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

PLAINTIFFS' MEMORANDUM IN SUPPORT OF SECOND MOTION TO COMPEL DISCOVERY

Under Federal Rule of Civil Procedure ("FRCP") 37, Plaintiffs respectfully request that this Court compel Defendants to: 1) produce documents inappropriately withheld as privileged or attorney work-product, or, in the alternative, provide a limited number of disputed records withheld as privileged to the Court for *in camera* review;[1] 2) provide an adequate description of all withheld documents; and 3) produce complete responses to RFPs 2, 29, 30, 31, 32, 33, 36, 37, and 39. Despite Plaintiffs' good faith attempts to resolve outstanding discovery issues, Defendants continue to defy their discovery responsibilities by improperly withholding and redacting documents under the guise of unspecified burden or inapplicable privilege.

The disputed discovery includes (1) emails improperly withheld due to incorrectly asserted attorney-client and work-product privilege; (2) privilege logs with insufficient, inconsistent, or missing entries; (3) production of improperly redacted documents; (4) failure to produce

[1] For a list of the emails and texts for which *in camera* review is requested, *see* Ex. 1 (11 email threads for which review is requested plus four text messages). The emails are from the privilege logs for RFP 2 and RFP 29. *See* Ex. 2 (RFP 2 Privilege Log – 6.26); Ex. 3 (RFP 2 Privilege Log – 6.26 with Problematic Entries Highlighted); Ex. 4 (RFP 29 Privilege Log – 5.10); and Ex. 5 (RFP 29 Privilege Log – 5.10 with Problematic Entries Highlighted).

responsive documents without adequate justification; (5) refusal to provide complete responses to RFP 2 and RFP 29; (6) refusal to answer RFPs 30, 31, 32, 33, 36, because they seek information about other students; and (7) refusal to answer RFPs 37 and 39 because they seek information about teachers and staff at Rowley.

In an attempt to resolve the latter three disputes, Plaintiffs conferred with Defendants on May 15, June 4, and July 9, and engaged in extensive email correspondence. Plaintiffs tried to resolve the first four disputed discovery issues through a Deficiency Letter, a meet-and-confer, and finally, a discovery conference with the Court. Doc. 60. Because of the urgency of the disputed issues and Defendants' unwillingness to adhere to their discovery obligations, Plaintiffs now seek a timely resolution from the Court. The disputed discovery is further outlined below.

I. Procedural Background

On June 27, 2023, Plaintiffs A.A. and B.B. filed this lawsuit against Doris Voitier, in her official capacity as Superintendent of St. Bernard Parish Public Schools ("SBPPS"), and the St. Bernard Parish School Board ("SBPSB") (collectively, "Defendants"). Plaintiffs challenge Defendants' use of their alternative school program to arbitrarily and discriminatorily isolate and segregate students with disabilities in a highly restrictive educational setting at C.F. Rowley Alternative ("Rowley"). Plaintiffs allege violations of the United States and Louisiana Constitutions, state statutes, Title II of the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act of 1974 ("Section 504"), the Individuals with Disabilities Education Act ("IDEA"), and the Louisiana Human Rights Act ("LHRA"). Plaintiffs C.C., D.D., and E.E. have since joined this lawsuit. Pending before this Court is Defendants' motion for judgment on the pleadings. Doc. 22. Plaintiffs have opposed that motion. Doc. 25. For an explanation of the Parties' negotiations to date, please see the attached Supplemental Certification. Ex. A.

II. Legal Standard

When a party fails to provide answers or produce documents in response to discovery requests, the FRCP permit the party seeking discovery to "move for an order compelling an answer, designation, production, or inspection." *See* Fed. R. Civ. P. 37(a)(3)(B)(iii)–(iv). The party filing a motion to compel bears the burden of establishing that the information requested is within the scope of discovery. *See Humphrey v. LeBlanc*, 2021 WL 3560842, at *2 (M.D. La. 2021) (citations omitted). Information is discoverable when it is non-privileged, "relevant to any party's claim or defense" and "proportional to the needs of the case." See Fed. R. Civ. P. 26(b)(1).

Relevancy is "broadly construed" for discovery purposes, and discovery requests "should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of a party." *Camoco, LLC v. Leyva*, 333 F.R.D. 603, 606 (W.D. Tex. 2019) (internal citations omitted). In determining whether a discovery request is proportional to the needs of a case, courts consider the importance of the issues at stake, the amount in controversy, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. *See* Fed. R. Civ. P. 26(b)(1). "Once the moving party establishes that the materials requested are within the scope of permissible discovery, the burden shifts to the party resisting discovery to show why the discovery is irrelevant, overly broad or unduly burdensome or oppressive, and thus should not be permitted." *LeBlanc*, 2021 WL 3560842, at *2 (internal citations omitted). To overcome a motion to compel, the party resisting discovery must "specifically object and show that the requested discovery does not fall within Rule 26(b)(1)'s scope of proper discovery (as now amended) or that a discovery request would impose an undue burden or expense or is otherwise objectionable." *Carr v. State Farm Auto. Ins. Co.*, 312

F.R.D. 459, 469 (N.D. Tex. 2015) (citing, *inter alia*, *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990)).

To prevent discovery of an otherwise discoverable document based on privilege, the privilege defense must be asserted and substantiated. "A [privilege holder] asserting a privilege exemption from discovery bears the burden of demonstrating its applicability." *United States v. Fluitt*, 99 F.4th 753, 763 (5th Cir. 2024) (citing *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001)). The party asserting the objection must prove that each document it has withheld is privileged and cannot rely merely on a blanket assertion of privilege. *Jordan v. Aries Marine Corp.*, No. 14-377, 2015 WL 151336, at *3 (E.D. La. Jan. 12, 2015) (citing *In re Equal Emp't Opportunity Comm'n*, 207 F. App'x 426, 431 (5th Cir. 2006)).

III. Argument

1. Defendants have improperly asserted attorney-client and work-product privilege over email and text communications.

i. Attorney-Client Privilege

The attorney-client privilege "only protects disclosure of confidential communications between the client and attorney." *Fieldwood Energy, LLC v. Diamond Servs. Corp.*, No. 14-650, 2015 WL 1415501, at *1 (E.D. La. Mar. 27, 2015) (citing, *inter alia*, *Upjohn Co. v. United States*, 449 U.S. 383, 395-96 (1981)). The attorney-client privilege is interpreted narrowly. *Equal Emp. Opportunity Comm'n v. BDO USA, L.L.P.*, 876 F.3d 690, 695 (5th Cir. 2017) (internal quotations omitted); *United States v. Robinson*, 121 F.3d 971, 975 (5th Cir. 1997) (Information is not "cloaked with the lawyer-client privilege" just because it was "passed from client to lawyer."). To sustain attorney-client privilege, the privilege-asserter must show: "(1) that he made a *confidential* communication; (2) to a lawyer or his subordinate; (3) for the primary purpose of securing either a legal opinion or legal services, or assistance in some legal proceeding." *Louisiana Corral Mgmt.,*

LLC v. Axis Surplus Ins. Co., 650 F. Supp. 3d 491, 496 (E.D. La. 2023); accord *Slocum v. Int'l Paper Co*., 549 F. Supp. 3d 519, 523-24 (E.D. La. 2021) (citing *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d 789, 795 (E.D. La. 2007)).

