



## **NEW JERSEY LAW REVISION COMMISSION**

### **Draft Final Report to Clarify the Meaning of “Physical Examination” in the Context of Public Entity Immunity Granted Under N.J.S. 59:6-4**

**January 13, 2020**

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.  
Please consult the New Jersey statutes in order to determine the law of the State.

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## Executive Summary<sup>1</sup>

In *Parsons v. Mullica Twp. Bd. of Educ.*, the New Jersey Supreme Court examined whether public entities and their employees are immune under the New Jersey Tort Claims Act (“TCA”) when they fail to “report the results of a preventative public health examination.”<sup>2</sup>

While the Court ultimately held that reporting the results of an examination constitutes an “adequate physical examination” under N.J.S. 59:6-4<sup>3</sup>, it only did so after extensive review of extrinsic sources and official legislative histories to determine the meaning of this term.<sup>4</sup>

After examining this opinion in conjunction with N.J.S. 59:6-4, the Commission determined that this provision might benefit from the addition of language to clarify the meaning of the term “physical examination.”

In accordance with New Jersey Supreme Court holding in *Parsons*, this Report recommends defining the term “physical examination” in N.J.S. 59:6-4 to better assist those who consult this provision.

## Background

Rachel Parsons was a student at Mullica Township Elementary School from 2001 through 2004.<sup>5</sup> As part of the school’s obligation to comply with state public health mandates, Parsons, along with the rest of the student body, underwent visual acuity testing.<sup>6</sup> Parsons was tested during the 2001-2002 academic year and again in 2004.<sup>7</sup> She failed both tests with regard to her right eye but her parents were not notified of the results until after the second test in 2004.<sup>8</sup> Afterwards, she was diagnosed with amblyopia<sup>9</sup> (commonly referred to as lazy eye).<sup>10</sup>

In 2013, Parsons and her parents (Plaintiffs) filed suit against the Mullica Hill Township Board of Education and the school nurse (Defendants) alleging they “breached their duty to timely notify Parsons’s parents of the earlier test results pursuant to N.J.A.C. 6A:16-2.2(1)(6),” the statute requiring parents be notified whenever public school vision examinations deviate from expected results.<sup>11</sup> In response, the Board moved for summary judgment and argued that it was immune

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<sup>1</sup> This Report is based, in large part, on the work of both Kiersten Fowler and Joseph A. Pistrutto, former Legislative Law Clerk and Legislative Fellow, respectively, during their time at the NJLRC.

<sup>2</sup> *Parsons ex rel. Parsons v. Mullica Twp. Bd. of Educ.*, 226 N.J. 297, 299 (2016).

<sup>3</sup> *Id.* at 312.

<sup>4</sup> *Id.* at 308-12.

<sup>5</sup> *Id.* at 301.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 302.

<sup>10</sup> Cleveland Clinic, <https://my.clevelandclinic.org/health/diseases/10707-amblyopia-lazy-eye> (Last visited Dec. 11, 2018).

<sup>11</sup> N.J.A.C. 6A:16-2.2(1)(6)

from suit pursuant to N.J.S. 59:6-4 of the TCA<sup>12</sup> which states:

Except for an examination or diagnosis for the purpose of treatment, neither a public entity nor a public employee is liable for injury caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination, of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of himself or others. For the purposes of this section, “public employee” includes a private physician while actually performing professional services for a public entity as a volunteer without compensation.<sup>13</sup>

In response to this motion, Plaintiffs argued there was no immunity under N.J.S. 59:6-4 because reporting results of an examination was not within the definition of “physical examination.”<sup>14</sup> According to them, “failure to disclose the results of the visual acuity test was a separate and distinct act from the physical examination.”<sup>15</sup> The Trial Court denied Defendants’ motion for summary judgment and ruled it was not immune from liability under the TCA for its failure to report results because it was “an examination or diagnosis for the purpose of treatment.”<sup>16</sup>

The Appellate Division reversed the decision of the Trial Court, finding that visual acuity tests were a “physical examination” under N.J.S. 59:6-4.<sup>17</sup> It noted that when courts analyze the liabilities of public entities, immunity is the general rule while liability is the exception.<sup>18</sup> With this in mind, the Court suggested that “common experience” dictated that a physical examination consisted of 3 parts: (1) arranging, (2) conducting, and (3) reporting the results.<sup>19</sup> Acknowledging the exception advanced by the Plaintiffs would, from the Court’s perspective, eliminate a necessary step in conducting an examination.<sup>20</sup>

