PREPARED BY THE COURT

D.T. ON BEHALF OF L.T., Plaintiff, v. NEW JERSEY DEPARTMENT OF EDUCATION AND RECORDS CUSTODIAN JEANETTE LARKINS, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION – MERCER COUNTY DOCKET NO. L-2374-23 CIVIL ACTION **ORDER GRANTING PLAINTIFF'S ORDER TO SHOW CAUSE AND DENYING DEFENDANTS' MOTION TO DISMISS**

THIS MATTER having come before the Court, the Hon. Robert Lougy, A.J.S.C., presiding, on the verified complaint and order to show cause filed by Plaintiff D.T on behalf of L.T., represented by Jamie Epstein, Esq.; and Defendants New Jersey Department of Education and Records Custodian Jeanette Larkins, represented by Deputy Attorney General Michael Lombardi, having filed a motion to dismiss Plaintiff's complaint; and Plaintiff having filed opposition to Defendant's

motion to dismiss; and the Court having considered the parties' pleadings and arguments; and for the reasons as stated below; and for good cause shown;

IT IS on this 1st day of May 2024 **ORDERED** that:

1. Plaintiff's application for an order declaring that Defendants violated OPRA by unlawfully and unfairly extending time to provide the majority of the documents in the file requested by Plaintiff's OPRA Request dated September 26, 2023 which shall be deemed a denial of records pursuant to N.J.S.A. 47:1A-5(i) is **GRANTED**.
2. Plaintiff's application for an order directing that within 20 days after the service of this Order upon them, Defendants shall provide Plaintiff with access to the complete contents of the file requested in Plaintiff's OPRA Request dated September 26, 2023 is **MOOT**.
3. Plaintiff's application for an order declaring that Plaintiff is the prevailing party in this matter is **GRANTED**.
4. Plaintiff's application for an order for an award of costs of this action and reasonable attorneys' fees and an enhancement is **GRANTED**. The parties shall engage in good faith negotiations to resolve counsel fees and costs.
5. Defendants' application for an order dismissing Plaintiff's complaint is **DENIED**.

6. This Order shall be deem served upon uploading to eCourts.

/s/ Robert Lougy
ROBERT LOUGY, A.J.S.C.

X **OPPOSED**
UNOPPOSED

PURSUANT TO RULES 1:6-2(f) AND 1:74(a) THE COURT PROVIDES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW.

This matter comes before the Court by way of Plaintiff's verified complaint and order to show cause. Defendants filed a motion to dismiss Plaintiff's complaint. Plaintiff filed opposition to Defendants' motion to dismiss. The Court heard oral argument on April 30, 2024. Because the requested records are government records under Open Public Records Act ("OPRA"), the Court grants Plaintiff's order to show cause and denies Defendants' motion to dismiss.

The Court provides the following procedural and factual histories. Plaintiff D.T. individually and her minor child L.T. live in Camden County. Compl. ¶ 3. Plaintiff and the minor child use their initials to protect their identities. Id. at ¶ 4. Defendant is New Jersey Department of Education ("NJDOE" or "DOE"), a Department of the State of New Jersey that supports schools, educators, and districts to ensure all of New Jersey's 1.4 million students have equitable access to high quality education and achieve academic success. Id. at ¶ 5. NJDOE is a "public agency" as the term is defined by OPRA, N.J.S.A. 47:1A-1.1. Id. at ¶ 7.

Defendant Records Custodian Jeanette Larkins ("Larkins" or "Custodian") is the official records custodian of the NJDOE and is a "Custodian of a government record" as that term is defined by N.J.S.A. 47:1A-1.1. Id. at ¶ 8.

