EXHIBIT 17

United States District Court,
D. Kansas.

Anna Marie Hernandez HILT, Plaintiff,
v.
SFC INC., f/k/a Skillpath Inc., d/b/a Skillpath Seminars, Defendant.
Civil Action No. 96-2047-EEO.

Jan. 17, 1997.

Employer against which sexual harassment claim had been brought by former employee moved to compel discovery, and former employee sought protective order. The District Court, Gerald L. Rushfelt, United States Magistrate Judge, held that: (1) employee's response to interrogatory requesting expert witness information was inadequate; (2) request for disclosure of all physicians, psychologists, or counselors who had treated employee was not overbroad; (3) interrogatories asking plaintiff to state each and every fact supporting all claims, and to identify each person having knowledge of each fact and all documents purporting to support claims, were overly broad and unduly burdensome; (4) notes taken by employee's counsel after interview with employee's former supervisor were protected attorney work product; (5) employee's tax returns were relevant and discoverable; but (6) employee would be allowed to submit redacted return which adequately disclosed her income.

So ordered.

West Headnotes

[1] Federal Civil Procedure 170A 1534

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)3 Answers; Failure to Answer
170Ak1534 k. Sufficiency. Most Cited Cases

Response to interrogatory requesting information described in provision of Federal Rules of Civil Procedure governing expert witnesses in which plaintiff stated that information requested was contained in affidavit of her expert and curriculum vitae attached as exhibit to plaintiff's response did not comply with discovery requirements; plaintiff did not provide answer under oath, curriculum vitae had not been signed by expert and thus did not satisfy requirement of written report, other cases in which expert had testified were not listed, and affidavit of expert did not contain basis and reasons for opinions. Fed.Rules Civ.Proc.Rules 26, 33(b)(1), 28 U.S.C.A.

[2] Federal Civil Procedure 170A 1534

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)3 Answers; Failure to Answer
170Ak1534 k. Sufficiency. Most Cited Cases

Plaintiff who responded to interrogatory requesting her to identify by name and address any individual known or believed to be in possession of evidence regarding plaintiff's allegations, and describe substance of evidence or knowledge of each individual, by stating that her deposition testimony, answers to other interrogatories, and disclosures were incorporated and that she would supplement interrogatory would be required only to provide information for witness about which she did not testify in deposition; response was otherwise sufficient. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

[3] Federal Civil Procedure 170A 1512

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)2 Scope
170Ak1512 k. Identity and Location of Witnesses and Others. Most Cited Cases

Interrogatory in which defendant asked plaintiff who brought action in which she sought recovery for men-

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tal and emotional pain, distress, humiliation, and anguish, and mental anguish and emotional distress, to identify any and all physicians, psychologists, and counselors who had treated or consulted with plaintiff was not overly broad and burdensome, as plaintiff had placed her mental, emotional, and psychological condition at issue. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

[4] Federal Civil Procedure 170A 1501

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)2 Scope
170Ak1501 k. In General. Most Cited Cases
Interrogatory is not necessarily overly broad or unduly burdensome simply because it is unlimited in time and scope. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

[5] Federal Civil Procedure 170A 1505

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)2 Scope
170Ak1505 k. Admitted Matters and Matters Already Known or Available. Most Cited Cases

Federal Civil Procedure 170A 1506

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)2 Scope
170Ak1506 k. Adverse Party's Case, Matters Relating to in General. Most Cited Cases
Interrogatories which asked plaintiff who brought sexual harassment claim to state each and every fact supporting all claims in her complaint, and to identify each person having knowledge of each fact and all documents purporting to support claims, were overly broad and unduly burdensome; no justification was presented for interrogatories, which indiscriminately swept entire pleading, including allegations which were admitted, with excessive number of interrogatories, and in essence required running narrative of entire case. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

[6] Federal Civil Procedure 170A 1272.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1272 Scope
170Ak1272.1 k. In General. Most Cited Cases
Discovery rules provide no absolute, unharnessed right to find out every conceivable relevant fact that opposing litigants know, nor do they prohibit such broad discovery if party can obtain it without unreasonably burdening the opposition. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

[7] Federal Civil Procedure 170A 1604(1)

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1604 Work Product Privilege; Trial Preparation Materials
170Ak1604(1) k. In General. Most Cited Cases
(Formerly 170Ak1600(3))
Notes taken by counsel for former employee who brought employment discrimination action following counsel's interview of supervisory worker for employer came within scope of attorney work product privilege, and could not be discovered absent showing of substantial need. Fed.Rules Civ.Proc.Rule 26(b)(3), 28 U.S.C.A.