Defendants improperly withheld eight (8) emails in their RFP 29 production on May 10, 2024; and seventy-nine (79) emails in the supplemental RFP 2 production from June 26, 2024, on the basis of work-product and attorney-client privilege. *See* Ex. 3 (RFP 2 Privilege Log - 6.27 with Relevant Entries Highlighted); Ex. 5 (RFP 29 Privilege Log - 5.10 with Relevant Entries Highlighted).[2] These emails, and the reasons they must be produced, are described below.

Communications With the District Attorney's Office

In their May 10 production (RFP 29), Defendants improperly withheld two (2) emails between school staff members and the St. Bernard Parish District Attorney's office.[3] In the June 26 production responsive (RFP 29), Defendants improperly withheld an additional five (5) emails between school district employees and the District Attorney's office.[4]

Defendants seek to defend the asserted privilege on the basis that the District Attorney serves as general counsel for the school district under state law. La. Rev. Stat. 16:2. While Louisiana law does allow the District Attorney's office to serve as general counsel for the school district under some circumstances, it is clear that "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." La. R.S. 16:2(B). That condition was satisfied here. At the time the email was sent, Defendants had retained separate

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[2] For unhighlighted versions of these privilege logs, *see* Ex.2J (RFP 2 Privilege Log – 6.26) and Ex. 4 (RFP 29 Privilege Log – 5.10).

[3] *See* Ex. 4 at P.A. 20532 (8/31/2022 email from D.A. Nicosia to Voitier copying L. Licciardi; 9/1/2022 email from Voitier to D.A. Nicosia). In the May 10 production, the two improperly withheld emails with D.A. Nicosia are also identified in Items 5C and 5D of the Deficiency Letter. *See* Ex. 5 at P.A. 20532; Ex. 6 at 2.

[4] Ex. 2 at P.A. 20519 (8/31/2022 email from Voitier to D.A. Nicosia; 8/31/2022 and 9/1/2022 emails from D.A. Nicosia to Voitier copying L. Licciardi), P.A. 20520 (two 9/1/2022 emails from Voitier to D.A. Nicosia).

counsel—the same private attorneys represented on the privilege log from Hammonds & Sills, (i.e., Wayne T. Stewart, Robert Hammonds, and Parris Taylor).[5] Especially where the School Board employed this outside, private counsel for legal matters involving the very students—who are Plaintiffs in this litigation—discussed in the communications,[6] there is no basis in state law for Defendants to continue to assert a general counsel relationship exists with the St. Bernard Parish District Attorney's office, and all of its employees, over these communications.[7]

Further, the communications are not with the School Board. Some emails at issue are between Mr. Nicosia and Defendant Voitier—while Mr. Nicosia might be an attorney, he does not represent Defendant Voitier. The remaining emails are between Mr. Nicosia and school district employees, not between Mr. Nicosia and the School Board; regardless of the Court's interpretation of the statute, Defendant Voitier and Mr. Nicosia do not have an attorney-client relationship. *See Steiner v. United States*, 134 F.2d 931, 935 (5th Cir. 1943). For the privilege to apply, the communication must be between Mr. Nicosia and the School Board. And the extent that Defendants rely on the subject line of these emails—"Meeting with Attorney,"[8] —to claim privilege, that argument fails as well. First, Defendants provided no information to suggest what "attorney" is referenced in the subject line. Second, even assuming that the email discusses

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[5] Plaintiffs have not requested <u>any</u> direct communications with these lawyers, as opposed to the few emails with an attorney copied or no attorney copied at all, in this motion.

[6] Plaintiffs are confident that each of the emails and text messages describe a student who is a Plaintiff in this litigation based on the search Defendants conducted. If the students were not discussed in the text messages and emails, the communications would not have been included on the privilege log.

[7] Indeed, were the Court to interpret the statute differently, it would lead to unfortunate conflicts of interest and ethical issue, where, in this matter, such representation would imply that the District Attorney was prosecuting a child in its role as the representative of the people of Louisiana with its corresponding duty to be fair, seek justice, balance the interests of the community, etc. and also at the same time acting as the representative of a political entity that has a vested interest in the outcome of that delinquency proceeding.

[8] This is nearly the same subject line as the emails in Items 5C and 5D of the Deficiency Letter. Ex. 6 at 2; *see* Ex. 1 at 11. Presumably, Items 5C and 5D of the Deficiency Letter, which are dated 8/31/22 and 9/1/22, are represented in the RFP 2 privilege logs as well. *Compare* Ex. 4 at P.A. 20532, *with* Ex. 2 at P.A. 20519-20. Plaintiffs have received no explanation, however, for which there appear to be: (a) two (2) emails between Perry Nicosia and Doris Voitier in the RFP 29 log; and (b) five (5) emails between Perry Nicosia and Doris Voitier in the RFP 2 log. *Id.*

communications between Doris Voitier and Defendants' privately retained outside counsel in this matter at Hammonds, Sills, Adkins, Guice, Noah & Perkins (hereafter "Hammonds & Sills"), that argument ignores the basic premise of the rules governing attorney-client privilege: Defendants waive privilege by conveying otherwise privileged communications to a third party.

Based on their partial production of some communications between school district employees and the District Attorney's office, Defendants recognize their arguments are insufficient to protect the communications at issue. Indeed, Defendants have already produced several emails with the D.A.'s office originally identified on the June 26 privilege log.[9] The remaining communications, seven emails between Doris Voitier and Perry Nicosia, *see* Ex. 2 at P.A. 20519-20, Ex. 4 at P.A. 20532, are not privileged and must be produced.

Emails Between School District Employees and Third Parties

Similarly, emails between school employees and a third-party employee of Young Cypress Psychology, Sarah Fletcher, must be produced. These include four (4) emails between various school district employees and Sarah Fletcher identified in the May 10 privilege log,[10] and an additional eleven (11) emails between school district employees and Sarah Fletcher identified in the June 26 privilege log.[11] As Ms. Fletcher is a third party, none of these emails can be considered

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[9] *See* Ex. 2 at P.A. 020523-25 (emails from 3/16/2023, 3/20/2023 and 3/28/2023 exchanged between D.A. employee Keena Van Court and school district employees Patchus, Billiot, and Petit).