On appeal to the New Jersey Supreme Court, Plaintiffs claimed the Appellate Division essentially “rewrote” N.J.S. 59:6-4 by improperly introducing a three part definition of “physical examination” which disregarded the statute’s plain language.<sup>21</sup> In their own review of medical publications, Plaintiffs believed reporting results of a physical examination were not encompassed by the term.<sup>22</sup> Instead, they suggested the statute only granted immunity from inadequate physical examinations.

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<sup>12</sup> *Parsons ex rel. Parsons v. Mullica Twp. Bd. of Educ.*, 226 N.J. at 302.

<sup>13</sup> N.J.S. 59:6-4.

<sup>14</sup> *Parsons ex rel. Parsons v. Mullica Twp. Bd. of Educ.*, 226 N.J. at 302.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 303.

<sup>17</sup> *Id.* (quoting N.J.S. 59:6-4).

<sup>18</sup> *Id.* (quoting *Parsons, supra*, 440 N.J. Super. at 89).

<sup>19</sup> *Parsons ex rel. Parsons v. Mullica Twp. Bd. of Educ.*, 226 N.J. at 303.

<sup>20</sup> *Id.* at 304.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 304-05.

Defendants argued they were immune from suit and claimed that the definition of “physical examination” included visual acuity tests and the communication of their results.<sup>23</sup> They emphasized that by adopting Plaintiffs’ argument and thereby excluding reporting from the definition of “physical examination,” the Court risked articulating a definition that ran “contrary to a patient’s common expectation of discussing their results with a medical professional.”<sup>24</sup> In further support their position, Defendants cited N.J.S. 59:6-4’s legislative history which included a report by the state attorney general suggesting that reporting results of a physical examination were included in the definition of this term.<sup>25</sup>

### Analysis

The issue before the Supreme Court was whether, for purposes of granting immunity to public entities, the definition of “physical examination” in N.J.S. 59:6-4 included reporting results of a visual acuity examination.<sup>26</sup> The Court first noted that this case would be “guided by the principal that ‘immunity for public entities [under the TCA] is the general rule and liability is the exception.’”<sup>27</sup> Next, it reviewed the legislative history of the TCA and highlighted that this legislation was enacted to compensate victims while preventing interference with government functions and placing an undue burden on taxpayers.<sup>28</sup> The Court also noted that when the TCA was being drafted, the New Jersey Attorney General submitted a “Task Force Report” to the Legislature—later incorporated as a comment to N.J.S. 59:6-4—which explained that the immunity granted in the bill pertained to inadequate public health examinations and provided a non-exhaustive list of examinations that would be covered.<sup>29</sup> Looking to the types of public health examinations listed in the comment (examinations for tuberculosis, athletes, motor vehicle applicants), in addition to other examinations added in a later amendment (scoliosis, hearing, eye, and mental examinations), the Court found that a visual acuity test is very similar to an eye examination.<sup>30</sup>

After determining that a visual acuity examination was a “physical examination,” the Court then considered whether an “adequate physical examination” includes reporting the results to patients or their guardians.<sup>31</sup> It noted that the TCA did not define “physical examination” or its constituent parts, so resorting to secondary sources were necessary.<sup>32</sup> The first source consulted was the American Medical Association’s definition of “physical examination” which discussed the taking of a patient’s medical history, something that likely includes communicating with the

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<sup>23</sup> *Id.* at 306.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 304-09.

<sup>27</sup> *Id.* at 308 (quoting *Kemp v. State*, 147 N.J. 294, 299 (2013)).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 310.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 311.

