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To Protect Sensitive Documents, School Districts Should Contact Their Board Attorneys When an Alleged Incident of Bullying, Harassment, or Intimidation is Reported

By Scott D. Zucker, Esq.

Based on the Appellate Division's decision in *K.L. v. Evesham,* ___ *N.J. Super.* ___ (App. Div. Dec. 12, 2011), school boards should involve their board attorneys early in the process to better protect their notes and documents from disclosure when an alleged incident of bullying, harassment, or intimidation is reported.

In *K.L.*, a parent requested school records pertaining to alleged incidents of bullying against his children. The district provided the parent with its "Harassment, Intimidating and Bullying Policy" only, and invited the parent to review his children's student records. After the parent filed a lawsuit, the district released to the parent one redacted document that reported the disciplining of a student for violent conduct against the parent's son. The district did not release to the parent eleven pages of notes concerning communications between school personnel and the parent and his children. The parent asserted his right to access these notes under the Open Public Records Act ("OPRA"), *N.J.S.A.* 47:1a-1 to -13, and the common law. The school claimed that its notes concerning the alleged bullying incidents were protected by the attorney-client privilege, the work product privilege, and the Family Educational Rights and Privacy Act ("FERPA"), 20 *U.S.C.* 1232(g), which prohibits the district from disclosing any records pertaining to other students.

The reviewing panel in *K.L.* found the notes requested by the plaintiff constituted government records for the purposes of an OPRA request because they were made and maintained in the course of the school district's official business. However, the panel rejected the argument that the attorney-client privilege protected the notes. The appellate panel observed, "communications between lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) to refuse to disclose any such information, and (b) to prevent his lawyer from disclosing it . . . ." *N.J.S.A.* 2A:84A-20; *N.J.R.E.* 504. The panel concluded that the requested notes were not communications from school personnel to its board attorney until the parent made a request for records under OPRA. Although the panel declined to find the attorney-client privilege *(cont'd* ➔)

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applied to the notes, it suggested that if the board attorney had directed district personnel to prepare notes, the notes had been prepared in anticipation of the filing of a lawsuit, and such notes had been sent to the attorney when they were prepared, the notes would have been protected by the attorney-client privilege.

The appellate panel found the notes fell within the work product privilege because they were “prepared at the direction of an attorney before litigation [had] commenced” and because “use for litigation was the dominant purpose of preparing the documents and . . . the attorney’s belief that litigation would ensue was objectively reasonable.” The panel noted the parent had claimed he and his children were victims of racial discrimination by the school district and had filed a complaint with the United States Department of Education, Office of Civil Rights. The parent also had demanded that a school principal communicate with him solely in writing. In turn, the board attorney advised school personnel to maintain detailed notes of communications with the parent and his children in anticipation of litigation. Hence, the court found the notes to be attorney work product and protected from disclosure under OPRA.

To overcome the work product privilege, the parent had to show he had “a substantial need” for the notes or he would be “unable without undue hardship to obtain the substantial equivalent of the materials by other means.” The panel observed the parent’s children were present during the incidents, and his communication with school personnel were the substantial equivalent of the information contained in the notes.

Regarding the Anti-Bullying Act, the court pointed out that the law provides that school district personnel must inform parents in writing of “the nature of [an anti-bullying investigation], whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying.” *N.J.S.A.* 18A:37-15b(6)(d). The Court declined to address whether records created in accordance with the Anti-Bullying Act must be disclosed under OPRA, the common law, or other authority.

Turning to the common law right to access government records, the panel noted that the common law balances the requestor’s interest against the public agency’s interest in confidentiality. The panel found that the Anti-Bullying Act, as an expression of State policy, supported the parent’s claim to view the records under the common law. However, this claim yielded to the work product privilege. The court found the school district orally provided the parent with the information he was seeking, and the court found no reason to believe the district provided inaccurate information or that the notes’ contents differed from the reports provided.

Next, the Court explained that FERPA provides for the withholding of federal funds from any school that effectively denies parents access to their own children’s records and requires school districts to establish appropriate procedures for granting parents access to their children’s records. The Court noted that FERPA does not permit a parent to view those portions of a record that include information on more than one student. Therefore, under FERPA, the panel found that the school district appropriately provided access to the portions of the record that pertained to the plaintiff’s children but that the name of another student had been appropriately redacted.

Based on *K.L.*, districts should immediately contact their board attorneys when 1) they anticipate litigation from a parent, or 2) an alleged incident of harassment, intimidation, or bullying has been reported. By involving their board attorneys early in the process, districts may be able to shield their documents from unnecessary exposure.

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The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact Anthony P. Sciarrillo of the EdLaw Group at edlawgroup@lindabury.com.

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