[10] Ex. 4 at P.A. 20531 (8/29/2022 email from Kerth to Voitier, Warner, Schneider, Powell, Koontz, Hall, Taylor, Buckman, Gros, Massey, Ben, Andry, Cipollone, Sanchez, Boudreaux, Foland, Holzenthal, and third-party Fletcher, and copying Attorney Stewart and Kerth), P.A. 20531 (8/29/2022 email from third-party Fletcher to Kerth); P.A. 20532 (9/9/2022 email from Kerth to Voitier, Warner, Schneider, Powell, Koontz, Hall, Taylor, Buckman, Gros, Massey, Ben, Andry, Cipollone, Sanchez, Boudreaux, Foland, Holzenthal, and third-party Fletcher, and copying Attorney Stewart), P.A. 20532 (9/12/2022 email from Kerth to Voitier, Warner, Schneider, Powell, Koontz, Hall, Taylor, Buckman, Gros, Massey, Ben, Andry, Cipollone, Sanchez, Boudreaux, Foland, Holzenthal, and third-party Fletcher, and copying Attorney Stewart); *See* Ex. 6 at 2 (Items 5A, 5B, 5E, and 5F).

[11] Ex. 2 at P.A. 20510 (2/15/2022 email from Ben to Razza and third-party Fletcher), P.A. 20511, 20515 (two 8/29/2022 emails from Kerth to third-party Fletcher), P.A. 20517 (8/29/2022 email from Kerth to Voitier, Warner, Schneider, Powell, Koontz, Hall, Taylor, Buckman, Gros, Massey, Ben, Andry, Cipollone, Sanchez, Boudreaux, Foland, Holzenthal, and third-party Fletcher, and copying Attorney Stewart and Kerth), P.A. 20518 (8/29/2022 email from third-party Fletcher to Kerth), P.A. 20520 (9/6/2022 email from third-party Fletcher to Kerth and 9/7/2022 email

privileged. *Alldread v. City of Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993); *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").

Nor is there any other basis for the assertion of attorney-client privilege or work-product in the privilege log. The subject of several of the emails from the June 26 log reveals only that the communications refer to a "Fw: Evaluation Meeting," "Fwd: exhbitis [*sic.*]," or "Re: evals." *See* Ex. 2 at P.A. 20510, 20525-26. The remaining emails are part of an August 29, 2022 email thread concerning the expedited due process hearing for A.A. discussed in the previous section. *See id.* at P.A. 20511, 20515, 20517-18, 20520-21; Ex. 4 at 20531-32. Attorney Wayne T. Stewart of Hammonds & Sills is carbon-copied on only three of the emails responsive to RFP 2, *see* Ex. 4 at P.A. 20531-32, and three of the emails responsive to RFP 29, *see* Ex. 2 at P.A. 20517, 20521. The rest of the emails are not in dispute, or were not sent or copied to an attorney. And although an attorney was eventually included on carbon copy in the email thread, the mere presence of counsel on carbon copy on several of the emails does not cloak the communications with attorney-client or work-product privilege. *See Robinson*, 121 F.3d at 975.

i. *Communications among School District Employees*

Finally, Defendants have improperly withheld a total of sixty-five (65) emails among school staff members, including two (2) emails responsive to RFP 2 from May 10, 2024,[12] and

from Kerth to third-party Fletcher), P.A. 20521 (9/9/2022 and 9/12/2022 emails from Kerth to Voitier, Warner, Schneider, Powell, Koontz, Hall, Taylor, Buckman, Gros, Massey, Ben, Andry, Cipollone, Sanchez, Boudreaux, Foland, Holzenthal, and third-party Fletcher, and copying Attorney Stewart), P.A. 20525 (4/27/2023 email from Cipollone to third-party Fletcher), P.A. 20526 (5/12/2023 email from Penn to Breaux, Gros, and third-party Fletcher).

[12] *See* Ex. 4 at P.A. 20532 (two 9/20/2022 emails from Gros to Kerth, copying Attorney Stewart); Ex. 6 at 2-3 (Items 6A and 6B).

sixty-three (63) emails responsive to RFP 29 from June 26, 2024.[13] Additionally, from the June 26 production of text messages, Defendants improperly withheld four text messages exchanged between school district employees.[14]

In the May 10 production, the two emails at issue are between child search coordinator Alison Gros and Special Education Coordinator Cheramie Kerth and Attorney Stewart is copied. Ex. 4 at P.A. 20532. The subject of the emails refers to an "FBA" and nothing more. Again, mere presence of counsel copied on an email, without more, does not shield the communication. *See Robinson*, 121 F.3d at 975. Defendants have provided no basis, other than the copying of an attorney, to support their assertion of privilege as to these emails.

Nor is there sufficient information in either privilege log to support Counsel's assertion that the remaining 63 emails—only two of which even have an attorney copied—are privileged. *See* Ex. 2 at P.A.20508-16, 20518-19, 20522-23, 20526-27. 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." Ex. 1at 1-11;[15] *see* Ex. 2 at P.A. 20510-16; *see also* Ex. 2 at P.A. 20518-19 ("Re: Mandatory Request for Expedited Due Process Hearing for LDOE Log No. 23-H-03-E").

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[13] Ex. 2 at P.A. 20508 (11/23/2021 email from Kerth to Voitier), P.A. 20509 (2/14/2022 email from Kerth to Ben, copying Gros), P.A. 20510-16 (forty-eight 8/29/2022 emails sent by Kerth to Sanchez, Andry, Foland, Warner, Voitier, Cipollone, Boudreaux, Powell, Boudreaux, Buckman, Holzenthal, Hall, Koontz, Massey, Buckman, Schneider, Gros, UNIDENTIFIED RECIPIENT, Ben, Taylor), P.A. 20518 (two 8/29/2022 emails from Voitier to Kerth), P.A. 20519 (two 8/30/2022 emails from Ben to Kerth and one 8/30/2022 email from Kerth to Ben), P.A. 20522 (two 9/20/2022 emails from Gros to Cheramie copying Attorney Stewart), P.A. 20523 (two 3/14/2023 emails from Cipollone to Cipollone; 3/16/2023 email from Petit to UNIDENTIFIED RECIPIENT; 3/17/2023 email from Petit to Janneck and Rost), P.A. 20526 (5/31/2023 email from Cipollone to Breaux), P.A. 20527 (9/21/2023 email from A. Licciardi to Voitier).

[14] Ex. 7.a and b at P.A. 19602 (redacted excerpt of 8/30/23 text message from Cipollone to Voitier), P.A. 19605 (redacted excerpt of 5/1/2023 text message from Cipollone to Voitier; redacted excerpt of 4/17/2023 text message from Cipollone to Voitier and Lumetta), P.A. 19608 (redacted excerpt of 12/20/2023 text message from Cipollone to Voitier). These issues were not resolved by Defendants' supplemental July 26 production, which did not include any text messages between Doris Voitier and Joseph Cipollone.

[15] [**NOTE**: For pin cites to exhibits without Bates Stamps, please note that the page numbers provided are the original page numbers, without the cover page. Accordingly, please reference the page number of the PDF at the bottom of the page, rather than the court-stamped page number at the top of the page.].

