



## CASE ALERT

### **SPECIAL EDUCATION SETTLEMENTS ARE NOW PUBLIC RECORDS**

On May 18, 2022, the Appellate Division of the Superior Court of New Jersey published an opinion finding that Orders or Initial Decisions entered by the Office of Administrative Law (“OAL”) approving special education settlement agreements are subject to disclosure under the Open Public Records Act (“OPRA”). The Court’s decision, therefore, requires the disclosure of Special Education settlement agreements and OAL Initial Decisions or Orders memorializing those settlement agreements. Previously, settlements of special education disputes, including those memorialized by an Administrative Law Judge, were considered confidential student records and were withheld as exempt from public disclosure requirements on that basis. As a result, this new Opinion has the potential to make countless prior special education settlements, entered with a presumption of confidentiality by all parties, now publicly accessible. We anticipate that Boards of Education and parents of special education students will be impacted by the new accessibility of these records and are available to help school districts best adapt to the changes.

#### **1. The Court’s May 18, 2022 Opinion**

On May 18, 2022, the Appellate Division issued its Opinion deciding the matter of C.E. and B.E., individually and on behalf of K.E., v. Elizabeth Public School District, (App. Div. 2022). The Plaintiffs, C.E., B.E. and K.E., had filed several OPRA requests with the school district, including for copies of “all settlements entered into by the school board in the New Jersey Office of Administrative Law EDS docketed cases” and “any final decisions incorporating or pertaining to” those settlements. The Board of Education denied the request on the basis that the settlements, and the final decisions that memorialized them, were protected from disclosure by exemptions for confidential student records. The Appellate Division held that the Board of Education had wrongly denied access to the records and that such records were publicly accessible as a general rule.

In its decision in favor of the Plaintiffs, the Court relied on a federal statute requiring public agencies to make special education settlements publicly accessible, which the Court found conflicts with, and thus preempts, New Jersey regulations that prohibit the disclosure of special education settlements. That statute, 20 U.S.C. § 1415(h)(4)(A), was interpreted by the Court as requiring “that findings of fact and decisions under IDEA shall be made available to the public...” See also, 34 C.F.R. § 300.513(d)(2) (“The public agency, after deleting any Personal Identifying Information, must...make those findings and decisions available to the public”). The Court further supported its decision noting that, generally, “settlement agreements qualify as accessible government records under OPRA”, and recognizing that “public interest in settlement agreements are strong since such settlements may provide valuable information regarding the conduct of government officials.”

As a result, the Court held that, where settlement agreements are submitted to the OAL for approval “without a protective order”, and the ALJ enters an Order approving the settlement, the settlement agreement and Order become “judicial findings and are subject to a presumption of public access.” As such, the settlement agreements and the OAL Orders that approve those agreements, are

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publicly accessible records that must be produced in response to otherwise-proper OPRA requests once all Personal Identifying Information is removed (using initials instead of full names and redacting any other personal identifying information like addresses or birth dates).

## **2. Issues to Consider**

The potential impacts of this change in the law may not be fully clear for some time. Initially, parents' attorneys may attempt to obtain copies of boards' past settlements in an attempt to find precedent for relief that they may seek. Even where a parents' attorney is able to find a settlement agreement previously entered that provided the types of services the parents seek, the impact of such 'evidence' may be limited, as what services are required to ensure the provision of a free and appropriate education are different depending on the individual needs of each student. Nonetheless, parents that previously entered settlement agreements under the assumption that the agreements and related Court records would be forever confidential, may now be dismayed to learn that those documents are now publicly available.

This new decision also necessarily raises questions about how Boards of Education can, or should, alter their current practices in response. We anticipate one frequent consideration will be whether to seek to resolve special education disputes without submitting settlement agreements to the OAL to be approved and memorialized in Orders/Initial Decisions, as the Court's holding requiring public disclosure is limited to those documents filed in, or generated by, the Court/OAL. For instance, a Board of Education may require, as part of the settlement, that the parents withdraw their pending Petition without the Court entering an Order approving the settlement. However, dismissals in lieu of Orders approving settlements may not always be appropriate. For instance, settlement agreements that are incorporated into an Order may be easier to enforce as such approved agreements are not only a binding contract, but an enforceable Court Order. OAL Orders entered after parents are questioned, on the record, to confirm they are settling the case voluntarily and without coercion can provide especially strong evidence in support of the enforcement of a settlement agreement. That opportunity would not be available for cases withdrawn without an Order approving the settlement.

The issue of parents' attorneys' fees may also be impacted by this decision. Previously, some Boards of Education would seek to resolve the educational services aspects of special education disputes while preserving the issue of attorneys' fees for a Court to decide in a later application. However, if the settlement agreement is not memorialized in an Order entered by the OAL, parents' attorneys may not be able to move for fees, in part because the parents may not be considered a "prevailing party" without a court order they can point to granting some relief to their clients. In such situations, Boards of Education and parents' attorneys may be newly motivated to resolve attorneys' fees applications simultaneously with educational service disputes.

Finally, especially in smaller school districts, this decision may provide parents with a disincentive to filing special education petitions due to increased privacy concerns. Although students' initials, not full names, are used, and other personal identifying information is redacted, settlement agreements of special education disputes often contain detailed educational and personal

histories of students and their families that would make their identities obvious to neighbors and friends. Parents with such privacy concerns may have previously been willing to proceed only because of the belief they would be able to prevent any resolution of their claims from becoming publicized. Now, because settlement agreements (in addition to final decisions issued after trial, which have always been publicly accessible) are subject to public disclosure, parents may feel that they have few options to obtain the relief they seek without risking the forfeiture of their student's and family's privacy. As a result, those parents may determine that the cost of forfeiting their child's privacy outweighs the potential benefits of pursuing a special education claim and, therefore, be less likely to file such claims in the future.

### **3. Conclusion**

The attorneys at the Busch Law Group are available to address any concerns caused by this change in the law, including helping respond to future requests for prior special education settlement records motivated by the Court's decision. We remain ready, willing and able to discuss the impact of this case on your specific school district and its policies and procedures going forward.

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