On September 26, 2023, Plaintiff requested Defendants give Plaintiff access to "The contents of the file of OAL DKT. NO. EDS 00267-22, DOE AGENCY DKT. NO. 2022-33719, D.T. ON BEHALF OF L.T., Petitioner, v. LAWNSIDE BOARD OF EDUCATION, Respondent. (final decision 1/19/23)" pursuant to the OPRA (APX 1). Id. at ¶ 15. The case was filed with Defendant NJDOE on 12/29/21. Id. at ¶ 16. On January 11, 2022, Defendant NJDOE transmitted the case to NJOAL for adjudication. Id. at ¶ 17. On January 19, 2023, after the final decision was entered by the New Jersey Office of Administrative Law ("NJOAL"), NJAOL returned the case file back to Defendant NJDOE. Id. at ¶ 18. On September 26, 2023, Defendants sent receipt of Plaintiff's OPRA request. Id. at ¶ 20. On October 4, 2023, Defendants provided some, but not all, of the records in the file. Id. at ¶ 22. On October 5, 2023, and on October 12, 2023, Plaintiff's counsel notified to Defendants by email that the complete contents of the requested file were not included in the records provided. Id. at ¶ 23. On October 12, 2023, Larkins responded to Plaintiff's Counsel that additional time was required as the potentially responsive records were being retrieved from the offsite storage. Id. at ¶ 24. On October 26, 2023, Larkins further extended the time to November 6,

2023 stating the same reason. Id. at ¶ 25. On November 6, 2023, Plaintiff filed another OPRA request, but this time for the related records of the September 26, 2023 search. Id. at ¶ 26. Thereafter, Larkins extended the September 26, 2023 OPRA request response due date four times: to November, 17, 2023, November 29, 2023, December 8, 2023, and December 19, 2023. Id. at ¶ 27. Finally, on December 20, 2023, Larkins extended the time to December 29, 2023. Id. at ¶ 28.

On December 26, 2023, Plaintiff filed a verified complaint and order to show cause, alleging the State violated OPRA. Count One alleged that Defendants had violated OPRA and sought judgment that Defendants were legally bound to provide the full contents of the requested file in Plaintiffs' OPRA Request(s) immediately. Id. at ¶ 37. Plaintiff seeks entry of a judgment ordering Defendants give Plaintiff access to a complete copy of the records requested in Plaintiff's September 26, 2023, OPRA request and awarding Plaintiff costs and reasonable attorneys' fees. Ibid.

Now before the Court is Plaintiff's order to show cause and Defendants' motion to dismiss Plaintiff's verified complaint and order to show cause.

Defendants argue the following in their letter brief in support of their motion to dismiss. First Defendants argue that Plaintiff has been provided with the requested records, therefore the portions of Plaintiff's complaint seeking access to the records is moot. Db6. Defendants assert DOE provided all records responsive

to Plaintiff's request on February 16, 2024. Ibid. Despite DOE's timely and reasonable extensions to respond to Plaintiff's request for student records, largely caused by factors outside DOE's control including the records' location and structural damage at the storage facility, Plaintiff prematurely field the instant matter before DOE completed its substantive response to Plaintiff's request. Id. at 6-7. On March 11, 2024, Plaintiff's counsel advised DOE and this Court that it had received the requested records, and it was satisfied with the production. Id. at 7. Defendants argue that, because DOE has provided Plaintiff with all the records requested, and as of the filing of this opposition Plaintiff has not articulated a legitimate objection to DOE's production of records, Plaintiff's complaint seeking access to records should be dismissed as moot. Ibid.

Next, Defendants argue that Plaintiff is not entitled to attorney's fees under OPRA. Ibid. Defendants assert that Plaintiff is not a "prevailing party" under OPRA because DOE did not deny access, the records should have already been in Plaintiff's possession, and access to the records is governed by federal and state laws concerning confidential student records, not OPRA. Id. at 7-8. Defendants maintain that Plaintiff can establish no causal nexus between the filing of the complaint and DOE's production of records on February 16, 2024, therefore Plaintiff is not entitled to attorney's fees under OPRA, and this complaint should be dismissed. Id. at 8.

