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

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO COMPEL DISCOVERY

Now come Plaintiffs before this Court to file a reply in support of their second motion to compel discovery. Defendants have failed to meet their burden that the withheld communications are privileged. Plaintiffs have demonstrated that the information requested is within the scope of discovery. *See* Doc. 73-1. Defendants have failed to meet their burden of showing that Plaintiffs' requests are irrelevant, overly broad, or unduly burdensome. Plaintiffs address specific arguments where we believe further clarification would be helpful for the Court, and otherwise let our original brief stand. Plaintiffs' Second Motion to Compel Discovery should be granted.

I. Argument

A. Defendants fail to show that withheld communications are privileged.

Defendants have the burden to show that communications are privileged. *See Louisiana Corral Mgmt. LLC v. Axis Surplus Ins. Co.*, 650 F. Supp. 3d 491, 496 (E.D. La. 2023). But Defendants do not address this burden in their response, *see* Doc. 83 at 3-5, because they cannot meet it. Moreover, Defendants admit in their response that they have mistakenly identified emails as privileged when they are not. *Id*. at 10, n. 41.[1]

[1] Plaintiffs have not received the emails Defendants admit are not actually privileged. Moreover, this is not Defendants' first admission of error regarding privilege designations, *see* Doc. 73-3 at 10-11, but it still took several emails and a meet-and-confer before Defendants acknowledged they had made any mistakes regarding privilege designations.

1. Communications with the District Attorney are not privileged.

Defendants argue that because District Attorney Perry Nicosia serves as the Board's general counsel seven contested emails to/from Mr. Nicosia are privileged. For the first time, Defendants point to a Board Resolution approving the employment of Hammonds, Sills, Adkins, Guice, Noah & Perkins ("Hammonds & Sills") as special counsel per the requirements of La. R.S. 42:263, Doc. 83-1 at 12-14, and a declaration from Superintendent Voitier attesting that Mr. Nicosia serves as "general counsel" for the Board. Doc. 83-2 ¶ 3.

Louisiana Revised Statute 42:263(A) allows for a parish school board to employ special counsel when procedural requirements are satisfied, including "a resolution stating the reasons for employment of counsel and the compensation to be paid, . . . [and] approv[al] by the attorney general" of the resolution. *Ackal v. Centennial Beauregard Cellular L.L.C.*, 700 F.3d 212, 218 (5th Cir. 2012) (citing La. Att'y Gen. Op. No. 1989-612, 1989 La. AG LEXIS 543, at *1-2). Where a school board hires special counsel per the procedures in La. R.S. 42:263, the District Attorney serving as general counsel is relieved of representation duties as to all legal issues within the scope of special counsel's representation. *See* La. Att'y Gen. Op. No. 16-0003 (La. A.G.), 2016 WL 7757527. In a procedurally similar situation, then-Louisiana Attorney General Jeff Landry issued an opinion explaining that the St. John the Baptist Parish District Attorney was relieved of her duties representing the school board regarding the "broad scope of matters covered" in contracts and resolutions. *Id.* at 2. The opinion clarified that the District Attorney remained required to provide representation for matters outside the scope of special counsel's representation. *Id.*

Here, Defendants' argument and supporting evidence actually supports Plaintiffs' position that the communications with the District Attorney are not privileged. The Board-adopted Resolution employs Hammonds & Sills as special counsel for:

school law issues including, but not limited to, special education, school personnel

> matters, public bid law and general school board policy matters involving compliance with the federal and state laws and regulations, including due process hearings, tenure hearings, misconduct investigations and the handling of administrative hearings and litigation in state and federal courts.

Doc. 83-1 at 12. The Board has retained Hammonds & Sills on a broad array of matters, relieving the District Attorney as general counsel on those same matters.

After Defendants conducted a search for Plaintiffs' names, Defendants logged the emails at issue in the privilege log. *See* Doc. 73-1 at 6, n. 6. If these emails discuss Plaintiffs (which presumably they do based on the search) and issues related to any matter where Hammonds & Sills serves as special counsel for the District, then Defendants cannot claim privilege over communications between District employees and the District Attorney. In this instance, in fact, the District Attorney would be a third-party and destroy privilege. *See infra* Sect. I(A)(2).

