

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

BENJAMIN AUSLANDER	:	No: 2:22-cv-01425-HB
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
TREDYFFRIN/EASTTOWN	:	
SCHOOL DISTRICT, ET. AL.	:	
	:	
Defendants	:	

**DECLARATION OF GOOD-FAITH EFFORTS TO RESOLVE DISCOVERY
DISPUTE OF WALTER S. ZIMOLONG III, ESQUIRE**

I, Walter S. Zimolong III, Esquire, make this declaration of good-faith efforts to resolve a discovery dispute under Fed. R. Civ. P 37 (a)(1) and Local Rule 26.1 (f).

1. On August 5, 2022, defendants, Tredyffrin/Easttown School District and Arthur McDonnell (collectively, “school district defendants”), served plaintiff with them answers to plaintiff’s requests for production of documents under Fed. R. Civ. P. 34.

2. On August 10, 2022, counsel for plaintiff, James J. Fitzpatrick, Esquire, sent a letter to counsel for school defendants outlining the infirmities with the school district defendants’ answers to plaintiff’s interrogatories and requests for production of documents. A copy of this letter is attached to this declaration.

3. On August 15, 2022, Attorney Fitzpatrick engaged in a telephone conference with counsel for the school district defendants, Brian Elias, Esquire.

4. The conference lasted over 1 hour.

5. However, Attorney Elias refused to supplement or amended the school district's discovery responses to address plaintiff's objections to the propriety of them.

6. On August 18, 2022, the deposition of defendant Arthur McDonnell was conducted.

7. During that deposition, defendant McDonnell was questioned about the school district defendants' answers to the requests for production.

8. Attorney Elias made clear on the record that responsive documents would not be produced and that searches for other documents would not occur.

9. Indeed, Attorney Elias expressly stated he instructed his clients not to search for documents. *See* McDonnell dep., 58:12-16.

This concludes my sworn statement. I declare under penalty of perjury that the facts stated in this declaration are true and correct to the best of my recollection, knowledge, and belief.

Dated: August 25, 2022

/s/ Walter S. Zimolong III
Walter S. Zimolong III



James J. Fitzpatrick
James@ZimolongLaw.com

August 10, 2022

Via Email Only

Brian R. Elias, Esq.
Wisler Pearlstine, LLP
460 Norristown Road, Suite 110
Blue Bell, PA 19422

**Re: Auslander v. Tredyffrin/Easttown School District, et. al.
No. 2:22-cv-01425-HB**

Dear Mr. Elias:

I have reviewed your clients' answers to my client's interrogatories and requests for production. The below answers and responses do not comply with the Rules of Civil Procedure and are deficient in many respects. I am writing in a good-faith effort to resolve a discovery dispute. Because of an expediated discovery schedule, if we cannot resolve the dispute by 5:00pm, Friday, August 12, 2022, we will have no choice but to file a motion to compel with the court. As you know, under Rule 37(a)(5), if that motion is successful, an award of attorneys' fees is mandatory.

I. DEFICIENCIES ANSWERS TO INTERROGATORIES

A. The answers to interrogatories are not properly verified.

Under Rule 33(b)(3), the answers to interrogatories must be verified *under oath*. Your clients' answers are not verified under oath. There is no sworn statement from the School District and the verification from Mr. McDonnell is an unsworn statement. Please provide revised answers to interrogatories that are signed by your clients under oath as required by the Rules.

B. The broad and general objections are improper.

Your clients' general objections and to each interrogatory are impermissible. The problem with the objections is that they are non-specific. To successfully raise an objection to an interrogatory, a party must do more than "intone this familiar litany" of objections, such as the interrogatory is overly broad, annoying, harassing, or potentially violative of some privilege. *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 296–97 (E.D. Pa. 1980) "On the contrary, the party resisting discovery "must



show specifically how ... each interrogatory is not relevant or how each question is overly broad, burdensome or oppressive.” *Josephs v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982) Your clients, therefore, must do more than simply object on some basis. They must “to clarify and explain its objections and to provide support therefore.” *Roesberg*, 85 F.R.D. at 296 (citations omitted).