Defendants argue that they did not deny access and Plaintiff is not the prevailing party. Ibid. Because DOE had to retrieve responsive records from an offsite facility, DOE took reasonable extensions to respond. Ibid. DOE provided its initial response producing the records it had available six business days after Plaintiff's initial request. Id. at 9. Plaintiff followed up seeking additional records from the requested OAL file; DOE advised Plaintiff that it need more time to retrieve and review additional responsive records that were located at an offsite storage facility. Ibid. Unknown to DOE's custodian, the offsite facility had experienced some structural damage that extended the necessary delay in retrieving records. Id. at 9-10. Therefore, DOE continued to take necessary and reasonable extensions and at no time denied Plaintiff access to records. Id. at 10. DOE finally received the records from the damaged offsite facility shortly after Plaintiff filed this lawsuit. Ibid. Furthermore, Defendants assert, despite review of the records and a determination that those records are confidential student records under OPRA, DOE produced the remaining records of the file as a courtesy with the understanding that Plaintiff as the subject of the underlying OAL matter should already possess these records, and Plaintiff's counsel asserts that he still represents D.T. Ibid. Therefore, Plaintiff establishes no causal nexus between the filing of this litigaiton and DOE's substantive production of records on February 16, 2024.

Plaintiff is not entitled to attorney's fees under OPRA, and this complaint should be dismissed with prejudice. Ibid.

Next, Defendants argue that, as the litigant in the underlying OAL matter, Plaintiff already possessed the requested records and therefore there was no denial of access. Id. at 11. Even if this Court were to consider DOE's response to be delayed, Plaintiff cannot establish a denial because Plaintiff should have already possessed the requested records. Ibid. Plaintiff was a party to the underlying OAL matter, and as a party to the matter, she should already be in possession of the requested file. Ibid. Furthermore, Plaintiff's counsel is required to have the requested records in his possession. Id. at 11-12. Plaintiff's counsel purportedly filed the ORPA request at issue on Plaintiff's behalf, as such, Plaintiff could not have been denied access to records which should already be in her or her counsel's possession. Ibid. Therefore, because there is no denial of access, Plaintiff is not entitled to attorney's fees under OPRA, and this complaint should be dismissed with prejudice. Ibid.

Next, Defendants argue that the records are exempt under OPRA as confidential student records. Ibid. Defendants assert that the requested records are student records involving a due process hearing filed by Plaintiff's attorney, who is also the advocate in the instant proceeding. Id. at 13. The OAL has specific procedural rules governing special education due process hearings. Ibid. Both the

Individuals with Disability Act ("IDEA") and the OAL's regulations require that special education due process hearings be conducted in a confidential manner. Id. at 14.

Defendants contend that education records are also governed by the Federal Family Educational Rights and Privacy Act of 1974 ("FERPA") and the New Jersey Pupil Records Act ("NJPRA") which provide safeguards to protect the legitimate privacy interests of students. Ibid. The IDEA incorporates the provisions provided by FERPA and provides additional confidentiality provisions for students receiving special education services under the IDEA. Id. at 15. The IDEA and state law allow for special education due process decisions to be made publicly available, but only once all Personally Identifiable Information ("PII") is redacted. Ibid. The IDEA and state law exclude exhibits and transcripts connected to due process hearings from being made publicly available; the regulation implementing FERPA, and the New Jersey Pupil Rights Act allow for access to confidential student records in certain limited circumstances. Ibid. Relevant to this matter are the exceptions for parental consent and for records that have been scrubbed of any student identifiers. Ibid. Plaintiff sought the records of a specific OAL matter for a specific student, under these circumstances the records at issue cannot be sufficiently redacted of PII, because any response to such a specific request would identify the Plaintiff as the student in the due process matter. Ibid.

The remaining records subsequently retrieved from storage included exhibits from the OAL hearing containing confidential student information, therefore these records are exempt under OPRA as confidential student records; Plaintiff is not entitled to access these records under OPRA, and he is not entitled to attorney's fees. Id. at 16.

Next, Defendants argue that the custodian did not knowingly and willfully deny access to the requested materials in violation of OPRA. Ibid. Defendants assert the record is devoid of any evidence of conscious wrongdoing. Id. at 17. DOE initially provided documents responsive to Plaintiff's OPRA request within seven business days. Ibid. Upon notification by Plaintiff's counsel that not all the records from the due process matter on behalf of Plaintiff were in the initial production, DOE searched off site locations where further potentially responsive documents could be stored. Ibid. DOE continued to seek reasonable and necessary extensions to respond to Plaintiff's records request, prior to Plaintiff's filing of this verified complaint and order to show cause. Id. at 18. DOE did not receive the balance of the requested file until January 8, 2024. Ibid. None of the custodian's actions could reasonably be seen as a willful violation of OPRA, therefore there was no knowing and willful violation and Plaintiff's complaint should be dismissed with prejudice. Ibid.