Defendants maintain that attorney-client privilege applies where they have stated that the emails discuss a legal proceeding. Without a communication to or from an attorney, however, mere discussion of legal proceedings is not protected by attorney-client privilege. *See Louisiana Corral Mgmt., LLC*, 650 F. Supp. 3d at 496. The only case Defendants cite in support of their proposition deals with in-house counsel, *see* Ex. 8 at 10 (citing *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d at 811), and Defendants do not have in-house counsel. Even if rules governing in-house counsel applied in this distinct context, the privilege log remains insufficient to justify the privilege assertion. To assert attorney-client privilege under these circumstances, it is Defendants' burden to show it is "clear that legal advice previously obtained was being circulated to those within the corporate structure who needed the advice in order to fulfill their corporate responsibilities." *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d at 811; *see also Slocum*, 549 F. Supp. 3d at 524. Especially where no attorney even appears on the communication until the end of the chain, no such showing has been made here.

For the four text messages between school staff withheld as privileged, Defendants did not list the communications on the privilege log. Ex. 7.a and b. at P.A. 19602, 19605, 19608. Instead, Defendants produced a PDF containing screenshot images and left comments on the redacted message excerpts that the communications "pass[] along a privileged message of counsel." *Id.* This is entirely insufficient to support the privilege assertion. *Spoon v. Bayou Bridge Pipeline, LLC*, No. CV 19-516, 2022 WL 17683109, at *3 (M.D. La. Dec. 14, 2022) ("[S]imply describing a lawyer's advice as 'legal,' without more, is conclusory and insufficient to . . . establish[ ] attorney-client privilege." (citations omitted)). While the withheld text excerpts show the date and time of the message as well as the name of the sender, they provide no other underlying factual information to allow Plaintiffs to assess the privilege claim. Notably, none of the parties listed on the text

messages were attorneys. *See Louisiana Corral Mgmt., LLC*, 650 F. Supp. 3d at 496. Without such supplemental description, Defendants have failed to meet their burden to protect the communications as privileged, and the text messages must be produced. *See Slocum*, 549 F. Supp.3d at 525.

ii. Attorney Work-Product Privilege

Another basis provided for withholding the disputed communications from June 26 is the attorney work-product doctrine[16] The work-product protection extends to "documents and tangible things that are prepared in anticipation of litigation or for trial by or for [a] party or its representative." Fed. R. Civ. P. 26(b)(3)(A). But the work-product protection cannot shield discovery of underlying relevant facts. *Blockbuster Entm't Corp. v. McComb Video, Inc.*, 145 F.R.D. 402, 403 & n.1 (M.D. La. 1992). Only if the document discusses "strategy [ ] and opinions" of counsel will the communication be protected. *Kiln Underwriting Ltd. v. Jesuit High Sch. of New Orleans*, No. CIV.A. 06-04350, 2008 WL 108787, at *7-8 (E.D. La. Jan. 9, 2008). Here, Defendants have provided so little information about the emails that it is impossible to assess whether such strategy and opinions are asserted, as opposed to other communications that discuss other matters. *See, e.g.*, *id*. at *9-10 (requiring production of emails between corporate employees and attorneys that did not discuss "strategic information").

Where Defendants have failed to provide such information, the asserted work-product protection cannot stand; and, at a minimum, the disputed four (4) text messages and seventy-nine (79) disputed emails are properly submitted for *in camera* review. *See, e.g.*, *id*.; *In re Vioxx Prod. Lab. Litig.*, 501 F. Supp. 2d at 815; *see also Equal Emp. Opportunity Comm'n v. BDO USA, L.L.P.*, 876 F.3d 690, 697 n.4 (5th Cir. 2017) (describing the appropriateness of *in camera* review and

[16] Defendants do not assert attorney-client work production protection as a basis for privilege in the RFP 29 log from May 10, 2024. Ex. 4.

stating that the "amount of documents in this case—278—does not present an unduly burdensome task for review").[17]

2. Defendants' privilege log is legally insufficient.

The law is clear that a privilege log must contain enough information to inform the other party of the nature of the privilege claimed, and to permit them to test the legitimacy of that claim. Fed. R. Civ. P. 26(b)(5)(A)(ii) (stating that a privilege log must "describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."); *see also United States v. El Paso Co.*, 682 F.2d 530, 541 (5th Cir. 1982) (stating that a claim of privilege must enable "the court and the adversary party [to] test[] the merits of the claim of privilege"). Defendants' privilege log fails to do so, and, as the party asserting privilege, Defendants bear the burden of proof to substantiate their privilege claims. *United States v. Newell*, 315 F.3d 510, 525 (5th Cir. 2002) (citing *In re Santa Fe Int'l Corp*., 272 F.3d 705, 710 (5th Cir. 2001)).

Defendants' log lacks "critical information that would permit Plaintiffs to test the merits of the privilege claim." *BDO USA, L.L.P.*, 876 F.3d at 697. While Defendants' privilege logs do, in most cases,[18] provide "the date, the author, and all recipients of *each document* listed therein," the logs fail to completely "describe the document's subject matter, purpose for its production, and specific explanation of why the document is privileged or immune from discovery." *Peacock v. Merrill*, No. 08-01, 2008 WL 687195, at *3 (M.D. La. Mar. 10, 2008) (citations omitted). Such descriptions are critical to avoid conclusory assertions of privilege that shield otherwise

[17] For additional reasons *in camera* review is requested, please see Ex. A (Certification) at 3-4.
[18] Notably, there are two emails in the RFP 2 log where a recipient is not even identified. *See* Ex. 2 at P.A. 20515, 20523 (8/29/2022 email from Kerth; 3/16/2023 email from Petit).

permissible discovery from review and permit counsel to perform a good-faith assessment that would avoid Court involvement. *See Chemtech Royalty Assocs., L.P. v. United States*, CIV.A. No. 05-944, 2009 WL 854358, at *3 (M.D. La. Mar. 30, 2009) ("The focus is on the specific descriptive portion of the log ... since the burden of the [withholding] party ... cannot be discharged by mere conclusory assertions." (citations omitted).

