IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

P.A., on behalf of minor child, **A.A.**; *et al.*	*	CIVIL ACTION NO.: 2:23-cv-2228
Plaintiffs,	*	JUDGE BRANDON S. LONG
v.	*	MAGISTRATE JUDGE JANIS VAN MEERVELD
DORIS VOITIER, *et al.* *Defendants.*	*	SECTION O

* *

MEMORANDUM IN OPPOSITION OF
PLAINTIFFS' SECOND MOTION TO COMPEL

MAY IT PLEASE THE COURT:

INTRODUCTION

The St. Bernard Parish School Board ("School Board" or "District") is defending this lawsuit filed by parents of five students ("Plaintiffs") who were referred to C.F. Rowley Alternative School ("Rowley") because they did not comply with District disciplinary rules. Fact discovery in this matter is ongoing. Plaintiffs' Second Motion to Compel seeks an order requiring the District to produce correspondence with Board attorneys and advice of Board counsel, provide more description of withheld documents, and respond to discovery responses to Plaintiffs' Requests for Production numbered 2, 29, 30, 31, 32, 33, 36, 37, and 39. However, Plaintiffs' second Motion to Compel is a continuation of their overall push for District information without explaining the relevance of this information to the current litigation.

Plaintiffs insist on disclosure of communications that are clearly privileged. In order to seek an order to reveal these arguments, Plaintiffs submit the unusual argument that the Board does not know who its general counsel is. Plaintiffs also argue that the Board did not sufficiently compose its

privilege logs when they meet all legal requirements. Finally, Plaintiffs have recycled discovery responses that the Court has already denied and that are otherwise irrelevant under Rule 26.

PLEADINGS AND RELEVANT PROCEDURAL HISTORY

Plaintiffs filed their initial complaint, at Record Document 1, on June 27, 2023. The School Board filed its initial Answer and Defenses, at Record Document 8, on August 26, 2023. On December 12, 2023, at Record Document 19, Plaintiffs filed their First Amended Complaint. The School Board filed its Answer and Defenses to the First Amended Complaint on December 26, 2023, at Record Document 20. In the complaint filed with the Court, Plaintiffs included seven (7) counts, including alleged violations of state and federal disability discrimination laws, retaliation, procedural due process violations under the United States and Louisiana Constitutions, violation of the Individuals with Disabilities Education Act ("IDEA"), and noncompliance with the Louisiana Human Rights Act.[1] Plaintiffs filed a Motion for Leave to file a Second Amended Complaint seeking to add additional plaintiffs that the Court granted over the objection of the Board.[2] This added D.D. and E.E. to this litigation, but the Court found that the referrals of these students to Rowley were prescribed.[3] This Court is also considering the District's motion for judgment on the pleadings.[4] Plaintiffs have opposed that motion, at Record Document 25, and the Board has filed its Reply at Record Document 28.

The current Scheduling Order, at Record Document 57, states that all discovery, including depositions, shall be completed no later than January 22, 2025. Plaintiffs have served five sets of discovery on the Board at this time. Overall, the Board has responded to four sets, and the fifth set is not yet due. Concerning the first two sets of discovery, which are at issue—on November 3, 2023,

[1] Plaintiffs filed their initial complaint at Rec. Doc. 1. On December 12, 2023, Plaintiffs filed their First Amended Complaint, which added a new plaintiff, C.C., and their seventh claim pursuant to the Louisiana Human Rights Act. Rec. Doc. 19. On May 20, 2024, Plaintiffs filed their Second Amended Complaint. All references herein to the Plaintiffs' "Complaint" will be to the operative Second Amended Complaint at Rec. Doc. 44.
[2] Rec. Doc. 39.
[3] *Id.* at 11-12.
[4] Rec. Doc. 22.

Plaintiffs served their First Set of Interrogatories and Requests for Production ("Requests") on the District by email. On December 4, 2023, within thirty (30) days of the date that the District received Plaintiffs' First Set of Interrogatories and Requests for Production, the Board served its initial Responses and Objections ("Responses") to Plaintiffs. On April 10, 2024, the Plaintiffs propounded their second set of discovery on the Board. The Board timely responded to this discovery on May 10, 2024.

LAW AND ARGUMENT

I. Standard for Discovery

The Federal Rules of Civil Procedure permit the party seeking discovery to "move for an order compelling an answer, designation, production, or inspection," and the party filing a motion to compel bears the burden of proving that the information requested is relevant and otherwise within the permitted scope of discovery.[5]

"The scope of all federal civil discovery is limited by the provisions of Rule 26(b)(1), whether sought pursuant to Rule 33, Rule 34, or any other discovery provision. Rule 26 was intended to and by its terms does limit discovery to the acquisition of information in discovery that is actually relevant to the subject matter of the action."[6] Rule 26(b)(1) establishes relevance as the outer boundary to the scope of discovery. The rule's language is plain and clear: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense *and* proportional to the needs of the case[.]"[7] Additionally, "[i]nformation requested in discovery need not be admissible in evidence to

[5] *Disedare v. Brumfield*, No. CV 22-2680, 2023 WL 3496395, at *3 (E.D. La. May 17, 2023)(citing *Wymore v. Nail*, No. 14-3493, 2016 WL 1452437, at *1 (W.D. La. Apr. 13, 2016) ("Once a party moving to compel discovery establishes that the materials and information it seeks are relevant or will lead to the discovery of admissible evidence, the burden rests upon the party resisting discovery to substantiate its objections.") (citation omitted); *Tingle v. Hebert*, No. 15-626, 2016 WL 7230499, at *2 (M.D. La. Dec. 14, 2016) (" '[T]he moving party bears the burden of showing that the materials and information sought are relevant to the action....' ") (citation omitted); *Davis v. Young*, No. 11-2309, 2012 WL 530917, at *3 (E.D. La. Feb. 16, 2012) (same) (citing *Export Worldwide, Ltd. v. Knight*, 241 F.R.D. 259, 263 (W.D. Tex. 2006)); and, *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles,* 894 F.2d 1482, 1485 (5th Cir. 1990)).

