the defendants to disclosure. Defendants were divided into the following subgroups:

Subgroup A:

**Non-disclosure of Settlement Agreements or Tuition Contracts
("Non-Disclosure Group")**

Demarest Board of Education; Glen Rock Board of Education; Paramus Board of Education; Bergenfield Board of Education; River Vale Board of Education; Alpine Board of Education; Englewood Cliffs Board of Education; Maywood Board of Education; Woodcliff Lake Board of Education; Ramapo Indian Hills Board of Education; River Edge Board of Education; Franklin Lakes Board of Education; Rochelle Park Board of Education; Midland Park Board of Education; Tenafly Board of Education; New Milford Board of Education; Northvale Board of Education; Pascack Valley Board of Education; Norwood Board of Education; Upper Saddle River Board of Education; North Arlington Board of Education; Montvale Board of Education; and the Cliffside Park Board of Education.

Subgroup B:

**Disclosure of Redacted Settlement Agreements and/or Redacted
Tuition Contracts ("Redacted Group"):**

Old Tappan Board of Education; Wood-Ridge Board of Education; Hasbrouck Heights Board of Education; Ramsey Board of Education; Rutherford Board of Education; Teaneck Board of

Governor; Executive Order of the Governor; Rules of Court; *any federal law, federal regulation, or federal order.*" (Emphasis added). N.J. Stat. § 47:1A-1.

Education; Westwood Regional Board of Education; Saddle Brook Board of Education; Elmwood Park Board of Education; and the Lodi Board of Education.

Subgroup C:

Redacted and Disclosed with Parental Consent, Settlement Agreements and/or Tuition Contracts (“Consent and Redaction Group”):

Old Tappan Board of Education; Allendale Board of Education; Cresskill Board of Education; Hillsdale Board of Education; Ho-Ho-Kus Board of Education; Oakland Board of Education; South Hackensack Board of Education; Wyckoff Board of Education; and the Leonia Board of Education.

Plaintiff later stipulated to the dismissal of three (3) defendant districts: Carlstadt Board of Education, Northern Highlands Board of Education, and Palisades Park Board of Education. Forty-one (41) named defendants remain in the present matter.

Briefing in this matter has concluded and oral argument is scheduled to take place on June 21, 2017.

Akin to the present matter, the non-disclosure and scope of redactions by defendant school districts is the subject of OPRA litigation spanning vicinages around the State of New Jersey. Several of these cases were filed by plaintiff, Innisfree Foundation, on behalf of families of special education students.

Within the state, vicinages have issued conflicting decisions. This court and others have held compliance with OPRA and/or the common law requires disclosure of the requested records

once any personally identifiable student information is redacted.² Others have held the requested records exempt from disclosure in their entirety under OPRA.³

Currently, there are at least twelve (12) matters before the Appellate Division seeking to address the scope of redactions of student records under OPRA. All involve school districts outside of Bergen County and in five (5) of those matters Innisfree is the plaintiff:

Palmer v. Jersey City Public School District, A-002923-14T2,
L.R. v. Cherry Hill Board of Education, A-003032-14T2,
L.R. v. Camden City Public School District, A-003972-14T2,
L.R. v. Woodbridge Public School District, A-004013-14T2,
L.R. v. Hillsborough Board of Education, A-004213-14T2,
L.R. v. Parsippany-Troy Hills Public School District, A-004214-14T2,
L.R. v. Elizabeth Public School District, A-000051-15T4,
Innisfree Foundation v. Hillsborough Twp. Board of Education, A-002387-15T4,
Innisfree Foundation v. Parsippany-Troy Hills Public School District, A-002688-15T2,
Innisfree Foundation v. Cherry Hill Board of Education, A-003066-15T2,
Innisfree Foundation v. Elizabeth Board of Education, A-003322-15T4,
Innisfree Foundation v. Jersey City Board of Education, A-003860-15T4.

On November 14, 2016, Hon. Jack M. Sabatino, P.J.A.D. issued an order *sua sponte* staying eight (8) of the appeals until a decision was rendered in four (4) of the “lead” cases⁴. The issues in the “lead” cases are identical to those in the present matter.

² The Innisfree Foundation v. Hackensack Board of Education, et al., BER-L-2268-16 (Law Div. May 6, 2016); The Innisfree Foundation v. Hawthorne Board of Education, PAS-L-894-16 (Law Div. Aug. 9, 2016); The Innisfree Foundation v. Sparta Board of Education, et al., Docket No. SSX-L-0237-16 (Law Div. July 8, 2016)

³ The Innisfree Foundation v. Hillsborough Twp. Board of Education, Docket No. SOM-L-1372-15 (Law Div., Jan. 8, 2016); The Innisfree Foundation v. Jersey City Board of Education, et al., Docket No. HUD-L-4414-15 (Law Div., Feb. 9, 2016)

⁴ L.R. v. Camden City Public School District, A-003972-14T2, L.R. v. Parsippany-Troy Hills Public School District, A-004214-14T2, Innisfree Foundation v. Hillsborough Twp. Board of Education, A-002387-15T4, and Innisfree Foundation v. Cherry Hill Board of Education, A-003066-15T2.