"Put simply, the information provided on the Privilege Log for each withheld email or document is woefully deficient to establish the elements of the attorney-client privilege." *Spoon*, 2022 WL 17683109, at *4; *see BDO USA*, 876 F.3d at 697. Where, even after weeks of negotiations[19] and a status conference with the Court, Defendants cannot provide adequate privilege logs meeting the basic requirements to assess privilege, the privilege asserted may be waived. *See BDO USA*, 876 F.3d at 697 ("Continual failure to adhere to Rule 26's prescription may result in waiver of the privilege where a court finds that the failure results from unjustified delay, inexcusable conduct, or bad faith."); *Taylor Energy Co. v. Underwriters at Lloyd's London Subscribing to Ins. Coverage Evidence by Pol'y No. HJ109303*, No. CIV.A. 09-6383, 2010 WL 3952208, at *1 (E.D. La. Oct. 7, 2010) ("Where descriptions in the privilege log fail to meet this standard, 'then disclosure is an appropriate sanction.'" (quoting *Smithkline Beecham Corp. v. Apotex Corp.*, 193 F.R.D. 530, 534 (N.D. Ill. 2000)). At a minimum, the continued failure to provide appropriate privilege logs supports the need for *in camera* review. *See United States v. Zolin*, 491 U.S. 554, 569 (1989) ("[T]his Court has approved the practice of requiring parties who

[19] Indeed, in the Deficiency Letter, Plaintiffs made an attempt to avoid this outcome. Ex. 6 at 3 (Item 8). As a corollary to the request for an amended privilege log, Item 8 pertains to providing the emails referenced in the privilege log without redactions of essential details like sender, recipient, carbon copy, date, subject, and any non-privileged information, which would have allowed Plaintiffs to assess privilege assertions. This information is not protected because attorney-client privilege protects only communications, not the underlying facts. *See Upjohn Co.*, 449 U.S. at 395.

seek to avoid disclosure of documents to make the documents available for in camera inspection ... and the practice is well established in the federal courts.").

3. Defendants improperly redacted emails and text messages and further failed to provide complete text messages.

Since the Parties' status conference in this matter, Defendants have submitted a document detailing the reasons for redactions in the May 10 RFP 29 production. Ex. 9 at P.A. 21653-55. Based on this information, Plaintiffs are satisfied, with one exception, that all redactions in the RFP 29 production have been explained and, if redacted on the basis of privilege, included in the privilege log. Plaintiffs continue to lack a basis for the redaction of P.A. 9842,[20] which Defendants state in the supplemental submission was provided in response to RFP 2 "with fewer redactions." *Id.* at P.A. 21653. The only information given for these continued redactions is that the emails contain "private information," which is even less detailed than other entries stating that educational records have been redacted. *Id.* at P.A. 21653. This is particularly problematic where no updates have been provided to the RFP 2 privilege log from June 29.

Even were all redactions sufficiently accounted for in the privilege log, the basis for many of the single-line redactions from emails—protection of other students' identity—is improper for reasons explained further below. The extent of Defendants' redactions, including non-privileged redactions in the text messages produced, further calls into question Defendants' transparency and the integrity of the legal process. *See, e.g.*, Ex. 10 at P.A. 9741, 9767, 9870-71, 9873, 9875-77, 9879, 10086-87.

a. Improper Redaction and Incomplete Production of Text Messages

[20] Before this supplemental submission, Plaintiffs had no basis to find that the following emails were listed in the privilege log, due to the extensive nature of the redactions: Ex. 10 at P.A. 9741, 9767, 9842, 9870-71, 9873, 9875-77, 9879, 10079-82, 10086-87. Ex. A at 1, n. 1.

In response to Item 7 of the Deficiency Letter, on June 26, Defendants provided a PDF containing screenshots of searches relating to Named Plaintiffs from Superintendent Voitier's district-issued cellphone. Rather than showing full messages, the screenshots show only the log of responsive search results—that is, for these ten messages, Defendants produced only portions containing search terms. For all but three of the excerpted messages, Defendants failed to provide either the complete version of the text message or the conversation within which the text message was sent.[21] Following the July 9 meet-and-confer, Defendants provided an additional, previously withheld screenshot of search results but again failed to produce the full text message or any proximate messages from the text conversation.[22] Defendants failed to provide separate images of text messages as they occurred in corresponding conversations along with texts containing "details that must be disclosed" that were sent "close in time[.]" *Toshiba Int'l Corp v. Kalaga*, No. CV H-19-4274, 2020 WL 13413223, *3 (S.D. Tex. Apr. 21, 2020); Ex. 7.a and b.; Ex. 11.

Additionally, instead of providing a separate privilege log, Defendants commented on the PDF document itself regarding each of the redactions. *See* Ex. 7a. (Comments Visible). The absence of a privilege log explaining these redactions is troubling, but even if Plaintiffs were to treat the comments on the PDF as a separate privilege log, the redactions of other students' names is improper for reasons described below, *infra* § III.3(b). And unfortunately, Defendants' supplemental submissions on July 26 did not resolve these outstanding disputes, as only three text

[21] *Compare* screenshot of redacted and unredacted search excerpts Ex. 7.b (Bates Stamp) at P.A. 19602 (redacted excerpt of 8/30/2023 text message from Cipollone to Voitier; excerpt of 5/1/2023 text message from Cipollone to Voitier), P.A. 19604 (excerpt of 3/9/2023 text message from Schneider to Lumetta and Voitier), P.A. 19605 (redacted excerpt of 5/1/2023 text message from Cipollone to Voitier; redacted excerpt of 4/17/2023 text message from Cipollone to Lumetta and Voitier), P.A. 19608 (redacted excerpt of 12/20/2023 text message from Cipollone to Voitier) *with* screenshot of text messages in conversation Ex. 7.b (Bates Stamp) at P.A. 19603, 19606-07 (6/16/23 text message from Lumetta to Voiter; 9/11/23 text message from Warner to Voiter; 8/28/2023 text message from Canepa to Voitier).

[22] Ex. 11 at P.A. 21624 (excerpt of 3/8/2023 text message from Lumetta to Voitier).

messages were produced, and each continued to show substantial redactions. *Compare* Ex. 7.b (Bates Stamp) at P.A. 19603, 19606-07 *with* Ex. 9 at P.A. 21651-52, 21661.

b. Improper Redaction of Student Records, Even with Appropriate Notation

Even where properly accounted for in Defendants' July 26 supplemental submission, the redaction of other students' names from the communications is improper. While Plaintiffs understand that Defendants have an obligation to protect student information, there is a protective order in this case that shield any information produced from disclosure, obviating the need for review and redaction. Doc. 14; Doc. 61. Protective orders are sufficiently prophylactic against unwarranted disclosures in cases where comparative information regarding non-parties is sought, even in cases involving student records protected under the Family Educational Rights and Privacy Act ("FERPA"). *See Hernandez v. Clearwater Transp., Ltd.*, No. l:18-CV-319 RP, 2021 WL 148053, at *3 (W.D. Tex. Jan. 15, 2021) ((HIPAA-protected records must be produced given entry of protective order); *see Doe 1 v. Baylor Univ.*, No. 616-cv-173, 2022 WL 180154, at *1-2 (W.D. Tex., Jan. 20, 2022) (allowing production of unredacted student records, notwithstanding FERPA limitations, in discovery to alleviate the burden of redacting requested records where a protective order was in place). To avoid further cost and burden caused by unnecessary redactions, and to facilitate efficient discovery, this Court should order Defendants to produce records without redaction.