[6] *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978).

[7] *See* Fed. R. Civ. P. 26(b)(1) (emphasis supplied).

be discoverable."[8] But "[w]hile relevancy in the discovery context is broader than in the trial context, that legal tenet should not be misapplied to allow fishing expeditions in discovery."[9]

While it is designed to allow civil trial litigants sufficient information, the discovery process has "ultimate and necessary boundaries."[10] Discovery under Rule 26(b) is not "a license to engage in an unwieldy, burdensome, and speculative fishing expedition."[11] As this court has recognized, "As to proportionality, the 2015 amendments to Rule 26(b)(1) emphasize the need to impose reasonable limits on discovery through increased reliance on the common-sense concept of proportionality."[12] Accordingly, Rule 26(b)(2)(C) requires the limitation of evidence outside the scope of Rule 26(b)(1) by stating the following,

> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
> (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
> (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

Additionally, "it is well established that the scope of discovery is within the sound discretion of the trial court."[13] This discretion includes the ability to limit discovery.[14] Moreover, Federal Rule 34, pursuant to which a party can seek production of documents, is limited to requests "within the scope of Rule 26(b)."[15]

---

[8] *Id.*

[9] *Crescent City Remodeling, LLC v. CMR Constr. & Roofing, LLC*, No. CV 22-859, 2022 WL 17403556, at *2 (E.D. La. Dec. 2, 2022) (citations omitted).

[10] *Marine Power Holding, LLC v. Malibu Boats, LLC*, No. CV 14-0912, 2016 WL 403650, at *2 (E.D. La. Jan. 11, 2016) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978)).

[11] *Crescent City Remodeling*, 2022 WL 17403556, at *2.

[12] *FSC Interactive, L.L.C. v. Rogers Collective, Inc.*, No. CV 22-4450, 2023 WL 8522949, at *1 (E.D. La. Nov. 14, 2023).

[13] *Marine Power Holding*, 2016 WL 403650, at *2.

[14] *Id.* at *3 (denying motion to compel due to speculative claim); *Jones v. Cannizzaro*, No. CV 18-503, 2019 WL 8888002 (E.D. La. Oct. 23, 2019) (limiting discovery in civil rights case).

[15] *See* Fed. R. Civ. P. 34. *See also, Baqer v. St. Tammany Par. Gov't*, No. CV 20-980, 2023 WL 4846828, at *5 (E.D. La. July 28, 2023) ("Indeed, numerous courts within the Fifth Circuit, including this Court, have recognized that Rule 34, along with Rule 37, empower federal courts to compel parties to sign written authorizations consenting to the production of various documents. The scope of such written authorizations, however, is not limitless, but is instead governed by Rule 26's relevance and proportionality standards.").

II. Argument

A. Plaintiffs' Arguments Concerning the Board's Privilege Log are Meritless.

Plaintiffs' Motion to Compel begins with stated concerns about the Board withholding eight emails from the District's production in response to Plaintiffs' Request for Production 29 and 79 emails from the Board's response to Plaintiffs' Request for Production 2. The Board opposes each request and reasserts the privileges asserted in its submitted logs.

1. Attorney-Client Privilege Generally

This court, in *Slocum v. Int'l Paper Co.*, has ruled that attorney-client privilege generally protects communications from the client to the attorney, and responsive communications from the attorney to the client.[16] In 1975, the Fifth Circuit Court of Appeals adopted the general definition listed below:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is (the) member of a bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[17]

In their briefing, Plaintiffs also note *In re Vioxx Prod. Liab. Litig.*[18] This Eastern District of Louisiana case thoroughly discusses attorney-client privilege in the context of corporations and recognizes two critical realities: 1) "[i]t is well settled that the attorney-client privilege applies to corporations," and, 2) privilege protects "communications between corporate employees in which prior advice received is being transmitted to those who have a need to know in the scope of their corporate responsibilities."[19]

---

[16] *Slocum v. Int'l Paper Co.*, 549 F. Supp. 3d 519, 523 (E.D. La. 2021).
[17] *In re Grand Jury Proc.*, 517 F.2d 666, 670 (5th Cir. 1975) (citing *United States v. United Shoe Machinery Corp.*, D.Mass.1950, 89 F.Supp. 357, 358-59).
[18] 501 F. Supp. 2d 789, 795 (E.D. La. 2007).
[19] *Id.*

2. Communications with the District Attorney's Office

Plaintiffs' briefing focuses, in part, on a total of seven emails between the Board's general counsel and Superintendent Voitier.[20] Although Plaintiffs indicate that these disputed communications are between employees of the St. Bernard District Attorney's Office and the Superintendent Voitier, all of these emails are actually between the Superintendent and *attorneys* from the St. Bernard Parish District Attorney's Office.

In a desperate attempt to access these privileged emails, Plaintiffs argue that the Board's general counsel no longer has this position. Undersigned counsel has repeatedly tried to explain to Plaintiffs' counsel that the Board has both general and special counsel. Plaintiffs then responded by stating that Louisiana R.S. 16:2 provides that the St. Bernard School Board can only have one set of attorneys.[21] However, this argument is clearly contradicted by the statute itself. Louisiana R.S. 16:2, subsection B., states the following:

> Notwithstanding any other provision of this Section or any law to the contrary, nothing shall prevent the governing authorities of the parishes of . . . or any city or parish school board in the state from each employing or retaining its own attorney to represent it *generally*. The employment of attorneys by the governing authorities shall relieve the district attorneys of the judicial districts serving the parishes . . . from any further duty of representing the governing authorities, and the employment of an attorney by any city or parish school board shall relieve the district attorney of the judicial district serving such city or parish school board from any further duty of representing such school board.[22]

Therefore, this language does not limit a school Board to one set of lawyers because the Board has not employed another attorney to represent it *generally*. Because the Board has not employed a general counsel in place of the District Attorney's office, the St. Bernard District Attorney's office does represent the Board. Further, Louisiana Revised Statutes at 42:262-263 allow Louisiana school boards to retain special counsel when necessary and upon approval by the Louisiana Attorney

[20] Rec. Doc. 73-1 at 5.
[21] Rec Doc. 73-1 at 5.
[22] La. Stat. Ann. § 16:2(B) (emphasis supplied).