[8] Federal Civil Procedure 170A 1631

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)5 Compliance; Failure to Comply
170Ak1631 k. In General. Most Cited

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Cases
Plaintiff who had given answers, through letter and formal response to discovery request for production of documents which were not entirely consistent, that no such documents existed would be required to serve amended response and to serve supplemental response affirming that she had no such documents.

[9] Privileged Communications and Confidentiality 311H ⚿372

311H Privileged Communications and Confidentiality
311HVI Public Officers and Records
311Hk372 k. Tax Returns or Information. Most Cited Cases
(Formerly 170Ak1603)
Although production of tax returns is not favored, no absolute privilege exists preventing their discovery.

[10] Privileged Communications and Confidentiality 311H ⚿372

311H Privileged Communications and Confidentiality
311HVI Public Officers and Records
311Hk372 k. Tax Returns or Information. Most Cited Cases
(Formerly 170Ak1603)
Two-pronged test is applied to requests for discovery of tax returns in order to assure balance between liberal scope of discovery and policy favoring confidentiality of tax returns; court must first find that returns are relevant to subject matter of action, and second must find that there is compelling need for returns because information contained therein is not otherwise readily obtainable.

[11] Federal Civil Procedure 170A ⚿1615.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)4 Proceedings
170Ak1615 Motion and Proceedings Thereon
170Ak1615.1 k. In General. Most Cited Cases
Party seeking production of tax returns during discovery has burden of showing relevancy, and once that burden is met, burden shifts to party opposing production to show that other sources exist from which information is readily obtainable.

[12] Federal Civil Procedure 170A ⚿1603

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1603 k. Taxes, Matters Relating To. Most Cited Cases

Privileged Communications and Confidentiality 311H ⚿372

311H Privileged Communications and Confidentiality
311HVI Public Officers and Records
311Hk372 k. Tax Returns or Information. Most Cited Cases
Tax return of former employee, who had brought sexual harassment claim in which employee claimed economic loss and sought back and front pay and had put her income at issue, was relevant to extent that it revealed income of employee, and could be discovered; however, in order to protect employee's privacy, employee would be allowed to submit redacted tax return which adequately revealed income, to which unredacted copies of forms showing unemployment compensation and earned income were attached.
***184** Sarah A. Brown, Sharon A. Coberly, Coberly & Brown, Overland Park, KS, for Plaintiff.

Karen K. Howard, Kansas City, MO, Linda S. Skinner, Mission, KS, for Defendant.

MEMORANDUM AND ORDER

RUSHFELT, United States Magistrate Judge.

Pending before the court is Defendant's Motion To Compel Discovery (doc. 39). Pursuant to Fed.R.Civ.P. 37, defendant seeks an order to compel

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plaintiff to fully answer Interrogatories 5, 6, 8, 9, 10, 11, 12, 13, and 16 and produce all documents responsive to Request for Production 1, 21, and 24. By agreement of the parties the court deems the motion moot to the extent it seeks further answers to Interrogatories 6 and 16. Plaintiff otherwise opposes the motion.

Interrogatory 5 asks: "With respect to each expert witness you intend to call at trial, please provide the information described in Rule 26(a)(2)(B) of the Federal Rules of Civil Procedure." In response to the interrogatory plaintiff states that she "will supplement this interrogatory answer." She submits in response to the motion that defendant has the information sought. She claims the information is in the affidavit of her expert, filed October 1, 1996 and a *curriculum vitae* attached as exhibit 3 to her response to the motion. Defendant claims the alleged answer to Interrogatory 5 is not in compliance with Fed.R.Civ.P. 26.

[1] The answer to Interrogatory 5 does not suffice. Plaintiff has provided no answer under oath in accordance with Fed.R.Civ.P. 33(b)(1). She improperly refers defendant to two documents for her answer. If she intends to incorporate the two documents, she should affirmatively state as much under oath and attach them to her answer to the interrogatory. The two documents, moreover, do not satisfy the requirements of Fed.R.Civ.P. 26(a)(2)(B).

Fed.R.Civ.P. 26(a)(2)(B) requires "a written report prepared and signed by the witness." Plaintiff submits an affidavit of her expert witness, Dr. Diane Rausch, as the written report. The affidavit purports to satisfy the requirement of a written report prepared and signed by the witness. Plaintiff also submits a *curriculum vitae* to supplement the affidavit. Dr. Rausch, however, has not signed the *curriculum vitae.* Plaintiff has not attached it to the proffered affidavit.