Moreover, Superintendent Voitier's declaration reinforces the conclusion that the employment of Hammonds & Sills relieved the District Attorney of any overlapping representation duties. *See* Doc. 83-2 ¶ 3(b) ("[District Attorney Perry Nicosia] and his office serve as general counsel for the St. Bernard Parish School Board. As such, I consult with Mr. Nicosia *concerning legal matters that are not assigned to outside special counsel*." (emphasis added)). Defendants have not met their burden because they have not sufficiently described how communications with the District Attorney, who does not represent them in this matter, regarding Plaintiffs is privileged.[2]

A.A. alleges that District employees participated in his delinquency adjudication—a proceeding brought and prosecuted by the District Attorney's Office—in a manner that constitutes prohibited retaliation. Doc. 44 ¶¶ 91-98; 173-178. Superintendent Voitier's communications with the District Attorney, particularly First Assistant Lance Licciardi, who is identified on the District

[2] Of course, this scenario also begs the question as to what matters involving Plaintiffs but not concerning the broad scope of representation outlined in the Resolution that the Superintendent would be obtaining privileged legal advice on from the District Attorney. Doc. 83-1 at 12.

Attorney's website as a prosecutor,[3] are directly relevant to this claim. Though Mr. Nicosia acts as general counsel for the Board in some circumstances, nothing in the law suggests that he maintains that role in every interaction with school system employees, even when undertaking prosecutorial duties where District employees are witnesses or interested parties.[4]

2. Communications between District employees and third parties are not privileged.

Defendants have not met their burden to show they are entitled to withhold the fifteen emails exchanged between District employees and third-party Young Cypress Psychology employee Sarah Fletcher. *See United States v. Fluitt*, 99 F.4th 753, 763 (5th Cir. 2024) ("[Privilege holder] asserting a privilege exemption from discovery bears the burden of demonstrating its applicability." (citing *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001))).

For one, Defendants' reliance on *In re Auclair*, 961 F.2d 65 (5th Cir. 1992), is misplaced. In the Fifth Circuit, there are only two types of communications protected under the "common legal interest" doctrine: "(1) communications between co-defendants in actual litigation and their counsel; and (2) communications between *potential* co-defendants and their counsel." *In re Santa Fe*, 272 F.3d at 710 (citations omitted). Defendants do not delve any further into the "common legal interest" doctrine or explain how it is applicable to Ms. Fletcher—nor could they, as it is clearly not applicable in this context, where Ms. Fletcher is a contractor not a co-defendant.

Additionally, the presence of third-party Ms. Fletcher in these withheld communications undermines two of the core elements of attorney-client privilege: "confidentiality anticipated and preserved," and "legal advice or assistance being the purpose of the communication." *Slocum v. Int'l Paper Co.*, 549 F. Supp.3d 519, 523 (E.D. La. 2021) (citations omitted). The voluntary

[3] *See* St. Bernard Parish District Attorney's Office, https://www.stbda.org/contact (last visited Aug. 16, 2024).
[4] At the very least, these communications warrant *in camera* review to determine which of the District Attorney's functions he and his First Assistant undertook in the course of the conversations.

inclusion of known third-party Ms. Fletcher in the communications casts doubt on the intended confidentiality of the communication. It also undermines any claim that the communication was for the purpose of seeking legal advice where Ms. Fletcher was not acting as an agent of counsel or a client in anticipation of litigation. Rather, as pointed out by Defendants, her role was to conduct student evaluations and participate in Individualized Educational Program meetings. Doc. 83 at 10. The District's inclusion of Ms. Fletcher waived its privilege claims on these fifteen emails.

3. Communications between non-attorney District employees are not privileged.

The only case Defendants cite in support of withholding emails between District employees on the basis of privilege is *In Re Vioxx Products Liability Litigation,* 501 F. Supp.2d 789 (E.D. La. 2007), arguing that communications are privileged when they convey advice from legal counsel. But reliance on *In re Vioxx* puts the cart before the horse. The opinion followed an extensive *in camera* review of 30,000 documents. 501 F. Supp.2d at 789. Whereas here, no *in camera* review has taken place, leaving Plaintiffs and the Court with only the privilege logs to look to. *See* Doc. 73-1 at 12; *Fluitt*, 99 F.4th at 763-64 (privilege log containing only names of parties to the email, date, and email subject line did not provide sufficient description to explain why each should be protected from disclosure).

Nor do Defendants' attempts to discount Plaintiffs' challenges have any merit. Defendants argue that the "Fw: Mandatory Request for Expedited Due Process Hearing for LDOE Log No. 23-H-03-E" thread is privileged because the "originat[ing]" email was sent to counsel. Doc. 83 at 11. However, there are several issues with this argument. First, the order of the emails is not clear—the two privilege logs contain 89 emails in the thread, 76 of them occurring on August 29, 2022. Doc. 73-13 at 2-12, Doc. 73-14 at 4-15, Doc. 73-16 at 2-3. Second, the privilege logs do not include timestamps, and the first email appearing on the May 10 privilege log, which Plaintiffs do not challenge, begins with a "Fw" while the next listed email, which Plaintiffs do challenge, does not