General.[23] In support of this Opposition, the Board has attached school board meeting minutes documenting the resolution that approved the law firm of undersigned counsel to serve the Board as special counsel.[24] The Board has also attached a declaration of the Superintendent Voitier attesting to the identity of the Board's general counsel.[25] For these reasons, the Court should reject this arguably frivolous argument of Plaintiffs' concerning Board representation.

Because the St. Bernard District Attorney's office still represents the Board, there is no viable argument that the communication between the Superintendent and their office are not attorney-client communications. In another feeble argument, Plaintiffs also contend that communications between the District Attorney's office and the Superintendent are not privileged because the District Attorney's office does not represent her personally. Plaintiffs argue that privileged communications have to be between "Mr. Nicosia and the School Board."[26] Plaintiffs fail to acknowledge the clear fact that Ms. Voitier is the Superintendent of the District who was hired by the School Board as the top administrator of the District. Plaintiffs also make the impractical argument that Board attorneys can only communicate directly with elected school board members. Under this logic, counsel for the Board would not be able to have privileged communications with any Board employee, *including the Superintendent*.

As the Board has explained in its briefing in support of its Motion for Judgment on the Pleadings, "[i]t is well settled that a suit against a [defendant] in [her] official capacity is simply another way of pleading a claim against the governmental entity that employs the official."[27] Therefore, in addition to dismissing Superintendent Voitier from this matter, the Court should reject Plaintiffs'

---

[23] La. Stat. Ann. § 42:262-263.
[24] Exhibit 1, July 26, 2022 School Board General Meeting Minutes, at 11-13.
[25] Exhibit 2, Declaration of Superintendent Doris Voitier.
[26] Rec. Doc. 73-1 at 6.
[27] Rec. Doc. 22-1 at 5 (citing *Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *see also, Delouise v. Iberville Parish Sch. Bd.*, 8 F. Supp. 3d 789, 807 (M.D. La. 2014) ("Actions for damages against a party in his official capacity are, in essence, actions against the governmental entity of which the officer is an agent.")).

argument that counsel for the Board cannot engage in privileged communications with the Board via the Superintendent and other District administrators and employees.

The Plaintiffs also point to the subject line of all of the emails at issue with the St. Bernard District Attorney's Office, which is "Meeting with Attorney."[28] Plaintiffs state that the Board should have informed Plaintiffs which attorneys would be meeting. However, if the Board were to provide more detail—such as the reason for the meeting or an explanation of which attorneys participated, and the subject of the discussions—this would invade the Board's claimed privilege. Rule 26(b)(5)(A) states that a privilege log must describe the "nature of the documents, communications, or tangible things not produced or disclosed . . . without revealing information itself privileged or protected."[29] Further, to view this argument practically, the Board is confident that the Plaintiffs would also object to a request from the Board for details concerning meetings of Plaintiffs' legal team.

Plaintiffs also stated that the Board included a third party in this communication and thereby waived any attorney-client privilege.[30] But Plaintiffs did not explain who they believe is a third-party in this communication. As explained above, the St. Bernard District Attorney's Office is general counsel for the Board, and Ms. Voitier is the Board's superintendent. Further, Mr. Lance Licciardi, who is an attorney with the St. Bernard District Attorney's Office, is also included on these communications. None of the participants in these emails are third parties.[31]

Plaintiffs also suggest that the Board has conceded that all communications with the St. Bernard District Attorney's Office are not privileged communications. The Board has made no such concession or waiver. In accordance with discussions of counsel at a meet and confer, the Board released some communications between the District Attorney's Office and District employees as a

[28] Rec. Doc. 73-1 at 6.
[29] Fed. R. Civ. P. 26(b)(5)(A).
[30] Rec. Doc. 73-1 at 6-7.
[31] *See* Ex. 2 at 1(bottom subparagraph).

compromise. However, this attempt at a resolution of this discovery dispute should not be used as a mechanism to defeat the Board's valid claims of attorney-client privilege between the Board attorneys and District administrators. Rather, the Board hoped that this compromise would have encouraged the Plaintiffs to consider a compromise themselves. Unfortunately, Plaintiffs have opted to engage in motion practice over seven emails between the Board's general counsel and the Superintendent. Plaintiffs have done this even though their arguments have little to no actual or arguable basis in the law.

The Board's privilege logs, filed under seal as Plaintiffs' Exhibits 3 and 4, provide the dates, names of people included in the communications, and a subject line for the emails at issue. Based on the information provided, it is clear that these emails pertain to a "Meeting with Attorney," and they are between the Board's general counsel and the Superintendent for purposes of securing legal advice or services. The attached declarations of Superintendent Voitier and Board special counsel further supports the Board's claim of privilege concerning these communications.[32]

3. Emails Between School District Employees and Third Parties

a) Communications with Board Contractor

Plaintiffs also argue that the Board must produce emails between school employees and an employee of Young Cypress Psychology.[33] They argue that Ms. Fletcher, who works with Young Cypress Psychology, is a third-party and that all emails to her cannot be privileged. In support of their position, Plaintiffs cite to cases that pertain to accidental disclosures and disclosures of disputed communications to parties with interests adverse to party claiming privilege.[34] Also Plaintiffs failed to

[32] *See* Ex. 2; Exhibit 3, Declaration of Board Counsel, at 1.
[33] Rec. Doc. 73-1 at 7.
[34] *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) (discussing inadvertent disclosure of putative privileged disclosures); *EPCO Carbondioxide Products, Inc. v. St. Paul Travelers Ins. Co.*, No. 06-1800, 2007 WL 4560363, at *2 (W.D. La. Dec. 21, 2007) (defendant failed to establish confidentiality for purposes of establishing attorney-client privilege when the evidence "suggest[ed] that the communications were shared with individuals acting on behalf of other parties").