4. Defendants failed to provide any details on non-privileged documents withheld as required by law.

In all of their discovery responses, Defendants further failed to provide a description of documents withheld for reasons other than privilege. "When a party objects to a request for production, the 'objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection

of the rest.'" *Chauvin v. United Parcel Serv., Inc.*, No. CV 23-392, 2023 WL 4175100, at *5 (E.D. La. June 26, 2023) (quoting Fed. R. Civ. P. 34(b)(2)(C)). "Objections interposed without also indicating whether any document or information is being withheld are improper." *Id.* "[T]he party claiming the information is important to resolve the issues in the case should be able 'to explain the ways in which the underlying information bears on the issues as that party understands them.'" *Id.* at *4 (quoting Fed. R. Civ. P. advisory committee's notes to 2015 amendment).

Neither Plaintiffs nor this Court have any way of knowing what responsive documents Defendants have withheld in response to RFP 29, or for that matter, any other RFP. Plaintiffs previously raised this issue with Defendants in the Deficiency Letter, *see* Ex. 6 at 3 (Item 9), and in meet-and-confers. Still, Defendants' responses note only their objections as to the relevance or burdensomeness of the request but do not indicate whether any search was performed, the query code used to perform the search, the categories of documents withheld, or any other descriptor. Defendants' responses to RFP 29 fail to adhere to what is required under the Rules.

5. Defendants are improperly withholding documents responsive to Plaintiffs' RFPs 2 and 29.

Defendants refuse to provide other non-privileged communications about Plaintiffs. There are two requests for communications about Plaintiffs in this case: (1) RFP 2, a general request for communications about Plaintiffs in the students' record, which the Court ordered the Parties to negotiate and; (2) RFP 29, which Plaintiffs issued after filing their first motion to compel (Doc. 29) to elicit more specific categories of communications.

a. **RFP 2**

Pursuant to the Court's Order on Plaintiffs' First Motion to Compel, the Parties engaged in negotiations regarding any emails responsive to RFP 2. *See supra* § I (Procedural History); *see also* Ex. A (Certification). The Parties have reached an impasse as to what communications should

be produced. First, the Parties dispute the date ranges in which communications should be produced. After several meet-and-confers, the Parties agreed that Defendants would produce emails within 30 days of Plaintiffs' referrals from Rowley, and Plaintiffs requested emails surrounding attempted exits and exits as well. Ex. 12. On June 26, 2024, Defendants produced 280 emails, though Defendants' production log listed 354 emails, within the negotiated referral windows for A.A., B.B., and C.C. *Id.*; Ex. 13. No emails have been produced within negotiated exit and referral dates, and Defendants refuse to do so.[23]

Meanwhile, Defendants refuse to even conduct a hit report on communications within the negotiated referral windows of D.D. and E.E., arguing that their referrals fall outside of the statute of limitations and are thus not relevant. But nothing in the FRCP limits discovery to the statute of limitations period. *Lewis v. Bd. of Supervisors of Louisiana State Univ. & Agric. & Mech. Coll.*, No. CV 21-198-SM- RLB, 2023 WL 3509691, at *6 (M.D. La. May 17, 2023) ("[S]eparate and apart from the . . . continuing violation doctrine, acts that fall outside of the statute of limitations, though not actionable, . . . may be used as relevant background evidence in support of a timely claim." (alterations and citations omitted)); *accord Mullenix v. Univ. of Texas at Austin*, No. 1-19-CV-1203-LY, 2021 WL 1647760, at *4 (W.D. Tex. Apr. 26, 2021). Communications before the 2022-2023 school year are relevant, where D.D. and E.E. each began attending Rowley before this school year and Plaintiffs have alleged policy and practice claims. Defendants appear to recognize as much where the Parties, for A.A., B.B., and C.C., have negotiated referral windows going back

[23] Defendants ran a hit report for A.A., B.B., C.C., D.D., and E.E. on their exits from Rowley and attempted exits from Rowley. This initially yielded around 7,000 hits, and Plaintiffs agreed to provide a custodian list, which narrowed the results to 2,917 results. Defendants objected to providing the emails based on burdensomeness. Ex. 14 at 6. But 2,917 emails is a reasonable compromise based on an initial hit report of approximately 11,000 emails, especially where, as outlined in the attached Certification, Ex. A, there is significant reason to doubt that the number of hits will accurately reflect the numbers of emails actually produced.

to August 2021. Yet, Plaintiffs have not received any communications—whether responsive to RFP 2 or RFP 29—for D.D. or E.E.

b. **RFP 29**

i. Failure to provide communications responsive to RFP 29 sections (c)-(g)

The Board also has refused to provide communications responsive to RFP 29 sections c, d, e, f, and g for all Plaintiffs,[24] citing relevance and burdensomeness objections.

(c): "Communications among Staff, or between Staff and Plaintiffs' parents or guardians, relating to any referral of Plaintiffs for an evaluation to determine eligibility for a 504 Plan or IEP"

Failure to identify students with disabilities is a specific allegation in the Complaint and a key underpinning on Plaintiffs' ADA and 504 claims. Doc. 44. ¶¶ 44, 64, 67. A.A., B.B., C.C., and E.E. all have claims of failure to identify under Section 504 and the ADA. *See, e.g.*, Doc. 44 ¶¶ 80-81 (A.A.); 107-120 (B.B.); 123-130 (C.C.); 144-147, 152 (E.E.).

(d): Communications among Staff, or between Staff and Plaintiffs' parents or guardians, relating to Plaintiffs' Daily Trackers for PBIS at Rowley.

The Rowley Student Parent Handbook requires communication with parents about whether children are meeting expectations for behavior recorded in PBIS (Positive Behavioral Interventions and Supports) Daily Trackers at Rowley. A student earning enough behavioral points is determinative to whether a child is permitted to exit Rowley. Whether or not a child had in fact achieved their behavioral points, but nevertheless was not allowed to exit Rowley, is relevant to

[24] RFP 29 requests the following: "To the extent such documents have not already been produced in response to Plaintiffs' second request in Plaintiffs' First Request for Production ("RFP 2"), the following communications: a. Communications among Staff, or between Staff and Plaintiffs' parents or guardians, relating to each Plaintiff's transfer to Rowley; b. Communications among Staff, or between Staff and Plaintiffs' parents or guardians, relating to each Plaintiff's exit from Rowley; c. Communications among Staff, or between Staff and Plaintiffs' parents or guardians, relating to any referral of Plaintiffs for an evaluation to determine eligibility for a 504 Plan or IEP; d. Communications among Staff, or between Staff and Plaintiffs' parents or guardians, relating to Plaintiffs' Daily Trackers for PBIS at Rowley; e. Communications among Staff, or between Staff and Plaintiffs' parents or guardians, relating to Plaintiffs' disciplinary referrals or incidents; f. Communications among Staff, or between Staff and Plaintiffs' parents or guardians, relating to the development or implementation of an FBA or BIP for Plaintiffs; and g. Communication between Staff and law enforcement officials relating to Plaintiffs." Ex. 15 at 4.

the discrimination claims, as is any presence or lack of accommodations that would permit variation from the behavioral points system for students with disabilities. Presumably, these communications also contain copies of the trackers which we have not received for all students, despite requests for full student records.