Plaintiff argues the following in opposition to Defendants' motion to dismiss. First, Defendants' motion to dismiss must be denied as a matter of law. Pb2. Defendants have failed to meet their burden to be granted their motion to dismiss. Ibid. The motion to dismiss must be denied because Defendants unlawfully denied Plaintiff access to most of the requested records on October 4, 2023 with their response stating the "request has been filled and closed." Id. at 3. Defendants' argument that this case must be dismissed because it is moot is meritless. Ibid.

Next, Plaintiff argues that there are three reasons that entitle her to the relief she requests as the prevailing party: (1) in DOE's "final response" on October 14, 2023, Defendants unlawfully denied access to all but nine files of the records requested, closed the file, and did not seek extension of time because the records were in storage; (2) DOE unlawfully denied access to the remaining 25 files of records until March 9, 2023, shortly before the return date of the postponed Order to Show Cause; and (3) she is entitled to attorney's fees according the "catalyst" theory. Id. at 5.

Next, Plaintiff argues that Defendants' motion to dismiss must be denied because such an order would violate Plaintiff's right to prevailing party attorney's fees under OPRA. Id. at 7. OPRA recognizes the catalyst theory as a basis for finding that a plaintiff is a prevailing party entitled to an award of fees and costs.

Ibid. The catalyst theory entitles a plaintiff to an award of attorney's fees if it can demonstrate that: (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 8.

Next, Plaintiff argues that DOE's October 4, 2023 denial of access violated OPRA. Id. at 9. Plaintiff's records request was submitted to DOE on September 26, 2023 and on the same day DOE emailed Plaintiff an acknowledgment of same. Ibid. Seven business days later, on October 4, 2023, DOE emailed their Response to the OPRA Request with records attached. Ibid. The DOE's OPRA request response was contained in the body of the email, which stated, "Mr. Espstein, Attached please find records responsive to the above referenced request, along with a receipt indicating that your request has been filled and closed." Ibid. DOE's response did not include any mention of the remainder of the requested records being in storage. Ibid. It was the effort of Plaintiff, not DOE, to address and bring about these missing records. Ibid. Not only was DOE's October 4, 2023 response fatal to their defense to the complaint, but it is likewise fatal to their pending motion to dismiss. Id. at 9-10.

Next, Plaintiff argues that DOE's seven extensions of its due date constitute a denial of access and a violation of OPRA. See id. at 10-12. The original OPRA request was filed on September, 26, 2023. Id. at 12. Counsel for Plaintiff issued

follow-up communications on October 4 and October 12. Ibid. Plaintiff argues that DOE never intended to meet the extended deadline, as it did not conduct a renewed and thorough search of off-site locations until after that deadline had passed. Ibid. At no time did DOE comply with the law regarding requesting extensions of time to provide access to the record requester. Id. at 13.

Next, Plaintiff argues that she did not already possess the records in question, and even if she did, the records would not be exempt under OPRA. Ibid. Defendants erroneously contend that Plaintiff does not qualify as a prevailing party because DOE claims that the records should have already been in possession of Plaintiff. Ibid. But Defendants lack any OPRA exception for such a defense and there is no reasonable basis for DOE to assume that Plaintiff was in possession of the records requested. Id. at 13-14. Furthermore, DOE's eventual response included at least 39 documents that Plaintiff had not previously retained. Id. at 14.

Next, Plaintiff argues that the requested records were not exempt under OPRA as student records. Ibid. DOE's contention that Plaintiff is not entitled to attorney's fees because access to the records is governed by federal and state laws concerning confidential student records, not OPRA, is moot. Ibid. DOE concedes that FERPA likewise allows for the disclosure of such OPRA records with parental consent. Ibid. Given that is it was parent D.T.'s OPRA Request that sought the records which DOE withheld, the consent of parents was implicit, and the records

were not exempt under FERPA, and fell under the umbrella of OPRA records. Id. at 14-15.