cite applicable precedent in the Fifth Circuit. *In re Auclair*, the Fifth Circuit Court of Appeals held that attorney-client privilege is not waived if "a privileged communication is shared with a third person who has a common legal interest with respect to the subject matter of the communication."[35]

As stated in the declaration of Board staff, Ms. Fletcher is a contractor who assists the Board with special education evaluations.[36] Therefore, she is not a someone who has acted on behalf of other parties, and she is not considered a third-party in the context of attorney-client privilege. In fact, Plaintiffs understand that Ms. Fletcher is a contractor for the Board. She has participated in Individualized Education Program (IEP) meetings with the attorneys for the Plaintiffs, during which they have discussed the evaluations she conducted as a Board contractor.[37] For these reasons, the Board did not waive privilege by including Ms. Fletcher in these communications.

b) Communications Between Board Employees

Plaintiffs also argue that communications, including those that included Ms. Fletcher, are not privileged unless an attorney is included in a communication.[38] Similar to the above explanation, these privilege log entries contain the date of the communication, the sender, the recipient, any carbon copied parties, and the subject line of the correspondence.[39] This information shows that the these emails concern ongoing discussions that included attorneys and clearly concern legal matters about which staff sought legal advice and services.

Plaintiffs discuss email chains with the subject line of "Fw: Evaluation Meeting," "Fwd: exhbitis [sic.]," and "Re: evals."[40] With the exception of the email marked "Re: evals.," all of these messages show that they involved counsel for the Board.[41] For instance, the email chain "Fw:

[35] 961 F.2d 65, 69 (5th Cir. 1992).
[36] Exhibit 4, Declaration of Joseph Cipollone, at 1.
[37] *Id.*
[38] Rec. Doc. at 8-11.
[39] *See* Rec. Docs 73-6.
[40] Rec. Doc. 73-1 at p. 8.
[41] The Board notes that counsel mistakenly marked the email with the subject line of "Re: evals" as privileged, and counsel will submit this email to the Plaintiffs.

Evaluation Meeting," has multiple communications with counsel for the Board starting on February 14, 2023.[42] Additionally, the email chain with subject line "Fwd: exhbitis [sic.]" originated with counsel and then went to Mr. Cipollone and Ms. Fletcher.[43]

Plaintiffs also extensively discuss emails with the subject "Fw: Mandatory Request for Expedited Due Process Hearing for LDOE Log No. 23-H-03-E. . . ." and state that the bulk of the disputed emails have this subject line.[44] Plaintiffs concede that Board counsel is included in messages in this conversation about an expedited due process hearing concerning a student in this litigation, A.A.[45] However, they omitted the fact that the Board's May 10, 2024 privilege log shows that the initial conversation started on the previous page and originated with an email between a District administrator and Board counsel on August 29, 2022.[46] Also, the submitted lengthy subject line plainly describes a discussion with counsel concerning a filed expedited due process proceeding.

The analysis contained in *In re Vioxx,* clearly applies to this corporate scenario via its examination of a much more complicated matter—multi-district litigation against a pharmaceutical company and a claim of privilege of approximately 30,000 documents.[47] While the Board is not a private corporation, like private corporations it has various administrators and employees who have to coordinate. This is especially true when there is an administrative complaint against the Board. As explained by the court in *In re Vioxx*, the District "cannot speak, but [it] is personified by employees and who represent its interests and speak on its behalf. Consequently, it protects communications between those employees and [ ] legal counsel on matters within the scope of their corporate responsibilities."[48]

---

[42] *See* Rec Doc 73-6, Plaintiffs' Exhibit 2 at 0020509-10.
[43] *See Id.* at 0020525.
[44] *See* Rec. Doc. 73-1 at 8-9.
[45] *See* Rec. Doc. 73-1 at 8; Rec. Doc. 73-8, Plaintiffs' Exhibit 4 at 0020532.
[46] *See Id.* at 002531 (first listed email, dated August 29, 2022).
[47] 501 F. Supp. 2d 789, 796 (E.D. La. 2007).
[48] *Id.* (Citing Paul R. Rice, 1 Attorney-Client Privilege in the United States, §§ 4:11-14 (Thomson West 2d ed.1999)).

Plaintiffs argue that this case does not apply because the Board does not have "in-house" counsel.[49] However, as explained above, the Board does have a general counsel with the St. Bernard District Attorney's Office. And while special counsel for the Board initiated and participated in various parts of the conversation, this fact supports the Board's claim of privilege. The privilege log clearly shows that a District administrator communicated with special counsel concerning the expedited due process complaint, and then included various other Board employees in this conversation. Because of the limited nature of the communications, there is no concern similar to *In re Vioxx*. Conversely, in that litigation, the court examined counsel engaging in corporate communications that are conventional in-house "business advice," as opposed to legal advice.[50]

Viewing the series of emails with the subjects "Fw: Mandatory Request for Expedited Due Process Hearing for LDOE Log No. 23-H-03-E. . . ." and all the information provided in the Board's privilege log—the Court can conclude that counsel advised various Board employees concerning and administrative complaint. It is also clear that these emails were circulated to various employees for this purpose. As explained in *In re. Vioxx*, "when the conveyance was by the lawyer and it appeared that it was for the purpose of acquiring more information upon which more informed legal advice or assistance could be rendered, the additional conveyance and response were also found to be privileged."[51] Other Courts have also made similar rulings when examining legal advice communicated among employees.[52] The Board urges the Court to apply this analysis for the entirety of the disputed conversations that do not have counsel included, but are part of this conversation about a legal matter.