<sup>32</sup> *Id.*

patient.<sup>33</sup> Next, the Court consulted materials from the Mayo Clinic for how it defines a complete eye examination.<sup>34</sup> Relevant to the Court’s inquiry, the Mayo Clinic’s definition appeared to contemplate communication of results when it stated a complete eye examination entails “discuss[ing] the results of all testing, including an assessment of your vision, your risk of eye disease and preventative measures you can take....”<sup>35</sup>

Ultimately, the Court held that an “adequate physical examination’ under N.J.S. 59:6-4 includes reporting the results of an examination.”<sup>36</sup> Given this, Defendants were immune from suit for their failure to report results to Plaintiffs.<sup>37</sup> This conclusion, according to the Court, was buttressed by public policy and logic.<sup>38</sup> Public policy considerations warranted granting immunity because a failure to do so would likely lead to both a decrease in the number of public entities that conduct public health examinations and thwart efforts to promote public health and wellness.<sup>39</sup> It also seemed illogical to the Court to grant immunity for performing examinations while declining to extend it for reporting the results.<sup>40</sup>

### **Statutory Text**

As previously discussed, *Parsons* involved defining the term “physical examination” as it is used in N.J.S. 59:6-4. That statute states, in relevant part:

Except for an examination or diagnosis for the purpose of treatment, neither a public entity nor a public employee is liable for injury caused by the failure to make a *physical* [ ] *examination*, or to make an adequate *physical* [ ] *examination*, of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of himself or others. For the purposes of this section, “public employee” includes a private physician while actually performing professional services for a public entity as a volunteer without compensation.

### **Legislative History**

N.J.S. 59:6-4 is a part of the New Jersey Tort Claims Act and was introduced by the State Senate as S969 in May 1972.<sup>41</sup> In passing this bill, the legislature modified the traditional doctrine of sovereign immunity<sup>42</sup> by imposing liability on public entities whose employees cause injuries

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 312 (quoting Mayo Clinic, *Eye Exam*, Mayo Clinic (Dec. 13, 2018) <https://www.mayoclinic.org/tests-procedures/eye-exam/about/pac-20384655>).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> S969, 195<sup>th</sup> Leg., Reg. Sess. (N.J. 1972).

<sup>42</sup> N.J.S. 59:1-2.

in carrying out their duties while preserving it for: high-level discretionary activities; the issuance, denial, suspension or revocation of permits, licenses, etc.; the failure to inspect or negligent inspection of property; actual fraud, malice or willful misconduct of public employees; and, injuries occurring on unimproved property.<sup>43</sup>

#### *The New Jersey Attorney General's Task Force Report*

Prior to enactment of the TCA, the New Jersey Attorney General assembled a task force exploring the impact of abolishing traditional sovereign immunity and replacing it with a Tort Claims Act.<sup>44</sup> In its report to the Legislature, the Task Force discussed immunities granted to those performing public health examinations.<sup>45</sup> In what would later become a comment to N.J.S. 59:6-4, the report explained that the immunity described in this provision “pertains to the failure to perform adequate public health examinations such as public tuberculosis examinations, physical examinations to determine the qualifications of boxers and other athletes, and eye examinations for vehicle operator applicants.”<sup>46</sup>

#### *Statement of the Senate Labor, Industrial, and Professions Committee*

In addition to the kinds of examinations mentioned in the Task Force Report, later statements by the Senate Labor, Industrial, and Professions Committee amended the Comment to include “tuberculosis, scoliosis, hearing, eye, mental, and other examinations for public health purposes.”<sup>47</sup> Later, the New Jersey Supreme Court noted that the listed examinations were by no means exhaustive.<sup>48</sup> Rather, they served as “general descriptions” allowing the provision to “be construed to embrace only other illustrations that are similar in nature to those enumerated.”<sup>49</sup>

### **Defining “Physical Examination”**

In *Parsons*, the Court looked to extrinsic aids to ascertain the definition of a physical examination. It consulted a medical encyclopedia written by the American Medical Association which defined “physical examination” as:

[a] thorough study of a person's state of health. The physical examination typically follows history-taking, in which a doctor listens to a person's concerns and asks questions. Examination usually includes inspection, palpation (direct feeling with the hand), percussion (striking parts of the body with short, sharp taps and feeling and listening to subsequent vibrations), and auscultation (listening with a stethoscope). If a person reports symptoms, the doctor will attempt to determine

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<sup>43</sup> Statement of Governor Cahill on the Signing of S-969 (June 1, 1972).

<sup>44</sup> Report of the Attorney General's Task Force on Sovereign Immunity, 4-5 (May 1972).

<sup>45</sup> *Parsons ex rel. Parsons v. Mullica Twp. Bd. of Educ.*, 226 N.J. at 299, 309-10.

<sup>46</sup> *Id.* at 310.