(e): "Communications among Staff, or between Staff and Plaintiffs' parents or guardians, relating to Plaintiffs' disciplinary referrals or incidents"

Discipline is allegedly a reason that students are sent to Rowley – and a reason they are not allowed to leave it. To the extent the school district's defense is that a child had to go to Rowley or stay there due to behaviors unrelated to their disability, we need information about those alleged disciplinary incidents.

(f): "Communications among Staff, or between Staff and Plaintiffs' parents or guardians, relating to the development or implementation of an FBA or BIP for Plaintiffs"

Communications regarding FBAs and BIPs is a key underpinning of Plaintiffs' failure to accommodate claims, as made clear in the Complaint's discussion of the failure to provide behavioral interventions or supports for students with disabilities at Rowley. Doc. 44 ¶ 64a. Plaintiffs have identified these issues for individual students in recent Interrogatory responses provided to Defendants with specifics about the failure to accommodate claims. *Id.* ¶¶ 81, 86, 91, 108.

(g): Communication between Staff and law enforcement officials relating to Plaintiffs.

The Complaint alleges a policy and practice of "utilizing the juvenile court process to expel students without notice and the opportunity to be heard." *Id.* ¶ 182(d). The reason school officials are communicating with Rowley is relevant to the motive behind law enforcement referrals of Plaintiffs. These communications are relevant and Defendants are required to produce them. To the extent Defendants contend production would impose an undue burden, specificity about the number of responsive records is required. But, as noted *supra* § III.4, no description of responsive

documents, or a hit report describing the number of responsive documents and communications, has been produced to date. Without such specific assertions of burden, Defendants' objections must fail. *McLeod*, 894 F.2d at 1485.

ii. Failure to provide responsive documents to RFP 29 for Plaintiffs D.D. and E.E.

Defendants argue that Plaintiffs' RFP 29 seeks information outside of the statute of limitation for D.D. and E.E., and thus seeks irrelevant information. Plaintiffs refer to their argument *supra* § III.5(a).

iii. Failure to provide communications responsive to RFP 29 (a) and (b) for A.A., B.B., and C.C. for school year 2021-2022.

Defendants argue that Plaintiffs' RFP 29(a) and (b) are irrelevant to the extent they seek information before the 2022-2023 school year, which Defendants contend is outside of the statute of limitations. Again, relevance is not defined by the statute of limitations. *See supra*, § III.5(a). Earlier communications are relevant Plaintiffs' establishment of a pattern or practice, especially for A.A. who was first referred to Rowley on or around October 1, 2021. Doc. 44 ¶ 76. And while the request seeks communications going back to 2018, Plaintiffs are willing to limit the temporal scope of RFP 29 to August 2021. Thus, only one additional year of responsive communications is sought, which should not be unduly burdensome.[25]

6. Defendants have no basis to refuse to answer RFPs seeking information about students at Rowley in RFPs 30, 31, 32, 33, 36.

Plaintiffs served Defendants with their Second Set of RFPs on April 10, 2024, which included RFPs 30, 31, 32, 33 and 36. Ex. 15 at 6-9. These requests seek information regarding other students who have attended Rowley from July 1, 2018 to present. Defendants claim that these

[25] If Defendants use search terms described in the Deficiency Letter, the number of responsive communications will be further diminished. Ex. 16 at 7. But Defendants refuse to run a hit report with these terms. *Id.*

requests are improper because they object to providing any information (even deidentified) about students other than the Plaintiffs. This defense ignores the *Monell* due process claims in this case. Further, the objections that the requests are overbroad (RFPs 30, 31, 32, and 36) and would be unduly burdensome to Defendants (RFPs 33, 36) are unfounded as explained below.

a. RFP 30[26]

Defendants claim that RFP 30 is irrelevant and overbroad. These objections are baseless.

RFP 30 is relevant to this case. Plaintiffs have alleged a policy and practice of failure to provide notice and due process prior to alternative school placements. Doc. 44 ¶¶ 46, 179-184. The District's defense is that it holds "alternate placement" appeal hearings after the child has already been placed at Rowley, and that these are sufficient to satisfy due process. To address this defense, Plaintiffs need information about how many of those hearings occurred; how many didn't occur; how many didn't occur due to waivers; and, for students that appeal, how many appeals occurred. Plaintiffs also have alleged a separate policy and practice of unlawful use of waivers of due process rights. *Id.* ¶ 182(c). Thus, Plaintiffs require information about Defendants' use of waivers of due process hearings. Moreover, Plaintiffs know that this information is available to Defendants; in their control; and presumably not too burdensome to produce where it has been at least partially produced before through a Public Records Request ("PRR") on September 30, 2022 Ex. 17 at SBPSB000159-63. Plaintiffs' request merely seeks to supplement that response through the 2023-24 school year. *See* Ex. 14 at 6-7. Plaintiffs require this information, which is within the statute of limitations and relevant to Plaintiffs' case.

[26] RFP 30 seeks: "All documents sufficient to show the number of students who were referred to Rowley as the result of a disciplinary incident or placement, including (a) the number of students who received an alternate placement/expulsion hearing in front of the District's designated hearing officer and the outcome of that hearing; (b) the number of students who completed a waiver form to waive their rights to an alternate placement/expulsion hearing in front of the District's designated hearing officer; and (c) the number of students who received an alternate placement/expulsion review hearing by the School Board and the outcome of that hearing."

b. RFP 31[27]

Defendants claim that RFP 31 is irrelevant and overbroad. Again, these objections are baseless. RFP 31 is relevant to this case because it is seeking information related to whether students have been expelled under state law when they are placed at Rowley for longer than a school semester. Doc. 44 ¶ 60. To determine this, Plaintiffs simply need information about how long students spend at Rowley and whether students spend over a school semester there. And where Defendants have provided similar information in response to RFP 9, it is appropriate to request a supplement through the 2023-2024 school year. Defendants refuse to supplement, or even confirm if the 2022-2023 response is complete.[28]

c. RFP 32[29]

Defendants claim that RFP 32 is irrelevant and overbroad. Again, these objections are baseless. RFP 32 is related to RFP 30: Plaintiffs need to know the disability status of students who received a hearing upon their transfer to Rowley.[30] Plaintiffs still need to know how many students with IEPs and 504 Plans are referred to Rowley each year for disciplinary incidents, through the 2023-2024 school year, so that Plaintiffs can determine whether students with disabilities are denied due process hearings provided to other, non-disabled students before alternative school placement, as relevant to the 504 and ADA claims. *See* Doc. 44 ¶ 160(c). Similarly, Plaintiffs need

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[27] RFP 31 requests: "All documents sufficient to show the number of students who exited Rowley; the length of each student's placement at Rowley; the date the student exited the alternative school; and the student's placement, if any, after exiting the alternative school program."