---

[49] Rec. Doc. 73-1 at 10.
[50] *In re Vioxx Prod. Liab. Litig.* 501 F. Supp. 2d at 797-800.
[51] *Id.*, at 811-12.
[52] 301 F.R.D. 676 (N.D. Ga. 2014), on reconsideration in part, No. 1:07-CV-2509-CAP-JSA, 2014 WL 11531065 (N.D. Ga. May 21, 2014) ("simply because a communication is made between two corporate employees, neither of whom are attorneys, that fact is not determinative of whether that communication primarily involves business advice rather than legal advice for purposes of applying the attorney-client privilege to that correspondence.") (citing *In re Denture Cream Products Liab. Litig.*, No. 09–2051–MD, 2012 WL 5057844, at *13 (S.D.Fla. Oct. 18, 2012); *In re Vioxx Products Liab. Litig.*, 501 F.Supp.2d 789, 811 (E.D.La.2007) (finding that privilege applies not only to communications between corporate employees and corporation's counsel, but also to communications among corporate employees discussing or

Plaintiffs also argue that including Board counsel via a carbon-copy is the same as emails that do not include counsel.[53] The emails with the subject line "Fw: Mandatory Request for Expedited Due Process Hearing for LDOE Log No. 23-H-03-E. . . ." are discussed above—and *do not* only include Board counsel via a carbon-copy. Rather the initiation of this conversation started with direct communication with counsel.[54] Plaintiffs similarly argue that two emails with the subject of "Re: FBA" are not privileged.[55] However, the Board's privilege log clearly gives sufficient information for the Court to conclude that these emails are privileged because they were made for purposes of receiving advice. Outside counsel was copied on a message concerning a functional behavioral assessment (FBA). Further, the authority cited by the Plaintiffs does not hold that a message that copies attorneys are not privileged.[56] Again, it is clear from the provided information identified in the privilege log, that Board employees communicated with special counsel concerning a special education issue. The Board claimed that these communications are privileged because they were for the purpose of obtaining legal advice and services from counsel. The Board also provided an additional declaration concerning these specific communications.[57]

c) Privileged Text Messages

The Plaintiffs also argue that the Board cannot claim that text messages containing legal "privileged message[s] of counsel" are privileged. In support of their argument, they cite caselaw where a court concluded that a party's blanket notation of "legal" is insufficient to support the assertion of

transmitting counsel's advice); *Weeks v. Samsung Heavy Indus. Co.*, No. 93–C–4899, 1996 WL 341537, at *4 (N.D.Ill. June 20, 1996) ("A privileged communication does not lose its status as such when an executive relays legal advice to another who shares responsibility for the subject matter underlying the consultation. Management personnel should be able to discuss the legal advice rendered to them as agents of the corporation.")).

[53] Rec. Doc. 73-1 at 8-9.

[54] *See* Rec. Doc. 73-8 at 0020531-0020532.

[55] Rec. Doc. 73-1 at p.

[56] *See Louisiana Corral Mgmt., LLC v. Axis Surplus Ins. Co.*, 650 F. Supp. 3d 491, 496 (E.D. La. 2023) (examining subpoenas to insurance field adjuster and expert building consultant in breach of contract suit, and contains no discussion of carbon-copies of communications to attorneys); *United States v. Robinson*, 121 F.3d 971 (5th Cir. 1997) (discussing whether a copy of notice of forfeiture proceedings was privileged when submitted to an attorney).

[57] Ex. 3 at 1-2.

privilege.[58] However, Plaintiffs also correctly concede this is not what the Board provided.[59] It is uncontested that the Board also provided images that include the date and time of the message along with the sender, the Board previously stated that the text messages were from the District-issued phone of the Superintendent.[60] The description of the messages informed the Plaintiffs of the reason for the withheld messages, which were text messages discussing communications from counsel. To provide more details would divulge the privileged information in these short text messages. And Plaintiffs provide no authority concerning the situation at bar. Rather, the authority they cite is either non-binding and cited by no other court,[61] or discusses a much different factual situation.[62] "The application of the attorney-client privilege is a 'question of fact, to be determined in the light of the purpose of the privilege and guided by judicial precedents.'"[63] Therefore, the facts of the particular circumstances must control. Here, the provided text images, along with the added descriptions, appropriately demonstrate privilege.

B. Attorney Work Product Claims of the Board and the Board's Privilege Log

Plaintiffs also argue that the Board has failed to sufficiently claim attorney work product and that its privilege log is generally insufficient. Concerning Plaintiffs' arguments about attorney work product, they simply assert a general legal standard and then argue that the Board did not meet it.[64] Plaintiffs suggest that the underlying facts in the claimed communications must be disclosed to allow them to know which portions of the communications are underlying facts and legal advice. However, the authority Plaintiffs cited does not support this requirement. More specifically, *Blockbuster Ent. Corp.*

[58] Rec. Doc. 73-1 at p. 10.
[59] *Id.*
[60] Rec. Doc. 73-23 at 40; Rec. Doc. 73-23 at 100; Rec. Doc. 73-23 at 130; Rec. Doc 73-23 at 220; Rec. Doc. 73-23 at 228.
[61] *See Spoon v. Bayou Bridge Pipeline, LLC,* No. CV 19-516-SDD-SDJ, 2022 WL 17683109 (M.D. La. Dec. 14, 2022).
[62] *See Louisiana Corral Mgmt.*, LLC, 650 F. Supp. 3d at 496 (examining subpoenas to insurance field adjuster and expert building consultant in breach of contract suit).
[63] *Equal Emp. Opportunity Comm'n v. BDO USA, L.L.P.*, 876 F.3d 690, 695 (5th Cir. 2017).
[64] Rec. Doc. 73-1 at p. 7.

v. McComb Video, Inc.[65] and *Kiln Underwriting Ltd. v. Jesuit High Sch. of New Orleans, No.*,[66] upon which Plaintiffs reply, do not support such a requirement. Federal Rule 26(b)(3)(A) protects against the disclosure of documents or tangible things that are prepared in anticipation of litigation.[67] The Board has identified each document that contains attorney work product in its privilege logs, and the Board has also submitted an additional declaration from counsel with additional support for its claims of attorney work product.[68] This declaration further supports the Board's claim of the protections of Rule 26(b)(3)(A).