have a "Fw" designation. Doc. 73-16 at 2; *see* Doc. 73-19 at 2. This suggests that the second listed email originated the thread. And again, Defendants cannot claim privilege on that email because it was sent to a third-party. Additionally, counsel was only carbon copied, undermining Defendant's claim that the communication was made to obtain legal advice. *See Zloop, Inc. v. Phelps Dunbar, LLP*, No. 6:18-CV-00031, 2019 WL 1320542 (W.D. La. Mar. 22, 2019) "[D]ocuments that were 'carbon copied' to counsel for informational purposes rather than for legal advice are not privileged."). Looking at the June 26 privilege log, it is even harder to decipher which email purportedly "originated" the thread because, as listed on Defendants' log, there are fifty emails exchanged between District employees before any email including counsel. Doc. 73-14 at 4-10.

Defendants also argue that the "Fw: Evaluation Meeting" thread "involved counsel for the Board," Doc. 83 at 10-11, but the email Defendants point to does not originate the thread. Moreover, Defendants' argument conflicts with their argument that the expedited due process thread is privileged because it "originated" with an email with counsel. The Defendants cannot have it both ways. The emails are not privileged.

Finally, contrary to Defendants' argument, *see* Doc. 83 at 10, the email subjects are not sufficiently descriptive to substantiate their privilege claims. *See In re Vioxx*, 501 F. Supp.2d at 798 ("[M]erely because a legal issue can be identified that relates to on-going communications does not justify shielding them from discovery."). This is especially true for several of the disputed email threads[5] where, in the context of emails sent to special education team members about special education services, the emails clearly pertain to "'business advice,' as opposed to legal advice." Doc. 83 at 12 (citing *In re Vioxx*, 501 F. Supp.2d at 797-800).

4. Defendants' text messages are not privileged communications.

[5] *See* Doc. 73-13 at Ex. 1 ("Fw: Evaluation Meeting," "Re: FBA," "Re: evals," "Prior Notice," and "Fw: Notice of Representation at Expulsion Hearing [] and Request for Records").

There are two discrete issues regarding the four text messages in question. Doc. 73-13 at 14. First, Defendants provided only redacted text excerpts rather than entire redacted copies of the withheld texts in the context of the conversation wherein the messages occurred, *see* Doc. 73-21 at 2, 4-5; second, Defendants have not met their burden to claim the texts as privileged. Defendants do not address the first issue in their response. As to the second issue, none of the texts were with counsel, and Plaintiffs incorporate by reference arguments above. *See supra* Sect. I(A)(3).

5. Defendants fail to demonstrate work product privilege.

Defendants once again ignore their burden to establish privilege. Defendants' only evidence to support privilege is a conclusory, self-serving declaration. Doc. 83-3. Even though Defendants claim work product privilege on every email on the June 26 privilege log, the phrase "work product" only appears twice in the declaration in reference to specific email threads: first, in reference to the "Meeting with Attorney" thread sent to Mr. Nicosia, *id.* ¶5a; *see supra* Sect. I(A)(1); and, second, in reference to the "Fw: Mandatory Request for Expedited Due Process Hearing for LDOE Log No. 23-H-03-E" thread. Doc. 83-3 at ¶ 5c. Additionally, as to the "Fwd: Exhbitis [sic]" thread, the declaration does not address the fact that the challenged email, which did not include counsel, was sent only to third-party Ms. Fletcher. *Id.* Moreover, Defendants' work product privilege claims are undermined by the fact that some of the emails from the June 26 privilege log also appear on the May 10 privilege log, but with different designations. On the May 10 log, these communications are designated only with attorney-client privilege, but by June 26, they had an additional designation as work product. Defendants offer no explanation for why the same communications not subject to work product privilege are suddenly entitled to it. Defendants' blanket assertion of work product privilege fails.

B. RFPs 2, 29, 30, 31, 32, 33, 36, 37 and 39 are relevant and will not present a burden.

1. Defendants fail to show that production of RFP 2 will cause an undue burden.

Plaintiffs are entitled to relevant information concerning all school years that Plaintiffs attended Rowley. *See* Doc. 29-1 at 6-10. Defendants object, claiming undue burden. To satisfy its burden, a party objecting to discovery "must make a specific, detailed showing of how a request is burdensome [or overbroad]" and "typically must present an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request." *Lozada-Leoni v. MoneyGram Int'l, Inc.*, No. 4:20CV68-RWS-CMC, 2020 WL 10046089, at *10 (E.D. Tex. July 8, 2020) (internal quotations and citations omitted).