Fed.R.Civ.P. 26(a)(2)(B) also requires that the report contain certain basic information, including "a complete statement of all opinions to be expressed and the basis and reasons therefor." The submitted report states:

> 2. In my opinion, the Defendant does not have appropriate policies and procedures regarding sexual harassment, it did not conduct a reasonable or adequate investigation of complaints of sexual harassment by Plaintiff and it failed to take appropriate corrective action in response to Plaintiff's complaints of sexual harassment and it failed to protect Plaintiff from further harassment and retaliation. Defendant did not satisfy its obligations [sic] an employer under the law with respect to sexual harassment in the workplace.
>
> 3. My opinions are based upon my education, training and experience as a psychologist, affirmative action and compliance director, consultant and trainer in employment discrimination and harassment concerns. I considered and relied upon the depositions of Anna Hilt and Linda Walker.

***185** (Aff. of Diane Rausch, attached to Plaintiff's Rule 26 Disclosure of Expert Testimony, doc. 34.) These two paragraphs do not satisfy the requirement that the report contain "the basis and reasons" for the opinions.

The report "is intended to set forth the substance of the direct examination" of the expert witness. Fed.R.Civ.P. 26(a)(2) advisory committee notes (1993 amend.). "The requirement ... of a complete and detailed report of the expected testimony ... may, moreover, eliminate the need for some ... depositions or at least reduce the length of the depositions." Fed.R.Civ.P. 26(b)(4)(A) advisory committee notes (1993 amend.).

The report here states the opinions of Dr. Rausch. It does not adequately set forth the basis and reasons for them. It simply says they are based upon the education, training, and experience of Dr. Rausch and her reliance on two depositions. Most, if not all, expert opinions reflect the education, training, and experience of the expert and her reliance upon something. That says nothing, however, as to how she reaches her expert opinions. To satisfy Fed.R.Civ.P. 26(a)(2)(B) the report must provide the substantive rationale in detail with respect to the basis and reasons for the proffered opinions. It must explain factually why and how the witness has reached them.

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Fed.R.Civ.P. 26(a)(2)(B) also requires that the report contain "the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years." The report here contains no list of the publications authored by the expert. Plaintiff proffers a *curriculum vitae* of her expert to satisfy this requirement. Although the *curriculum vitae* provides a list of publications authored by the expert, Dr. Rausch has neither signed it nor attached it to her signed report.

Fed.R.Civ.P. 26(a)(2)(B) also requires "a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years." In her report Dr. Rausch states: "I have testified either at trial or deposition in the following matters within the last five years: In 1996 I was retained as an expert in a sexual harassment claim held before an arbitration panel of the National Association of Securities Dealers, Inc. in Overland Park, Kansas. In 1994 I was deposed in a legal case as an expert for the plaintiff in a sexual harassment charge." (Aff. of Rausch, ¶ 6.) The statement fails. It identifies no specific "cases." "The identification of 'cases' at a minimum should include the courts or administrative agencies, the names of the parties, the case number, and whether the testimony was by deposition or at trial." *Nguyen v. IBP, Inc.*, 162 F.R.D. 675, 682 (D.Kan.1995). If the witness does not have that information within her control, she should say so.

For all the preceding reasons plaintiff shall supplement her answer to Interrogatory 5 to comply with Fed.R.Civ.P. 26(a)(2)(B) and 33.

Interrogatory 8 asks plaintiff to "[i]dentify by name and address any individual known by you [plaintiff] or believed by you to be in possession of evidence or knowledge concerning the allegations made by you in your EEOC Charge of Discrimination and your judicial Complaint." Subparagraph (a) further states: "For each individual identified, describe the substance of the evidence or knowledge possessed by that individual as you understand it." By supplemental answer plaintiff states: "Plaintiff incorporates her deposition testimony, answers to interrogatories number 6 and 8 and her disclosures. To the extent Plaintiff has witnesses not testified to in her deposition, she will supplement this interrogatory." In her memorandum plaintiff further explains that at her deposition defendant inquired at length about her knowledge of the testimony of the witnesses. In her reply defendant does not refute this.