As for Plaintiffs' general arguments concerning the Board's privilege log, the Board has discussed Plaintiffs' concerns about specific emails above—concerning emails of the Board's general counsel, emails to a Board contractor, and emails among employees that contain privileged communications. However, Plaintiffs also argue that the Board's privilege logs are *de facto* insufficient.[69] Citing a case from the Middle District of Louisiana, Plaintiffs argue that the Board's privilege log is insufficient because the Board did not "describe the document's subject matter, purpose for its production, and specific explanation of why the document is privileged or immune from discovery."[70] However, the case cited by Plaintiffs concerns a motion to compel compliance with a subpoena. And the section of the case that Plaintiffs quoted cites Federal Rule 45(d)(2)—which pertains to subpoenas.[71] Another Middle District case cited by the Plaintiffs, *Chemtech Royalty Assocs., L.P. v. United States*, contains a clear instruction that "the sufficiency of privilege log descriptions are decided on a case-by-case basis, and it is well within the discretion of the Court to determine what constitutes

[65] 145 F.R.D. 402 (M.D. La. 1992).
[66] CIV.A. 06-04350, 2008 WL 108787 (E.D. La. Jan. 9, 2008).
[67] Fed. R. Civ. P. 26(b)(3)(A).
[68] Ex. 3 at 1-2.
[69] Rec. Doc. 73-1 at 12.
[70] *Id.* (citing *Peacock v. Merrill*, No. 08-01-B-M2, 2008 WL 687195, at *3 (M.D. La. Mar. 10, 2008).
[71] *Id.* at *1.

enough information in a privilege log."[72] Further, in *Chemtech Royalty Assocs., L.P.*, the party claiming privilege included only sixteen subject matter descriptions and included email strings without explaining each part of the email and all recipients of emails.

In this case, as explained above, the Board's privilege log contains email subjects that explain the topic of the emails. This is especially notable given that the vast majority of the disputed emails concern emails with the subject of "Fw: Mandatory Request for Expedited Due Process Hearing for LDOE Log No. 23-H-03-E."[73] This is not a vague description. Rather, as explained herein, this is sufficient to establish the subject of the conversation. Distinguishing this matter from *Chemtech Royalty Assocs., L.P.*, the Board did not limit its responses to general descriptions of the communications. Also, it is clear from the Board's privilege logs that it included each email included within email chains—which has allowed the Plaintiffs to question participants included on individual emails. What the Board provided is more than sufficient given the facts of this case. The Court should therefore deny the relief requested by the Plaintiffs. There is no basis to claim that the Board waived privilege, and the Plaintiffs have not provided a sufficient basis for an *in camera* review.

C. The Board is Obligated to Redact Information Concerning Other District Students.

Plaintiffs also argue that the Board should provide unredacted discovery, even when it contains educational records of students who are not parties in this litigation.[74] While the Plaintiffs cite cases in which Courts have ordered unredacted documents, they did not argue that the protective order in this case allows for, or obligates the Board, to disclose communications to Plaintiffs that contain education records protected by the Family Educational Rights and Privacy Act ("FERPA").[75] The

[72] Rec. Doc. 73-1 at 13(citing *Chemtech Royalty Assocs., L.P. v. United States*, No. 06-258-RET-DLD, 2009 WL 854358, at *5 (M.D. La. Mar. 30, 2009).
[73] *See* Rec. Doc. 73-1 at p. 9 ("Of these emails, the majority have the subject line: "Fw: Mandatory Request for Expedited Due Process Hearing for LDOE Log No. 23-H-03-E.")
[74] Rec. Doc. 73-1 at 14-16.
[75] *Id.*

Board agrees that the agreed-upon protective order does not allow for or require the disclosure of educational records of students who are not parties to this litigation. Further, the Board is concerned about providing educational records of uninvolved students to the Plaintiffs given the limited scope of this litigation. As the Board has repeatedly stated, there is no basis for Plaintiffs' request for information concerning other students. Moreover, the time dedicated to redactions can be attributed to the Plaintiffs' overbroad communication requests instead of privacy redactions. The Board will further discuss this concern in response to the Plaintiffs' arguments concerning Plaintiffs' Request for Production 2 ("RFP 2").

D. The Board Complied with Its Obligation to Explain Documents that were Withheld.

Plaintiffs also argue that the Board has failed to explain whether it has withheld documents responsive to its Request for Production 29 ("RFP 29").[76] However, as counsel for the Board has explained via correspondence, the Board "provided responsive documents for subparts a and b, but objected to the remaining subparts."[77] This clearly explained which part of RFP 29 the Board responded to, and the Board's objections to subsections of this Request were not ambiguous in this regard.[78] The Board also submits the attached declaration concerning the compilation and production of the documents the Board submitted in response to RFP 29, subparts a. and b.[79]

E. Request for Production 2 and 29

1. Request 2

The parties have litigated this Request and the Board has briefed its concerns about Plaintiffs' Request for "All documents and communications relating to Plaintiffs" going back to the 2018-2019

[76] *Id.* at 16.
[77] Rec. Doc 73-13, Plaintiffs' Exhibit 8 at 29/36.
[78] Rec. Doc. 73-20, Plaintiffs' Exhibit 15 at 4-6.
[79] Ex. 4 at 2-3.

school year.[80] The Board will not restate its arguments here, but again note that the Plaintiffs still have not explained the relevance of their Request for "all documents and communications relating to Plaintiffs." Notably, there is no discussion of the relevance of these communications in their brief. Conversely, the Board submitted a detailed and timely objection to Plaintiffs discussing its concerns about the relevance of the wide range of documents requests that would be retrieved. In fact, the Board stated that it "would have to search and extremely broad range of documents and communications."[81] As explained by the attached declaration, since the time of the Plaintiffs' last Motion to Compel, the Board has engaged in various meet and confers with Plaintiffs and, proposed potentially workable solutions to the Board's objection to this Request.[82] The Board has also engaged in various searches and "hit reports" requested by Plaintiffs, and they yielded results ranging from hundreds to over 100,000 emails.[83] However, the Board has also refused to continually run these reports at the sole discretion of the Plaintiffs. These searches take District time and resources, and the District cannot simply complete searches of this scale in a matter of minutes.[84]

After all of these actions, the Board agreed to provide communications with agreed-upon variations of the name of A.A., B.B., and C.C. within thirty days of their referrals.[85] The Board even agreed to an expanded search that added hundreds of additional emails.[86] This resulted in the Board reviewing and redacting a great many emails that Plaintiffs acknowledged as largely irrelevant to this action.[87] The redactions were necessary because the emails, based on searches of the full names of A.A., B.B., and C.C. and their first initial and last name, included information about many other