Next, Plaintiff argues that the Custodian knowingly and willfully denied access to materials in violation of OPRA. Id. at 15. DOE maintains the defense that all attempts were made by the record custodian, Defendant Jeanette Larkins, to fulfill Plaintiff's request, but this is unsubstantiated, even accounting for DOE's offered "proof" –DOE's initial response, which included only four documents; the DOE's email communications delaying response without justification; and the notification of damage to the facility housing the records. Ibid. The Custodian's failure to conduct a thorough search within the first deadline, in tandem with her failure to notify Plaintiff of the damage to the archive facility when it became known to her, demonstrates an unreasonable and willful denial of access to the requested records.

The Court now turns to the relevant law. The standards governing a motion to dismiss are well-established. In determining whether a plaintiff has failed to state a claim upon which relief can be granted under Rule 4:6-2(e), the Court limits its examination to evaluating the legal sufficiency of the facts alleged on the face of the complaint. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (citing Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987)). The Court "searches the complaint in depth and with liberality to ascertain

whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary." Ibid. (citing Di Cristofaro v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div. 1957)). At this preliminary stage of the litigation, the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint; therefore, plaintiffs are entitled to every reasonable inference of fact. Ibid. (citing Indep. Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1965)). In short, "the test for determining the adequacy of a pleading [is] whether a cause of action is 'suggested' by the facts." Ibid. (citing Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)). "In evaluating motions to dismiss, courts consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.'" Teamsters Loc. 97 v. State, 434 N.J. Super. 393, 412 (App. Div. 2014) (quoting Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005)). "The examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach." Ibid.

If the complaint states no basis for relief, dismissal of the complaint is appropriate: "[d]iscovery is intended to lead to facts supporting or opposing a legal theory; it is not designed to lead to formulation of a legal theory." Camden Cty. Energy Recovery Assocs., L.P. v. DEP, 320 N.J. Super. 59, 64 (App. Div. 1999).

Thus, "if the complaint states no claim that supports relief, and discovery will not give rise to such a claim, the action should be dismissed." Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 107-08 (2019) (citing Rezem Family Assoc., LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div. 2011); Camden Cty. Energy Recovery, 320 N.J. Super. at 64-65)). The Court may dismiss some of the counts without dismissing the entirety of the case. See Jenkins v. Region Nine Housing, 306 N.J. Super. 258 (App. Div. 1997). However, dismissals "should be granted in only the rarest of instances." Printing Mart-Morristown, 116 N.J. at 772.

Ordinarily, a dismissal for failure to state a claim is without prejudice, and the court has the discretion to permit a plaintiff to amend the complaint to allege additional facts to state a cause of action. Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 116 (App. Div. 2010). Complaints should not be dismissed if the facts suggest a potential cause of action that may be better articulated by an amendment of the complaint. Printing Mart-Morristown, 116 N.J. at 746. However, "our courts have not hesitated to dismiss complaints with prejudice when a … challenge fails to state a claim." Teamsters Local 97 v. State, 434 N.J. Super. 393, 413 (App. Div. 2014).

"Courts normally will not decide issues when a controversy no longer exists, and the disputed issues have become moot." Betancourt v. Trinitas Hosp., 415 N.J.

Super. 301, 311 (App. Div. 2010). "A case is technically moot when the original issue presented has been resolved, at least concerning the parties who initiated the litigation." Ibid. (quoting DeVesa v. Dorsey, 134 N.J. 420, 428 (1993) (Pollock, J., concurring)). Stated differently, "an issue is moot when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." Greenfield v. N.J. Dep't of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006) (internal quotation marks omitted) (quoting N.Y. Susquehanna & W. Ry. Corp. v. State Dep't of Treasury, 6 N.J. Tax 575, 582 (Tax 1984)).

Courts will consider an issue notwithstanding its mootness if it "presents a question that is both important to the public and likely to recur." Clymer v. Summit Bancorp., 171 N.J. 57, 65-66 (2002); see In re Civil Commitment of E.D., 183 N.J. 536, 540, 552 (2005) (electing "to address a challenge to the procedures used to revoke a committee's conditional discharge and to recommit under the [SVPA]" because the issues "may reoccur" but finding other issues raised by the committee moot).