[2] The Court will require plaintiff to supplement her answer to Interrogatory 8 to the extent of providing the requested information for any witnesses about which she did not testify in deposition. She shall also exhibit to her supplemental answer copies of the pertinent page(s) from the transcript of her deposition which answer the interrogatories. The court otherwise finds the answer sufficient. The interrogatory does duplicate the initial disclosures. Defendant has provided no persuasive reason, furthermore, to ***186** require plaintiff merely to repeat by written answers her testimony at deposition.

Interrogatory 9 asks plaintiff to "[i]dentify by name, business address and specialty, if any, any and all physicians or other health care professionals, psychologists, and/or counselors with whom you have ever consulted or by whom you have ever been treated." Subparagraph (a) further asks that plaintiff "identify the dates of treatment, the nature of treatment, the diagnosis and any recommendations for ongoing treatment." Plaintiff objects that the interrogatory seeks irrelevant information and is overly broad and burdensome in that it is unlimited in time and scope. She nevertheless provides a list of names and addresses for the past five years.

[3][4] Defendant suggests Interrogatory 9 seeks information relevant to alleged emotional distress and mental anguish of plaintiff. It submits, furthermore, that the proffered answer insufficiently answers subparagraph (a). Plaintiff submits that information for a period of five years, on the other hand, adequately answers the interrogatory. She suggests that older information has no relevancy. She further suggests that defendant can obtain information responsive to subparagraph (a) through her medical records.

Plaintiff has claimed damages for "mental and emotional pain, distress, humiliation and anguish" (Compl.¶¶ 22 and 28) and mental anguish and emotional distress (Compl. ¶ 36). She thus places her mental, emotional, and psychological condition at

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issue. The medical history sought by Interrogatory 9 appears relevant both as to causation and as to the extent of her alleged injury and damages. Plaintiff has not shown it to be irrelevant. An interrogatory is not necessarily overly broad or unduly burdensome simply because it is unlimited in time and scope. Plaintiff has the burden to show the validity of her objections. She has not done so. She shall fully answer Interrogatory 9, including subparagraph (a). She may not answer it by referring defendant to previously produced medical records.

Interrogatories 10 through 13 ask plaintiff to state "each and every fact supporting all of the allegations" in Counts I through IV of her Complaint and identify "[e]ach person having knowledge of each fact" and "[a]ll documents purporting to support Count[s I through IV]." Plaintiff objects that these interrogatories are overly broad and unduly burdensome. She directs defendant to her initial disclosures and all discovery to date.

[5] The court finds Interrogatories 10 through 13 overly broad and unduly burdensome. They represent a type of excess which in the opinion of the court has become too common in recent months. The interrogatories ask not merely for material or principal facts. They seek "each and every fact" supporting the allegations of plaintiff, no matter how insignificant or minor. They make no distinction between admitted and contested allegations. In its answer defendant has admitted the following allegations: that defendant's place principal of business and its registered agent are as the complaint alleges; that plaintiff was employed in various capacities by defendant from July 27, 1994 through January 4, 1995 at its distribution center in Kansas City, Kansas; that plaintiff filed EEOC and KHRC charges on April 19, 1995; that the EEOC issued a right-to-sue letter to her on December 7, 1995; that plaintiff is female and a member of a protected group; that on or about August 31, 1994, she sustained a work-related injury when a bin fell on her shoulder; and that she exercised her rights under the Workers Compensation Act for that injury. As to these and all the remaining allegations in the four counts of the complaint Interrogatories 10 through 13 thus ask for "each and every fact," together with the identification of each knowledgeable person and supporting document. This would require plaintiff to provide the equivalent of a narrative or otherwise detailed account of her entire case in chief, together with identification of virtually all supporting evidence for each fact.

Whatever may be said for the virtues of discovery and the liberality of the federal rules, which perhaps all courts recognize, there comes at some point a reasonable limit against indiscriminately hurling interrogatories at every conceivable detail and fact ***187** which may relate to a case. Fed.R.Civ.P. 1 states that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Indiscriminate use of blockbuster interrogatories, such as these, do not comport with the just, speedy, and inexpensive determination of the action. To require answers for them would more likely cause delay and unreasonable expense of time, energy, and perhaps money.

[6] The nature of the federal discovery rules themselves suggests they are intended to facilitate reasonable discovery, not unduly burdensome, but selected by each party to fit the needs of the particular case. The discovery rules provide no absolute, unharnessed right to find out every conceivable, relevant fact that opposing litigants know. Nor do they prohibit such broad discovery, if a party can obtain it without unreasonably burdening the opposition. Fed.R.Civ.P. 16 and 26 authorize the courts with help of counsel to supervise and manage the discovery process so as to allow parties reasonable opportunity to find out what the opposition contends and knows. This requires counsel in any given case to exercise professional judgment and determine the priorities of discovery.