<sup>47</sup> *S. Labor, Indus. & Professions Comm. Statement to S. No. 524* (1982).

<sup>48</sup> *Kemp by Wright v. State*, 147 N.J. 294, 303 (1997).

<sup>49</sup> *Id.*

their cause. Tests may also be ordered to aid in diagnosis. One main objective of regular physical examinations, conducted at frequent intervals even when a person is feeling well, is the early detection of disease.<sup>50</sup>

In addition, the Court reviewed a medical definition of “eye examination.” A complete eye examination consists of, “...a series of tests designed to evaluate your vision and check for eye diseases. Your eye doctor may use a variety of instruments, shine bright lights directly at your eyes and request that you look through an array of lenses. Each test during an eye exam evaluates a different aspect of your vision or eye health.”<sup>51</sup>

The Court also noted that at the end of an eye exam, the patient and the doctor will discuss the results of all testing, including a vision assessment, the risk of eye disease and preventive measures can be taken to protect an individual’s eyesight.<sup>52</sup>

### **Proposed Revisions**

In accordance with the New Jersey Supreme Court’s holding in *Parsons*, “physical examination” will be explicitly defined to include a reporting component. This definition will be placed after the current text of the statute and paraphrase the extrinsic medical sources used by the Supreme Court. Aside from incorporating *Parsons*, there will be a modest reorganization of the statute to clearly delineate a definitions section within the provision and the introduction of gender-neutral language. These proposed changes have been noted by underlined text in the Appendix attached to this Report.

### **Outreach**

In connection with this Report, Staff sought comments from several knowledgeable individuals and organizations. These included: numerous County Counsels; members of the New Jersey State Bar Association’s medical malpractice section; the New Jersey League of Municipalities; the New Jersey State School Nurses Association; and several private practitioners.

#### **• In Support**

The proposed modifications set forth in the Appendix to this Report received the support of a County Counsel.<sup>53</sup> In addition, one stakeholder advised Staff that he, “...fully agree[s] with

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<sup>50</sup> *Am. Med. Ass’n Complete Med. Encyc.* 531 (20th ed.2003).

<sup>51</sup> Mayo Clinic, Eye Exam, Mayo Clinic (Dec. 13, 2018, 10:07 AM) <https://www.mayoclinic.org/tests-procedures/eye-exam/about/pac-20384655>.

<sup>52</sup> *Id.*

<sup>53</sup> E-mail from Kevin Kelly, Sussex County Counsel to Joseph Pistritto, Former Legislative Fellow, New Jersey Law Revision Commission (May 24, 2019) (on file with the NJLRC).

the suggested language, as it is illogical for physical examinations not to contemplate a reporting/notification element.”<sup>54</sup>

- *Modifications*

One stakeholder proposed minor modifications to the proposed statutory language.<sup>55</sup> The stakeholder suggested the removal of the words “determining” and “prompt.”<sup>56</sup> This commenter was concerned that “the cause” of the patient’s illness may not ultimately be “determined” during the physical examination.<sup>57</sup> In place of the word “determining” the stakeholder suggested using the word “investigating the cause of reported symptom....”<sup>58</sup>

The word “prompt,” which precedes the term “notification” in the draft language would also be removed by the commenter. The stakeholder noted that, “...the qualification of the timing of the notice seems to run counter to the notion of immunity for the failure to make an adequate examination.”<sup>59</sup>

- *No Comment*

Two of the stakeholders who responded to the Commissions inquiry were not prepared to comment on the legal terminology sought to be defined.<sup>60</sup>

- *Opposition*

The New Jersey League of Municipalities (the League) offered comments to the Commission on proposed modifications to N.J.S. 59:6-4.<sup>61</sup> This stakeholder, “...do[es] not believe that the proposed revision to N.J.S.A. 59:6-4 will be of benefit to municipalities or public entities in general....”<sup>62</sup> The concern with modifying this statute emanates from the belief that, “...an area

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<sup>54</sup> E-mail from Amos Gern, Esq., to Joseph Pistrutto, Former Legislative Fellow, New Jersey Law Revision Commission (May 28, 2019) (on file with the NJLRC).