The Court finds that the matter is not moot. Whether Defendants have provided all records responsive to Plaintiff's request or the fact that Plaintiff's counsel advised the DOE and this Court that it was satisfied with the production does not necessarily render that issue moot. Even if Defendants provided all of the records requested before the resolution of this lawsuit, under the catalyst theory,

Plaintiff may have claim that she is the prevailing party in the matter and may be entitled to attorney's fees and costs. Here, Plaintiff has sufficiently plead that Defendants violated OPRA and may be entitled to counsel fees. The request for counsel fees remains outstanding. Thus, Plaintiff has satisfied the "test" showing that a "cause of action is 'suggested' by the facts." Printing Mart, 116 N.J. at 746 (citing Velantzas, 109 N.J. at 192).

"Any analysis of OPRA must begin with the recognition that the Legislature created OPRA intending to make government records 'readily accessible' to the state's citizens 'with certain exceptions.'" Gilleran v. Twp. of Bloomfield, 227 N.J. 159, 170 (2016) (alteration in original) (quoting N.J.S.A. 47:1A-1); see also Mason v. City of Hoboken, 196 N.J. 51, 65 (2008). New Jersey champions a "long and proud 'tradition[] of openness and hostility to secrecy in government.'" Simmons v. Mercardo, 247 N.J. 24, 37 (2021) (quoting Educ. Law Ctr. v. DOE, 198 N.J. 274, 283 (2009)). "The public's right to disclosure is not, however, absolute." North Jersey Media Grp., Inc. v. Bergen Cty. Prosecutor's Office, 447 N.J. Super. 182, 195 (App. Division 2016) (citations omitted).

N.J.S.A. 47:1A-1 provides that "government records shall be readily accessible for inspection, copying, or examination … with certain exceptions, for the protection of the public interest …." N.J.S.A. 47:1A-1. A "[g]overnment record" includes:

> any . . . information stored or maintained electronically . . . that has been made, maintained or kept on file in the course of . . . official business by any officer . . . of the State or of any political subdivision thereof . . . or that has been received in the course of . . . official business by any such officer ….
>
> [N.J.S.A. 47:1A-1.1.]

"The custodian must 'promptly comply with a request' and, if 'unable to comply … shall indicate the specific basis therefor on the request form and promptly return it to the requestor.'" North Jersey Media Group, 447 N.J. Super. at 195. "A public agency that denies access bears 'the burden of proving that the denial of access is authorized by law.'" Ibid.; N.J.S.A. 47:1A-6.

OPRA does not diminish any grant of confidentiality afforded by other statutes or regulations. N.J.S.A. 47:1A-9. Defendants rely on numerous such authorities here. N.J.A.C. 6A:32-7.5 governs access to student records. In relevant part, it provides:

> (g) In complying with this section, district boards of education and charter school and renaissance school project boards of trustees shall adhere to the requirements pursuant to the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 et seq., and the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 CFR Part 99.
>
> 1. When responding to OPRA requests from any party, including parties other than those listed [in other sections], a district board of education or charter school or renaissance school project board of trustees may release, without consent, records

> removed of all personally identifiable information, as such documents do not meet the definition of a student record. Before making any release, the district board of education or charter school or renaissance school project board of trustees shall have made a reasonable decision that a student's identity cannot be determined whether through single or multiple releases, or when added to other reasonably available information.
>
> [N.J.A.C. 6A:32-7.5.]

Federal regulations define "personally identifiable information" to include, but not limited to:

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

Further, the regulation explains where prior consent is not required:

> De-identified records and information. An educational agency or institution, or a party that has received education records or information from education records under this part, may release the records or information without the consent required by § 99.30 after the removal of all personally identifiable information provided that the educational agency or institution or other party has made a reasonable determination that a student's identity is not personally identifiable, whether through single or multiple releases, and taking into account other reasonably available information.
>
> [Ibid.]

State law also provides various protections to student information. Under the New Jersey Pupil Records Act:

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

Additional state and federal regulations protect confidentiality provisions for students receiving special education services. See N.J.A.C. 1:6A-1.1 to -18.5; 20 U.S.C. § 1400.