Your clients have raised general objections and interjected objections to each and every interrogatory. This careless approach does not comport with the Rules of Civil Procedure. Your clients must support its objections with specifics, not just raise them and hope they stick. So, your client must remove unsubstantiated objections or revise its objections so that they have a sufficient factual basis.

C. Unresponsive answers to interrogatories.

Interrogatory No. 4.

This interrogatory requests written documents, oral communications or other information sources which reference the name “Auslander” from any internal database, record or any other internal system by defendants. Your clients’ answer is non-responsive.

First, if the subject of the interrogatory is privileged, your client can identify the privileged communication in the privilege log. To date, the privilege log provided only contains one communication. Further, a protective order was never filed on this subject. If there are no responsive documents, please state as such. Otherwise, it must produce documents responsive to this interrogatory and identify the documents produced that are responsive to this interrogatory.

Second, your client cites the Family Educational Rights and Privacy Act (hereinafter FERPA). FERPA does not apply. FERPA is a federal law administered by the U.S. Department of Education that protects the disclosure of educational records to third parties. Parents and students have the right to inspect educational records pertaining to themselves, as in this situation. FERPA does not provide a right for a school administrator to exercise to prevent a record from being shared with a parent or a student. *See* 34 CFR § 99.

Please correct this deficiency and specifically answer this interrogatory.



Interrogatory No. 7.

The interrogatory seeks the specific policy on parental review of curriculum. If the school district's position is that Mr. Auslander is not permitted to review this curriculum material in his desired fashion, there must be a policy that your client is basing that decision on. We are entitled to see the policy and be specifically directed to it. Simply stating that the document is "published on the District's website" is insufficient. If it is on the website, your clients need to identify where on the website.

Please correct this deficiency and specifically answer this interrogatory.

Interrogatory No. 10.

This interrogatory seeks each oral conversation that Mr. McDonnell had with anyone at or representing PEG related to Right to Know Requests seeking PEG Materials, Plaintiff's inspection of PEG Materials, or after Plaintiff's inspection of PEG Materials and the content of the discussion. Your clients' response is non-responsive.

We are entitled to know whether Mr. McDonnell engaged in verbal communications with all of the entities and topics mentioned in the interrogatory. We do not need to wait until the deposition to find out something this basic.

Please correct this deficiency and specifically answer this interrogatory.

Interrogatory No. 11.

This interrogatory seeks each oral conversation that Mr. McDonnell had with anyone at the School District related to Right to Know Requests seeking PEG Materials, Plaintiff's inspection of PEG Materials, or after Plaintiff's inspection of PEG Materials, and the content of the discussion. Your client's response is non-responsive.

We are entitled to know whether Mr. McDonnell engaged in verbal communications with all of the entities and topics mentioned in the interrogatory. We do not need to wait until the deposition to find out something this basic.

Please correct this deficiency and specifically answer this interrogatory.



Interrogatory No. 12.

This interrogatory seeks each oral conversation that anyone at the School District had with any Tredyffrin/Easttown School Board member related to Right to Know Requests seeking PEG Materials or about Plaintiff, and the content of any such discussion. Your client's response is non-responsive.

If the subject of the interrogatory is privileged, your client can identify the privileged communication in the privilege log.

Please correct this deficiency and specifically answer this interrogatory.

Interrogatory No. 13.

This interrogatory seeks to identify all Tredyffrin/Easttown School Board members that Wendy Towle had a discussion with about Plaintiff and any of his Right to Know Requests or his activities impacting the School District, and the content of the discussion. Your client's response is non-responsive.

We are entitled to this information per the Rules of Civil Procedure. If the subject of the interrogatory is privileged, your client can identify the privileged communication in the privilege log.

Please correct this deficiency and specifically answer this interrogatory.

Interrogatory No. 14.

This interrogatory seeks to identify all Tredyffrin/Easttown School Board Members that Mr. McDonnell had a discussion with about Plaintiff and any of his Right to Know Requests or his activities impacting the School District, and the content of the discussion. Your client's response is non-responsive.

