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## C A S E A L E R T

### **APPELLATE DIVISION RULES IN FAVOR OF M&W CLIENTS, SETS NEW PROTOCOLS FOR PROTECTION OF STUDENT RECORDS**

On October 16, 2017 the Appellate Division published its long-awaited decision addressing the statewide practice of “Innisfree Foundation” and other OPRA requestors demanding copies of special education settlement agreements, correspondence relating to special education, HIB reports and other student records. Over the past several years, member school districts have responded differently to such OPRA requests due to a lack of controlling law, concerns over student confidentiality and the anticipated cost and expense of OPRA litigation, in which prevailing requestors are entitled to an award of attorney fees.

[L.R. and J.R. v. Camden City Public School District](#) involved four consolidated “test” cases in which trial judges issued conflicting rulings on the accessibility of student records through OPRA. The Appellate Division, while not rejecting out of hand all OPRA requests for student records, agreed with the appealing school districts that student records may not be redacted into “OPRA-ability” as public records to circumvent the privacy protections of the Family Educational Records Privacy Act or the New Jersey Pupil Records Act.

The Court conducted a scholarly review of the history of pupil record access laws, reviewed areas of conflict between OPRA,

FERPA and the PRA and attempted to harmonize the statutes, remanding all four “test cases” to Camden County Superior Court for further proceedings.

In two of those four cases such proceedings will include a determination of whether the “Innisfree Foundation,” the creation and client of the attorney who represents it, constitutes a “bona fide researcher” who is entitled to student records for legitimate research purposes. The articulated definition of a bona fide researcher is rather vague and its application by the trial court in Camden County, to which the cases have been remanded for further proceedings, could very well culminate in a determination which the Appellate Division would be called upon to review on appeal.

As to OPRA requestors for student records other than “bona fide researchers,” such requestors henceforth will be entitled to obtain records only if they obtain a court order based on a finding that their “wholesome public interest” or “a legitimate private interest” outweighs the District’s legitimate interest in maintaining confidentiality.

Any records that are released, the Court held, should be redacted to the extent necessary to render the students unidentifiable. Further, parents of all students whose records fall within the

scope of the request are entitled to three days written notice and an opportunity to object. Presumably any objections will inform the trial court's decision whether or not to order their release.

This decision was issued on October 16, 2017 and has been stayed for a period of 30 days, to be extended if any party petitions the Supreme Court for leave to file an appeal. However, unless and until it is overturned, its directive to school districts is clear:

1. Should you receive an OPRA request for student records as that term is broadly defined by the PRA and/or FERPA, you should not release such records without either a court order or a demonstration that the requestor is a "bona fide researcher" – which you should explore with your Board solicitor should the requestor claim to enjoy this status.
2. You should send written notice to the parents of any students (or the students themselves if over 18 years of age) whose records fall within the scope of the request that such records may be released and that the students may voice any objection or concern in writing to you, which your attorney should review and address as s/he sees fit.
3. Any records ultimately released, whether by court order or on account of the requestor's status as a bona fide researcher, should be heavily redacted to remove personal identifiers. Should there be any dispute over the extent of redaction, your Board solicitor should seek a judicial ruling, following an "in camera" review by a trial judge.

Should you have any questions regarding this important decision feel free to contact [Eric Harrison](#) at Methfessel & Werbel, whose direct line is (732) 650-6511.

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