On January 26, 2017, Judge Sabatino issued a second order to stay proceedings *sua sponte* pending the outcome of the “lead” cases:

IT IS ON THIS 26 DAY OF JANUARY, 2017, HEREBY ORDERED that all appeals involving issues concerning accessibility to school records under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, and other related issues, such as the propriety of using initials in redacted student records turned over to requestors, are hereby stayed pending disposition, including any certification proceedings and appeals to the Supreme Court, of the following cases which shall be calendared back-to-back for oral argument before the same Part, in accordance with the case management order entered in the within appeal on November 14, 2016: L.R. V. CAMDEN CITY PUBLIC SCHOOL DISTRICT, A-003972-14T2; L.R. V. PARSIPPANY-TROY HILLS PUBLIC SCHOOL DISTRICT, A-004214-14T2, INNISFREE FOUNDATION V. HILLSBOROUGH TWP. BOARD OF EDUCATION, A-002387-15T4, AND INNISFREE FOUNDATION V. CHERRY HILL BOARD OF EDUCATION, A-003066-15T2;

On May 3, 2017, the Honorable Stuart Minkowitz, A.J.S.C., issued an order staying proceedings in Innisfree v. Hopatcong Board of Education, SSX-L-093-17 (Sup. Ct. Law Div. May 3, 2017), citing the interests of judicial economy and uniform results. Judge Minkowitz opined that it was unclear whether Judge Sabatino’s recent order to stay applies only to appeals from the Law Division to the Appellate Division, or if it is inclusive of appeals to the Law Division based on a denial of an OPRA request by a record’s custodian. *See* N.J.S.A. 47:1A-5(f)(requiring an OPRA request for to include “a statement of the requestor’s right to challenge a decision by the public agency to deny access and the procedure for filing an *appeal*.” (emphasis added)).

On May 23, 2017, the instant motion to stay was filed on behalf of all Bergen County defendant school districts, to preserve “judicial economy, fairness, and [to] maintain the status quo.” Defendants’ Certification, ¶ 20. It appears that defendants assert Judge Sabatino’s recent

order operates to “stay all appeals concerning student records under OPRA,” including those pending in the Law Division following the denial of a request by a record’s custodian. *Id* at ¶ 16.

On June 9, 2017, the return date for the instant matter, plaintiff submitted to the court an adjournment request by facsimile transmission, proffering “excusable neglect” as grounds. The court did not find the reasons stated within plaintiff’s request to constitute excusable neglect and the adjournment request was denied. The present motion is deemed unopposed.

Law

The authority to stay a proceeding “is incidental to the court’s inherent power to schedule disposition of actions so as to promote a fair and efficient adjudication.” Chalom v. Benesh, 234 N.J. Super. 248, 252 (Law Div. Apr. 5, 1989).

The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

Procopio v. Government Employees Ins. Co., 433 N.J. Super. 377, 380 (App.Div. Nov. 21, 2013) *citing* Landis v. N. Am. Co., 299 U.S. 248, 254-55 (1936).

“The power to grant a stay is unquestioned” where the circumstances equitably call for such action. Devlin v. National Broadcasting Co., 47 N.J. 126, 131 (1966).

Findings

Innisfree is the plaintiff in two of the “lead” cases entertaining oral argument in the Appellate Division⁵, as well as in a large portion of the cases pending appeal overall⁶. From their

⁵ Judge Sabatino’s January 26, 2017, *sua sponte* order

⁶ *Id.*

inception, these cases have been largely uniform and the imposition of a binding precedent will provide uniform results. Plaintiff initiated the present proceedings and others by submitting virtually identical OPRA requests for the same categories of documents across the state. Differing approaches to disclosure and redactions by both the defendant sub-groups and the vicinages across the state highlight a need for uniformity.

The interest in judicial economy is enormous. As an organization with activist goals, plaintiff has utilized the OPRA request process to place pressure on school districts across the State of New Jersey to achieve its ultimate goal of procuring information for families of children with special needs. It is apparent that the enormity of these filings is strategic. In Bergen County alone, forty-four school districts were served with verified complaints. Thus, to stay the present proceeding, pending an appellate decision, will result in sizeable judicial economy, by absolving the plaintiff and the forty-one remaining defendants from litigation and its costs.

As aptly noted by Judge Minkowitz, staying the instant proceeding will also maintain the status quo. If adjudicated, defendants face either violating OPRA by not disclosing records or violating privacy rights of their students by disclosing their records. Staying the present matter pending a binding decision will allow for the records to either be withheld or disclosed in accordance with precedent.

On balance, it is in the interest of fairness not to require the large number of defendants to litigate identical cases. Under OPRA, the prevailing party is entitled to reasonable attorney fees. It violates common sense principles of fairness to subject defendant school districts to vast attorney fees unnecessarily, particularly when their motivation in withholding the records was to avoid potential forfeiture of funding under FERPA.⁷ Further, it would be inequitable to subject Bergen

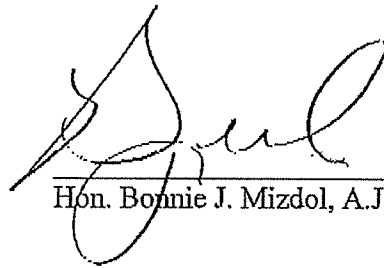
⁷ FERPA provides that “[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally

County school districts to the fee-shifting provisions of OPRA, in an unsettled area of the law currently pending determination by the Appellate Division.

The court finds a stay in the instant matter is proper due to equitable considerations of judicial economy, fairness, and uniformity of results.

Conclusion

Defendants' motion to stay the present matter is granted, pending a determination of the four related cases before the Appellate Division⁸.



Hon. Bonnie J. Mizdol, A.J.S.C.

identifiable information contained therein . . .) of students without the written consent of their parents.” 20 U.S.C. 1232g.

⁸ L.R. v. Camden City Public School District, A-003972-14T2, L.R. v. Parsippany-Troy Hills Public School District, A-004214-14T2, Innisfree Foundation v. Hillsborough Twp. Board of Education, A-002387-15T4, and Innisfree Foundation v. Cherry Hill Board of Education, A-003066-15T2.