34 C.F.R. § 99.30 provides for conditions where prior consent is required to disclose information. It states:

> (a) The parent or eligible student shall provide a signed and dated written consent before an educational agency or institution discloses personally identifiable information from the student's education records, except as provided in § 99.31.
>
> (b) The written consent must:
>
> (1) Specify the records that may be disclosed;
>
> (2) State the purpose of the disclosure; and
>
> (3) Identify the party or class of parties to whom the disclosure may be made.
>
> (c) When a disclosure is made under paragraph (a) of this section:
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> (1) If a parent or eligible student so requests, the educational agency or institution shall provide him or her with a copy of the records disclosed; and
>
> (2) If the parent of a student who is not an eligible student so requests, the agency or institution shall provide the student with a copy of the records disclosed.
>
> (d) "Signed and dated written consent" under this part may include a record and signature in electronic form that —

> (1) Identifies and authenticates a particular person as the source of the electronic consent; and
>
> (2) Indicates such person's approval of the information contained in the electronic consent.

[Ibid.]

Because Plaintiff's request for production of documents is moot, all that remains in dispute is whether Plaintiff is entitled to counsel fees and costs. "To be entitled to such counsel fees under OPRA, a plaintiff must be a prevailing party in a lawsuit . . . that was brought to enforce his or her access rights." Smith v. Hudson Cty. Register, 422 N.J. Super. 387, 393 (App. Div. 2011). A plaintiff becomes a prevailing party under OPRA "after the entry of some form of court order or enforceable settlement" granting access to the records sought. Mason, 196 N.J. at 77. A plaintiff may also obtain a counsel fee award "when a government agency voluntarily discloses records after a lawsuit is filed." Mason, 196 N.J. at 76-77. To obtain a fee award under latter approach a plaintiff must "establish a 'causal nexus' between the litigation and the production of requested records" and "that the relief ultimately secured by plaintiffs had a basis in law." Ibid (citation omitted).

The Court concludes that Defendants denied Plaintiff access to the records. Defendants' initial response indicated that the request had been filled and closed. Defendants subsequently identified additional records, but only after being notified

by Plaintiff's counsel, on October 5, 2023, that the production was incomplete and missing hundreds of records. Furthermore, Defendants did not respond to Plaintiff's initial notification on October 5, 2023, until Plaintiff's counsel sent a follow-up email on October 12, 2023. Only then did Defendants notify Plaintiff that Defendants were retrieving potentially responsive records from storage. That sequence of events constitutes a denial. See N.J.S.A. 47:1A-5. Further, although the DOE eventually produced the records to the satisfaction of Plaintiff, they did so after four months and shortly before the return of Plaintiff's order to show cause. That establishes the causal nexus between this litigation and Defendants' production of the records.

Accordingly, the Court finds that Defendants violated OPRA by unlawfully and unfairly extending time to provide most of the documents in the file requested by Plaintiff. Plaintiff is the prevailing party in the instant action.

The Court briefly addresses Defendants' remaining arguments. First, the Court addresses Defendants' argument that Plaintiff already possessed the requested records and therefore there was no denial of access. The Court finds Plaintiff's assertion that she did not possess all the records in question is enough to survive Defendants' motion to dismiss. Second, regarding Defendants' argument that the records are exempt under OPRA as confidential student records, the Court disagrees. But even if the records are exempt under OPRA; the Custodian failed to

provide that as a reason for the denial and delay as alleged by Plaintiff. Furthermore, Defendants knew that D.T. was the parent of L.T., and federal law provides for an exception allowing disclosure of such records with parental consent. On those facts, granting Defendants' motion to dismiss be inappropriate; the Court finds that the records requested by Plaintiff were neither exempt under OPRA nor other state and federal regulations.

Finally, the Court turns to Plaintiff's application for an attorney's fee award under OPRA. Because Plaintiff is the prevailing party under OPRA, she is entitled to receive a reasonable attorney's fee award. A plaintiff may obtain a counsel fee award "when a government agency voluntarily discloses records after a lawsuit is filed." Mason, 196 N.J. at 76-77.

Accordingly, the Court grants Plaintiff's order to show cause and denies Defendants' motion to dismiss. The Court directs counsel to make good-faith efforts at resolving the counsel fees award without further court involvement. If such negotiations do not resolve the issue, Plaintiff may move for counsel fees and costs, supported by certification addressing all relevant factors (i.e., RPC 1.5(a), R. 4:42-9).