[80] Rec. Doc. 31 at 7-9.
[81] Rec. Doc. 29-7 at 3(original pagination).
[82] Ex. 4 at 1-2.
[83] *Id.*
[84] *Id.* at 2.
[85] Rec. Doc. 73-19, Plaintiffs' Exhibit 14 at 40, 41, and 47. Rec. Doc. 73-13, Plaintiffs' Exhibit 8 at 11, 12, and 36.
[86] Rec. Doc. 73-25, Plaintiffs' Exhibit 2 to Certification at 28/56 (last paragraph).
[87] Rec. Doc. 73-13, Plaintiffs' Exhibit 8 at 19 (last paragraph).

students. The Board has now provided hundreds of communications, totaling thousands of pages of documents with the inclusion of all email attachments.[88]

In Plaintiffs' instant motion, they now complain about a technical problem with the submission of emails.[89] However, Plaintiffs have refused the Board's proposed solution of submitting printouts of all emails listed in the production log, which the Board voluntarily submitted as an accountability measure.[90] Plaintiffs refuse to accept the supplemental documents in the formats offered due to software limitations.[91] However, anyone with basic software can open and read documents in a pdf format.

Plaintiffs also raise concerns about the Board's objection to going through this tedious process concerning the referrals of D.D. and E.E.[92] However, the Court has ruled that their referrals are not timely and that Plaintiffs could not include them in this case.[93] The burdensome nature of the processing of communications concerning the referrals of A.A., B.B. and C.C. instruct against engaging in this same process for the communications about the referrals of D.D. and E.E. This is especially true given that the Court has determined these issues are prescribed.

These months of attempted compromise have only further revealed the underlying problem with the Plaintiffs' RFP 2. It is overbroad and is not focused on Plaintiffs' actual claims. The Board's attempted compromises have demonstrated—in practice—that this request is onerous, overly burdensome, and has produced very little relevant information. Vitally, Plaintiffs have also opted not to address their burden of establishing the relevance of their request.[94] As the Board predicted at the

[88] Ex. 3 at 2-3.
[89] Rec. Doc. 73-1 at 18 (end of first paragraph).
[90] Rec. Doc. 73-13, Plaintiffs' Exhibit 8 at 10, 18 (offering PDF files).
[91] *Id.*
[92] Rec. Doc. 73-1 at 18.
[93] Rec. Doc. 39 at 12 (denying untimely claims of D.D. and E.E.).
[94] *See Disedare v. Brumfield*, No. CV 22-2680, 2023 WL 3496395 (E.D. La. May 17, 2023) (discussing the initial burden of establishing relevance).

outset, this Request is beyond the appropriate scope of discovery, and we ask for denial of the Plaintiffs' motion concerning this Request.

2. Request 29

Plaintiffs also raised concerns about the Board's objections to subsections c. through g. of their Request for Production 29 ("RFP 29").[95] As discussed above, the Board has not submitted documents in response to these subsections due to the objections explained in the Board's response to the Plaintiffs' Second Set of Discovery.[96]

The Board notes that it objected to the broad and vague drafting of RFP 29 due to Plaintiffs' request for all communications "relating to" all of the subjects listed. Because of the Plaintiffs' insistence on the use of "relating to," which the Board has briefed in a previous filing, the Board cannot discern the scope of this request.[97]

Concerning subjection c., the Board did not provide the communications requested because they do not pertain to a claim or defense in this litigation. Plaintiffs have not included any alleged failure to evaluate or determine eligibility for a 504 Plan or IEP of the students in this litigation. Further, the Board has already provided all of the involved students' evaluations, 504 Plans, and IEP documents to Plaintiffs. Therefore, there is no factual dispute as to when and if and when the Board has evaluated the students involved in this litigation during any relevant time period. The Board also notes that Plaintiffs did not and cannot identify any portion of their "Claims for Relief" that describes an alleged failure to evaluate. Rather, they point to portions of the proceeding 155 paragraphs, which contain many allegations that are simply background information that is not incorporated into Plaintiffs' claims—such as race discrimination allegations.[98]

[95] Rec. Doc. 73-1 at 19.
[96] *See* Rec. Doc. 73-20 at 5-6.
[97] Rec. Doc. 44 at 38-48.
[98] Rec. Doc. 34 at 7(regarding RFP 9 and stating race discrimination is not a claim in this case).

Concerning subsection d. of RFP 29, the Plaintiffs also made no claim that a failure to provide daily trackers or that withheld daily trackers resulted in a denial of any of Plaintiffs' exits from Rowley. And Plaintiffs' briefing identifies no claim in the operative complaint where they allege that compliance with any behavioral points system prevented the exit of any of the involved students from Rowley. If Plaintiffs have concerns about requests for educational records, those would be covered by another Request that they have not included in their motion.

Concerning subjection e., the Board also objected to the relevancy of communications concerning all disciplinary referrals to Rowley. Also, this request is duplicative of a previous subsection. Subsection a. of RFP 29 requested communications concerning referrals of the students to Rowley. The Board has already provided communications concerning referrals that occurred within the 2022-2023 school year and the next school year. These are the only referrals that are not prescribed. However, consistent with the Board's general temporal objections concerning the relevant years of discovery in this matter, the Board has objected to a global request concerning all other disciplinary responses.

As for subjection f., similar to subjection c., Plaintiffs have not filed a claim that there was any failure to provide the involved students functional behavior assessments or behavior intervention plans. Further, there is no factual dispute as to when and if functional behavior assessment or behavior intervention plans were provided to the students. These documents are also included in the student's educational records. Moreover, Plaintiffs have not alleged that there was a request for a functional behavior assessment or behavior intervention plan that the Board refused to conduct.