The Court does not find, however, that discovery rules either expressly allow or otherwise encourage the use of interrogatories as 10 through 13 are asserted here. The rules provide for a variety of discovery procedures to fit the various ways in which information can best be obtained. In many instances depositions, rather than interrogatories, will better serve the purpose of obtaining detailed facts. Arguably depositions are more expensive than interrogatories. Experience suggests, however, that litigants seldom reduce the volume of depositions upon receiving large amounts of information from interrogatories. Indeed, a voracity for more depositions more often

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flows forth. The federal rules themselves contemplate a reasonable limit to the number of interrogatories which may be served upon another party-25. By order or stipulation the Court or the parties may enlarge that number. In this case they agreed to limits of 30 interrogatories and 12 depositions per party. Interrogatories 10 through 13 with their subparts, however, would expand the number to 132 or more, with no stipulation or order of the court to allow them.

If the drafters of the rules had intended to authorize interrogatories with an impact as wide as the entire case, they could more realistically and easily have adopted a simple rule to require every pleading to be accompanied by a statement of all the facts supporting every allegation and the identifications of every knowledgeable person and supporting document. The rules, of course, contain no such requirement. They contemplate instead that discovery in each case be sensibly organized and managed-and often limited-to provide each party with reasonable opportunity to learn information essential to a fair resolution of the case.

Recent authority counsels discretion and a tempered use of interrogatories seeking all supporting facts and those which duplicate the initial disclosures required by Rule 26(a)(1):

> Each interrogatory should consist of a brief, simple, direct, and unambiguous question, dealing with one point only. The question should be objective and nonargumentative. They should not seek narrative answers or attempt to argue, cross-examine, or impeach. They should be written so that the question and the expected answer can be understood easily when read at trial....
>
> Whenever a decision is made to propound interrogatories, counsel should have clearly in mind what information he seeks and what he intends to do with it. Interrogatories should be targeted at discrete issues, rather than blanketing the case, and should be few in number. The Rules permit a party to serve on any other party no more than twenty-five interrogatories, including all discrete subparts. That number can be exceeded only with leave of court or a stipulation from the opposing party. Local rules may also impose limits on the use of interrogatories.
>
> Even where fewer than twenty-five interrogatories are served, or the parties have agreed pursuant Rule 29 to allow a greater number, judges may look askance ***188** at sets of interrogatories that appear to be unduly burdensome, and may demand a justification for the interrogatories before ordering responses....
>
> . . . . .
>
> A particular problem is the use of definitions of the term "identify" that attempt to force an opponent to provide information about every document, witness, or event referred to in the interrogatory answers. Such sweeping definitions tend to be ineffective and invite objections-often legitimate-that they are too burdensome, rendering the entire set of interrogatories useless.

William W. Schwarzer et al., *Civil Discovery and Mandatory Disclosure: A Guide to Efficient Practice,* 4-5 to 4-7 (2d ed. 1994); *see also,* Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 662 (D.Kan.1996).

In its own decisions this Court has compelled parties to answer interrogatories similar to those here in question, 10 through 13. Most if not all of those rulings have addressed interrogatories directed at a discrete or specific allegation of a pleading, sometimes to an entire claim or defense. At this point the Court does not propose to reject as overly broad or unduly burdensome all interrogatories which seek underlying facts or the identities of knowledgeable persons and supporting exhibits for material allegations.

In this case, however, the court finds that Interrogatories 10 through 13 go too far. They indiscriminately sweep an entire pleading, including allegations which are admitted, with an excessive number of interrogatories (at least 132 instead of four). They require the responding party to provide in essence a running narrative or description of the entire case, together with identifications of all knowledgeable persons and supporting documents. Aside its general argument for discoverability, defendant has provided no reason or

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justification for this kind of indiscriminate sweep. For the foregoing reasons the Court sustains the objections that Interrogatories 10 through 13 are overly broad and unduly burdensome. Plaintiff need not respond to them.