<sup>55</sup> E-mail from Julien X. Neals Bergen County Counsel, to Joseph Pistrutto, Former Legislative Fellow, New Jersey Law Revision Commission (May 22, 2019) (on file with the NJLRC).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> E-mail from Michael Glovin, Passaic County Counsel, to Joseph Pistrutto, Former Legislative Fellow, New Jersey Law Revision Commission (May 22, 2019) (on file with the NJLRC) (*noting* “the Passaic County Health Dept. doesn’t conduct the type of physical examinations that [Parsons] dealt with [n]or do they do exams for members of the public period.) and e-mail from Lorraine Borek, J&J School Health Leadership Fellow at the New Jersey State School Nurses Ass’n. to Joseph Pistrutto, Former Legislative Fellow, New Jersey Law Revision Commission (May 19, 2019) (on file with the NJLRC) (*noting* the NJSSNA is “...not in a position to comment on legal terminology...” and noting that there is “definitely a difference in medical terminology regarding the term, physical examination vs. screening....”).

<sup>61</sup> Letter from Robert F. Renaud, Esq., Renaud Deapponio, LLC to Frank Marshall, Esq., Staff Attorney, N.J. State League of Municipalities (May 15, 2019) (on file with the NJLRC).

<sup>62</sup> *Id.* \*1.



of law which is now settled in favor of immunity under the Tort Claims Act [...] will become unsettled and will lead to litigation weakening the protections afforded by N.J.S. 59:6-4....”<sup>63</sup>

The League perceives the “new definition” as problematic.<sup>64</sup> After considering the proposed language, the League questions whether or not an examination that is not thorough and is not conducted pursuant to public health objectives would be covered by the TCA.<sup>65</sup>

The League has also expressed concern that immunity might not be granted in instances in which the practitioner does not “determine the cause of reported symptoms... does not administer required tests... or does not give prompt notification of test results to the patient and/or [the] patients legal guardians.”<sup>66</sup> Because the proposed definition is based upon a medical definition, the League believes that this definition “...will confuse that which is now clear and will unsettle that which is now settled.”<sup>67</sup>

It is noted that the New Jersey Supreme Court has found that a failure to report the results of a medical examination is covered by the TCA. In order to alert the public to the determination in this case without expanding sovereign immunity, the language set forth in the Appendix reflects the Supreme Court holding.<sup>68</sup> In addition, the Court found support in the medical definition of “adequate physical examination” and the proposed modifications that follow are an attempt to reflect the decision of the Supreme Court.<sup>69</sup>

### **Conclusion**

In its current form, N.J.S. 59:6-4 does not define the meaning of “physical examination.” In order to clarify the exact contours of municipal tort liability and place both public entities and members of the general public on proper notice, this provision would greatly benefit from the addition of a statutory definition consistent with *Parsons*.

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<sup>63</sup> *Id.* \*1.

<sup>64</sup> *Id.* \*2.

<sup>65</sup> *Id.* \*2.

<sup>66</sup> *Id.* \*2. *See also* n. 55 *supra*.

<sup>67</sup> *Id.* \*2.

<sup>68</sup> N.J. Law Rev. Comm’n (2019) ‘Physical Examination’. *Minutes from the meeting of New Jersey Law Revision Commission on 21 March 2019*, \*4, Newark, New Jersey.

<sup>69</sup> *Id.*

## Appendix

### **N.J.S. 59:6-4. Failure to make physical or mental examination or to make adequate physical or mental examination**

(a) Except for an examination or diagnosis for the purpose of treatment, neither a public entity nor a public employee is liable for injury caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination, of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of ~~himself~~ him or herself or others.

(b) For the purposes of this section:

i. “Public employee” includes a private physician while actually performing professional services for a public entity as a volunteer without compensation;

ii. “Physical examination” is a thorough study of person’s state of health conducted pursuant to public health objectives. It includes the taking of medical history, a thorough inspection of all or part of the patient’s body, determining the cause of reported symptoms, administering required tests, and prompt notification of test results to the patient and/or patient’s legal guardians.

### **Comment**

The proposed modifications to N.J.S. 59:6-4 are based on the medical definition used by the New Jersey Supreme Court in *Parsons ex rel. Parsons v. Mullica Twp. Bd. of Educ.*, 226 N.J. 297, 299 (2016) (*Am. Med. Ass'n Complete Med. Encyc.* 531 (20th ed.2003)).

In addition, these revisions seek to reorganize the statute to delineate a definition section and introduces gender-neutral language.