We are entitled to this information per the Rules of Civil Procedure. If the subject of the interrogatory is privileged, your client can identify the privileged communication in the privilege log. If there are no responsive documents, please state as such.

Please correct this deficiency and specifically answer this interrogatory.



Interrogatory No. 15.

This interrogatory seeks to identify all Tredyffrin/Easttown School Board members that any School District employee had a discussion with about Plaintiff and any of his Right to Know Requests or his activities impacting the School District, and the content of the discussion Your client's response is non-responsive.

We are entitled to be specifically directed to the meeting minutes, agendas, and videos that your client references in the answer. Simply stating that the materials are "publicly available for inspection at the District's website" is insufficient.

Please correct this deficiency and direct me to the exact website or document where this policy is listed.

Please correct this deficiency and specifically answer this interrogatory.

II. DEFICIENCIES IN THE RESPONSES TO REQUESTS FOR PRODUCTION

A. The broad and general objections are improper.

Your clients' general objections in the preamble of their response, and several of the non-specific responses in the responses and objections section are impermissible. As stated above, to successfully raise an objection, an objection must be specific in nature. Please remove all general objections.

B. Several answers to the requests for production are non-responsive.

Request No. 2.

This request seeks all communication by and between your client and Plaintiff. Your client's response is non-responsive.

We are entitled to copies all communications between your client and the Plaintiff per the Rules of Civil Procedure.

Please correct this deficiency and specifically respond to this request for production.



Request No. 3.

This request seeks all communication by and between the School Board and PEG relating to, concerning, or referencing the PEG Materials. Your client's response is non-responsive.

This request does not seek, as your client states in the response, "documents that... relate to **whether or not Plaintiff should be permitted to make reproductions of the PEG materials** during Plaintiff's February 7, 2022 Inspection of the PEG materials". Your client is confusing or misstating the information that Plaintiff seeks in his response. The request seeks, "all communication by and between the School Board and PEG relating to, concerning, or referencing the PEG Materials." Your clients need to produce documents responsive to this request not some other smaller set of documents.

Please correct this deficiency and specifically respond to this request for production.

Request No. 5.

This request seeks all communication all communication by and between the School Board and Mr. McDonnell relating to, concerning, or referencing the PEG Materials. Your client's response is non-responsive.

To the extent that your client has these communications, we are entitled to view them per the Rules of Civil Procedure. Please correct this deficiency and specifically respond to this request for production.

Request No. 6.

This request seeks all communication by and between the School Board and PEG relating to, concerning, or referencing Plaintiff. Your clients' answer is non-responsive.

Your clients responded, "[s]ee the response to 3 above." Nothing in your client's response to Request No. 3 is responsive to this request. And no documents have been produced that are responsive to this request.

Please correct this deficiency and specifically respond to this request for production.



Request No. 8.

This request seeks all communication by and between Mr. McDonnell and any person or entity relating to, concerning, or referencing Plaintiff. Your client's response is non-responsive.

If the subject of the request is privileged, your client can identify the privileged communication in the privilege log. But the only privileged communication you have identified is the real time communication on February 7, 2022. Therefore, your clients must produce any non-privileged communication other than the privileged communication identified. There are no documents in your client's production responsive to this request. We note that communication is defined broadly and includes emails and text messages. If there are no responsive documents to this request, then your clients need to verify under oath that no such documents exist.

Please correct this deficiency and produce all documents responsive to this request.

Request No. 9.

This request seeks all communications by and between the School Board and any person or entity and documents referring to, concerning, or referencing Plaintiff. Your client's response is non-responsive.

First, If the subject of the request is privileged, your client can identify the privileged communication in the privilege log. Second, there are no responsive documents to this request in your client's document production produced. If there are no responsive documents to this request, please state as such.

Please correct this deficiency and specifically respond to this request for production.

Request No. 11.

This request seeks all of Defendants' communications between January 1, 2021 to the present that contain the term "Auslander." Your client's response is non-responsive.