[28] Defendants also contend their court-ordered response to RFP 9 is sufficient to respond to this interrogatory. *See* Ex. 14 at 6-7. But what Defendants answered in a PRR does not determine their discovery obligations. Further, as noted in the Certification accompanying this motion, there have been compliance issues with the Court's order requiring production of these native copies of the PRR responses. Ex. A (Certification).

[29] RFP 32 seeks: "All documents sufficient to show the number of students with IEPs and 504 Plans who were referred to Rowley as the result of a disciplinary incident or placement; the number of students for which a manifestation determination review (MDR) was held and the outcome of the MDR; and the number of students who were returned to their regular IEP/504 placement as the result of an MDR"

[30] This information was requested in Plaintiffs' PRR but was not provided. Ex. 17 at SBPSB000159-63.

information about the number of students who received an MDR, the outcome of the MDR, and the number of students who returned to their IEP or 504 placement as a result of the MDR, as relevant to the disability discrimination claims.[31] *See id.* ¶¶ 156-172; *see also id.* ¶ 195. Defendants do not claim this information is unavailable, or even unduly burdensome to produce. Ex. 15 at 7.

d. **RFP 33[32]**

Defendants claim that RFP 33 is irrelevant, disproportionate, and unduly burdensome. These objections are baseless. RFP 33 is related to RFP 31: it seeks updated information from Defendants through the 2023-2024 school year, and, for the same reasons as RFP 31, is both relevant and appropriately tailored. Plaintiffs know that Defendants have this information in their possession based on their RFP 9 and PRR responses, and, therefore, supplementation of the same information for later school years should not impose an undue burden.

e. RFP 36[33]

Defendants object to RFP 36 because of relevance, overbreadth, undue burden, and proportionality. Again, this information is relevant to Plaintiffs' claims. Plaintiffs plan to show they have been denied access to education due to Defendants' policies and practices of expulsion – including total exclusion – from school without due process procedures. *See, e.g.*, Doc. 25 at 15-16. Defendants will argue that Plaintiffs have not shown a policy and practice without evidence

[31] In its PRR responses, the District provided "outcome" information in their for each alternate placement hearing, *i.e.* whether the recommendation for alternative placement was upheld. Ex. 17 at SBPSB000159-63. For students with disabilities, prior to determining an "outcome," under federal law, a Manifestation Determination Review ("MDR") must be held. Doc. 44 ¶ 195; *see also id.* ¶¶ 76, 82, 84. Whether or not an MDR was held to prevent a placement at Rowley should be accounted for in this outcome for students with disabilities.

[32] RFP 33 requests: "All documents sufficient to show the number of students with IEPs and 504 Plans who exited Rowley; the length of each such student's placement at Rowley; the date each such student exited the alternative school environment; and each such student's placement, if any, after exiting the alternative school program."

[33] RFP 36 seeks: "For all students in Plaintiffs' academic classes, including virtual classes, at Rowley, daily Session Logs in Edgenuity sufficient to show the start and stop time, as well as idle time, for each student on the first Monday, second Tuesday, third Wednesday, fourth Thursday, and first Friday of each calendar month in which any Plaintiff attended in-person school at Rowley in the 2022-2023 or 2023-2024 school year, with identifying information redacted."

that other students (besides Plaintiffs) are denied access to education after being sent to the alternative school. Thus, Plaintiffs require this information to prove their allegations that Defendants have a policy and practice of denying access to education. *See* Doc. 44 ¶¶ 51, 179-184; *see also id.* ¶¶ 160, 169 (denial of access to education for students with disabilities). Further, Defendants admit in their Answer that Edgenuity is used for instructional purposes at Rowley. Doc. 48 ¶¶ 51, 63. While Plaintiffs requested the information with identifying information redacted to assuage any concerns Defendants may have about production of the information, to the extent that redaction poses an undue burden, Plaintiffs will also accept these records without redaction (and do not feel redaction is necessary) for the reasons in *supra* § III.3(b). *See* Ex. 14 at 7.

7. Defendants have no basis to refuse to answer RFPs seeking information about teachers and staff at Rowley responsive to RFPs 37 and 39.

a. RFP 37[34]

Defendants object on the basis of relevance, proportionality, and burden. These objections are baseless. Plaintiffs have alleged that placement at Rowley is tantamount to an expulsion and amounts to "total exclusion" from the educational environment, as relevant to the *Monell* due process claims; further, Plaintiffs claim that they are denied access to general education and special education due to their disabilities. *See* Doc. 44 ¶¶ 51, 160(a)-(b), 169(a)-(b), 203; *see also* Doc. 25 at 15-16. Defendants will argue that Plaintiffs receive education at Rowley. Whether or not the teachers, service providers, and other staff Rowley claims to employ are in fact in the school building, during school hours, is relevant to whether Plaintiffs in fact receive education and special education at Rowley. Meanwhile, the undue burden claims are unfounded where Defendants have not provided a concrete estimate of the burden imposed, such as the number of responsive log

[34] RFP 37 seeks "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."

pages or the amount of labor that would be required to obtain such a log. Indeed, Defendants have not even stated whether a log tracking individuals going in and out of Rowley exists and is being withheld. It is Defendants' burden to describe any withheld documents, *supra* § III.4, and, to the extent responsive documents exist, describe with specificity the burden imposed by their production. *McLeod*, 894 F.2d at 1485.

b. RFP 39[35]

Defendants object on the basis of relevance. This objection is baseless. Like RFP 37, this request seeks relevant information about whether children are denied access to general education and/or special education at Rowley. The District will defend against these claims by arguing that Plaintiffs received instruction from qualified staff at Rowley. Whether or not Rowley staff have been disciplined is critical to combatting this assertion. Defendants appear to recognize as much where, in response to RFP 8, Defendants provided the certifications of Rowley staff. Doc. 29-7 at 12-13. The information is therefore relevant, and where Defendants have not objected on any other basis, the documents must be produced.[36]

IV. Conclusion

Despite Plaintiffs dutiful attempts, the Court's intervention is required to resolve the disputed discovery issues and avoid further delay of the discovery process. Defendants inappropriately asserted privilege over documents and simultaneously made it impossible for Plaintiffs to evaluate their privilege claims by providing an inadequate privilege log. Additionally, Defendants continue to improperly withhold responsive documents, without even providing a

[35] RFP 39 seeks: "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."
[36] Plaintiffs offered to limit this request to seek documents only, rather than communications. Defendants nevertheless refused to respond. Ex. 14 at 7.

description of the documents withheld to Plaintiffs. For the foregoing reasons, Plaintiffs respectfully request that this Court grant their motion.

Dated: July 30, 2024

Respectfully submitted,

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