Concerning subjection g., the Board has objected to the relevancy of communications with law enforcement "related to" Plaintiffs. Plaintiffs did not include an allegation of discriminatory law enforcement in this litigation. However, the Board notes that it has already provided a detailed interrogatory response—and underlying communications—pertaining to the Plaintiffs' allegation of

retaliation against A.A. in connection with his juvenile court involvement. For these reasons, these arguments lack merit and the Board urges the Court to deny Plaintiffs' requested relief.

F. Requests 30, 31, 32, 33, and 36, 37, and 39 are beyond the scope of this litigation.

Requests 30, 31, 32, 33, and 36 seek information regarding other students who have attended Rowley from July 1, 2018, to present. While the Board has provided educational records for students involved in this litigation (i.e., IEPs, BIPs, evaluation documents, etc.),[99] it maintains its objections to Plaintiffs' request for documents concerning non-parties.[100] These requests are not relevant to the claims of the involved students and far out of proportion with the needs of the case. The records of all student referrals to alternative placements and expulsion hearings are not relevant to the Plaintiffs' *Monell* due process claims. Courts require a clear demonstration of procedural due process violations before considering broader claims such as those the plaintiff is attempting to assert here. The Plaintiffs must first establish a direct connection between the alleged policy and/or practice and the specific instances of due process violations before such records become pertinent. Without such a connection, the requested student records are irrelevant.[101] The Plaintiffs will be unable to establish a procedural due process violation because it is uncontested that Plaintiffs were never fully deprived of educational services.[102]

Similarly, as to the Plaintiffs' current contention in requests 30, 31, 32, 33, and 36, the Court previously ruled on Plaintiffs' Request for Production 22 and found that their argument that other students are similarly situated to Plaintiffs is meritless.[103] Nevertheless, Plaintiffs continue to request information that is overbroad and irrelevant to the claims of their clients. These requests seem to be futile attempts by Plaintiffs to establish additional, broader class claims. And the Board is not obligated

[99] Rec. Doc. 73-20 at 3-4.
[100] *Id.* at 6-9.
[101] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694-95, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978).
[102] *See* Rec. Doc. 22-1 at 17-20 (discussing lack of procedural due process protections when there is no total exclusion from educational process).
[103] Rec. Doc. 38.

to assist, via discovery on discrete claims, Plaintiffs' class-building endeavors.

Requests 37 and 39 seek information about teachers and staff at Rowley, and these are grossly out of proportion to the needs of the claims in this litigation. Plaintiffs requested in Request 37: "Documents sufficient to show dates and times that school employees, including teachers, counselors, special education service providers, tutors, and substitute teachers, entered or exited the campus at Rowley in the 2022-2023 and 2023-2024 school years." This request is burdensome and irrelevant. The Plaintiffs have included no claim that teachers at Rowley fail to come to work. Further, this information would be far from probative without a comparison to the District's non-alternative schools. Further, the burdensome nature of this request is inherent in the request for time records for essentially all employees at Rowley, every school day, for two school years. A detailed review of the Defendants' records will be needed to assemble data from multiple sources, then ensure that personal information is appropriately redacted as part of the production request. To satisfy the Plaintiffs' evolving requests, the Board has already exhausted countless hours of District staff time gathering data. Again, besides the burdensome nature of this production, there is no apparent relevance to the records.

Plaintiffs also requested in 39, "All documents and communications relating to the evaluation and assessment of school personnel for each teacher and each administrator at Rowley during the relevant time period." The Board's concerns regarding this Request are similar to the previous one. To summarize these concerns, the Board would simply ask: Why and how does this relate to any claim in the Plaintiffs' complaint? Plaintiffs argue that they must be able to determine whether students are denied a general education at the school. However, Plaintiffs do not explain how staff evaluations shed light on whether general education is offered at Rowley and how would this show any comparison to other District schools—without also providing this same information for all middle and high schools in the District. The Board has already provided the qualifications and resumes of the

teachers who work at Rowley as a compromise concerning another discovery request. However, this previous submission is not a waiver of stated objection to this audacious request.

Concerning Requests 30, 31, 32, 33, 36, and 37 and 39, Plaintiffs seem to believe that they have the right to audit all aspects of Rowley's operations. Perhaps, as detailed in the Board's Motion for Judgment on the Pleadings, the Plaintiffs now realize that the claims they filed have little to no merit. Regardless of their motivation, they are not entitled to fish for new or viable claims at the expense of the District. As stated by the Fifth Circuit, a party must "lay out her claims before seeking discovery germane to them."[104] And "discovery is not a license to fish for a colorable claim."[105]

CONCLUSION

The Board has appropriately claimed privilege through its submitted privilege logs. Further, the Board has explained the basis of its objections to the specific Requests listed in Plaintiffs' briefing. For the reasons detailed in this Opposition, the Court should deny the Plaintiffs' Second Motion to Compel.

Respectfully Submitted,

HAMMONDS, SILLS, ADKINS, GUICE, NOAH, & PERKINS, L.L.P.
2431 South Acadian Thruway, Suite 600 Baton Rouge, Louisiana 70808
Telephone: 225-923-3462
Facsimile: 225-923-0315

/s/ Timothy J. Riveria
WAYNE T. STEWART, T.A.
La. Bar Roll No. 30964
wstewart@hamsil.com
TIMOTHY J. RIVERIA
La. Bar Roll No. 39585
triveria@hamsil.com
PARRIS A. TAYLOR
ptaylor@hamsil.com

[104] *Barnes v. Tumlinson*, 597 F. App'x 798, 799 (5th Cir. 2015).
[105] *Juan Antonio Sanchez, PC v. Bank of S. Texas*, 494 F. Supp. 3d 421, 431 (S.D. Tex. 2020) (citing *Barnes v. Tumlinson*, 597 F. App'x 798, 799 (5th Cir. 2015)).

La. Bar Roll No. 25519
CARLAR M. ALEXANDER
calexander@hamsil.com
La. Bar Roll No. 41040

CERTIFICATE OF SERVICE

I certify that I have this day caused a copy of the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system, which will forward a copy to all attorneys of record.

Baton Rouge, Louisiana this 13th day of August 2024.

/s/ Timothy J. Riveria
TIMOTHY J. RIVERIA