First, if the subject of the request is privileged, your client can identify the privileged communication in the privilege log. If there are no responsive documents to this request, please state as such.



Second, as stated above on page two of this letter, your client cites FERPA. FERPA does not apply. *See* 34 CFR § 99.

Please correct this deficiency and specifically respond to this request for production.

Request No. 12.

This request seeks all of Defendants' communication and documents relating to, concerning, or referencing, Plaintiff's "Right to Know" request directed to the School District. Your clients' response is non-responsive.

If the subject of the request is privileged, your client can identify the privileged communication in the privilege log. If there are no responsive documents to this request, please state as such.

Please correct this deficiency and specifically respond to this request for production.

Request No. 17.

This request seeks all documents detailing the School District's internal policies and procedures for parental review and/or parental notification in reference to curriculum material. Your client's response is non-responsive.

First, if the subject of the request is privileged, your client can identify the privileged communication in the privilege log. If there are no responsive documents to this request, please state as such.

Second, if the school district's position is that Mr. Auslander is not permitted to review this curriculum material in his desired fashion, there must be a policy that your client is basing that decision on. We are entitled to view the policy and be specifically directed to it. Simply stating that the document is "published on the District's website" is insufficient.

Please correct this deficiency and specifically respond to this request for production.



Request No. 22.

This request seeks all communication referencing the incident on February 7, 2022, wherein Mr. Auslander went to the Tredyffrin/Easttown School Board Administrative Offices located at 940 West Valley Road, Suite 1700, Wayne, PA 19087, to inspect records. Your client's response is non-responsive.

While your clients have identified certain communications that are responsive to this request as privileged, the privileged documents are limited only to real time communication occurring on February 7, 2022. Communication other than that real time communication must be produced.

Please correct this deficiency and specifically respond to this request for production.

Request No. 23.

This request seeks all communications by and between defendants between June 1, 2021 and the present. Your client's response is non-responsive.

We are entitled to this information per the Rules of Civil Procedure. We will decide what is relevant to Plaintiff's case, not you.

Further, there are no responsive documents to this request in your client's document production produced with Bates Labels TESD 000001-000073.

Please correct this deficiency and specifically respond to this request for production.

Request No. 25.

This request seeks all documents and communications between the School District and PEG relating to any discussion of copyright protection of PEG Materials. Your client's response is non-responsive.

Please correct this deficiency and specifically respond to this request for production.



Request No. 27.

This request seeks all documents which reference the name “Auslander” kept in any internal database, record, or any other internal system by defendants. Your client’s response is non-responsive.

First, if the subject of the request is privileged, your client can identify the privileged communication in the privilege log. If there are no responsive documents to this request, please state as such.

Second, FERPA does not apply. *See* 34 CFR § 99.

Please correct this deficiency and specifically respond to this request for production.

Request No. 28.

This request seeks all meeting minutes for the School District’s Board of Education from June 1, 2021 to the present. Your client’s response is non-responsive.

We are entitled to see the all meeting minutes. Simply stating that the “information is publicly available on the District’s website for public consumption” is insufficient. We are not required to fish around the District’s website to obtain documents requested in document request.

Please correct this deficiency and specifically respond to this request for production.

Request No. 29.

This request seeks all communication exchanged by and between the members of the School District’s Board referencing, concerning, or relating to the subject matter of this litigation.

If the subject of the request is privileged, your client can identify the privileged communication in the privilege log. If there are no responsive documents to this request, please state as such.

Please correct this deficiency and specifically respond to this request for production.



Please feel free to contact me with any questions. We are available to discuss this discovery dispute on the telephone in an attempt to resolve it.

Respectfully,

A handwritten signature in black ink, appearing to read "J. Fitzpatrick", written in a cursive style.

James J. Fitzpatrick

cc: Michael Donohue, Esquire (*via email*)
Christina Gallagher, Esquire (*via email*)
Mark S. Gregory, Esquire (*via email*)
Nicholas Barry, Esquire (*via email*)