Here, after much negotiation between the parties pursuant to this Court's order, Doc. 36 at 1, the parties agreed to a narrow timeframe and search terms for RFP 2. Despite this agreement Defendants evade production of documents by abruptly refusing to conduct searches, produce documents listed in their production log,[6] and conduct hit reports or production on D.D. and E.E, even after participating in this exercise. Docs. 73-8 & 73-9. Defendants' objection of undue burden is not sufficiently specific or detailed to relieve them of their discovery responsibilities. Mr. Cipollone's declaration merely describes Defendants' efforts to produce discovery to which Plaintiffs are entitled. Doc. 83-4 ¶ 5(a)-(d). Defendants testify that they ran searches pursuant to the Court's order, sent those documents to their attorneys who produced them to Plaintiffs, and they conclude that "our attempts to run searches has not gotten us closer to a resolution." *Id.* ¶ 5(d). This is confounding where the parties have agreed on the search timeframe parameters and Defendants have produced only some of the responsive documents. *See* Docs. 73-8 & 73-9. Indeed, Defendants have unilaterally decided that they are done with this exercise and will not even attempt

[6] Plaintiffs use discovery software that requires production be made in a certain format. This is not unusual for modern-day e-discovery. Because of this, Plaintiffs proposed an ESI agreement in February 2024 to which Defendants would not agree. *See* Ex. 1. Such an agreement would have resolved this issue.

to complete it.[7] Moreover, Mr. Cipollone states that Plaintiffs' requests are "unreasonable" and most emails have "nothing to do with this litigation." Doc 83-4 ¶ 7. While, perhaps, this is Mr. Cipollone's lay opinion, it is not reason enough to refuse to produce documents.

Further, an "investment[] of significant District time and resources" is insufficient under law to shirk Defendants' duty to produce.[8] Doc 83-4 ¶ 5(d); *see e.g. S.E.C. v. Brady*, 238 F.R.D. 429, 438 (N.D. Tex. Oct. 16, 2006) (sustaining an undue burden objection where the objecting party estimated that 226 hours would be required to review the documents for responsiveness and privilege, and that 16,111 hours would be required to review requested electronic data); *see also Clark v. Louisiana*, No. 00–0956–JJB–RLB, 2014 WL 3897659, at *3 (M.D. La. Aug. 8, 2014) (holding that defendants' objections of undue burden were not specific and thus insufficient, especially where defendants had already produced some documents in response to the request). Defendants have not demonstrated undue burden. Defendants cannot avoid the discovery process simply because it requires some dedication of time and resources.

2. Plaintiffs are entitled to RFPs 30, 31, 32, 33, and 36, and Defendants have not shown otherwise.

Plaintiffs have demonstrated how RFPs 30, 31, 32, 33, and 36 are relevant to their claims. *See* Doc. 73-1 at 21-25. Plaintiffs need information sought in these RFPs to prove their discrimination claims, and Defendants are unsuccessful in explaining why Plaintiffs requests are irrelevant to such claims. Defendants cite to *Monell* to support their argument that other students' records are irrelevant without a connection between the District's policy and specific instance of due process violations; however, this assertion is unsupported by *Monell* for discovery purposes.

[7] Plaintiffs maintain that they are entitled to a response to RFP 2 in regard to D.D. and E.E. because the Federal Rules of Civil Procedure do not limit discovery to the statute of limitations period. *See* Doc. 73-1 at 18-19.

[8] It is unclear why Mr. Cipollone is participating in the process of coordinating searches with IT staff, reviewing emails containing Plaintiffs' names, removing emails that do not concern the referrals or exits of Plaintiffs, and *then* submitting them to attorneys. This is not only traditionally the role of counsel, but Defendants' process relies on Mr. Cipollone, who is not an attorney, to determine the legal relevance of responsive materials.

Information regarding the implementation of District policies on placements at Rowley, placements for students with disabilities, placement hearings, and quality of education are relevant to their *Monell* claims.

3. Defendants fail to specify how RFPs 37 and 39 are burdensome.

Plaintiffs have established that RFPs 37 and 39[9] are relevant and proportional to the needs of this case. *See* Doc. 73-1 at 25-26. Defendants continue to make blanket assertions that these requests are irrelevant, disproportionate or unduly burdensome. Such assertions are insufficient. Specifically, RFP 37 is relevant to Plaintiffs' *Monell* due process claims. *Id*. Defendants claim that the Board has already exhausted countless hours of District staff time gathering data. "[C]ountless hours" of "staff time" is not specific enough to meet their burden. Doc. 83 at 23.

CONCLUSION

Plaintiffs ask that this court grant their Second Motion to Compel Discovery.

Respectfully Submitted,

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[9] Plaintiffs refer to Doc. 73-1 at 26 to their arguments about why RFP 39 is relevant and proportional.