[7] Request for Production 21 seeks "[a]ny and all documents identified in response to Interrogatory number 16." Plaintiff's written response was "None." Plaintiff has since identified one document responsive to the request: notes taken by her counsel after interviewing Mike Karch, a supervisory employee of defendant at the time of the interview. She objects to its production on grounds of work product. The notes constitute work product within the meaning of Fed.R.Civ.P. 26(b)(3). A party can discover work product documents "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fed.R.Civ.P. 26(b)(3). Defendant has shown no substantial need. Plaintiff need not produce documents in response to Request 21.

[8] Request 24 seeks "[a]ll documents prepared by Robin Duncan pertaining to any alleged statement by Mike Karch that 'sexual harassment was a problem at Skillpath.' " Plaintiff objects that this request seeks privileged work product. She indicates in response to the motion and in a letter dated October 8, 1996 (Ex. F, attached to Suggestions in Supp. of Mot. To Compel, doc. 40) that no responsive documents exist. Because of inconsistencies between the response and the letter, defendant asks that plaintiff be required to serve an amended response to Request 24, if there are no responsive documents. The court will so order. Plaintiff shall serve a supplemental response to the request, to affirm that she has no responsive documents.

Request 1 seeks a copy of plaintiff's 1995 tax return. Plaintiff produced an extensively redacted copy. Defendant wants an unredacted copy. It suggests that an existing protective order adequately protects disclosure and dissemination of information contained in the tax return. Plaintiff submits that she filed a joint return with her husband in 1995. She contends that the income and earnings of her husband are irrelevant and that the request is not reasonably calculated to lead to the discovery of admissible evidence.***189** She suggests that defendant seeks an unredacted return only to assure itself of the propriety of the redactions. She has offered to produce an unredacted tax return under a protective order which limits disclosure to defense counsel. Alternatively, she offers to produce the document for *in camera* review.

[9][10][11] This court has often refused discovery of tax returns. Public policy protects against their production. Although courts do not favor compelling production of tax returns, no absolute privilege exists preventing their discovery.

> The courts have developed a two-pronged test to assure a balance between the liberal scope of discovery and the policy favoring the confidentiality of tax returns. "First, the court must find that the returns are relevant to the subject matter of the action. Second, the court must find that there is a compelling need for the returns because the information contained therein is not otherwise readily obtainable." "The party seeking production has the burden of showing relevancy, and once that burden is met, the burden shifts to the party opposing production to show that other sources exist from which the information is readily obtainable."
>
> *Audiotext Communications Network, Inc. v. US Telecom, Inc.*, No. Civ.A. 94-2395-GTV, 1995 WL 625962, at *11 (D.Kan., Oct. 5, 1995) (citations omitted).

[12] To the extent the tax return reveals income of plaintiff, defendant has shown it relevant to the issue of damages. Plaintiff claims economic losses. She seeks back and front pay. (Compl. ¶¶ 22, 28, and 36.) She has put her income at issue. She has produced a redacted tax return which adequately reveals her income. Attached to the redacted return are unredacted copies of Forms 1099-G and W-2, relating respectively to unemployment compensation and to earned income. A redacted copy of Form MO-1040 also shows her individual income. Accordingly, the court finds the proposal of plaintiff to be adequate and acceptable. She shall produce an unredacted tax return solely for inspection by defense counsel for the purpose of this lawsuit. Defense counsel shall not reveal

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the previously redacted parts to any other person.

In summary, the court sustains in part, overrules in part, and deems moot in part Defendant's Motion To Compel Discovery (docs. 39 and 44.) Within twenty days of the date of this order, plaintiff shall serve a written response to Request 24 and answer Interrogatories 5, 8, and 9, as directed herein. Within that same time period, she shall produce all documents responsive to Request 1, as directed herein and subject to the protective order entered herein. Such production shall take place at the offices of defense counsel located at 5925 Beverly; Mission, Kansas; or at any other location agreed upon by the parties. The court deems the motion moot to the extent it seeks further answer to Interrogatories 6 and 16. It otherwise overrules the motion. Each party shall be responsible for its own costs and expenses incurred upon the motion.

IT IS SO ORDERED.

D.Kan.,1997.
Hilt v. SFC Inc.
170 F.R.D. 182, 37 Fed.R.Serv.3d 919

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EXHIBIT 18

HOnly the Westlaw citation is currently available.

United States District Court,
C.D. California.
SOUTHERN CALIFORNIA HOUSING RIGHTS CENTER, dba Housing Rights Center
v.
Robert KRUG, et al.

No. CV06-1420SJOJCX.

Sept. 5, 2006.

CIVIL MINUTES-GENERAL

Nancy Hackney	None	06-23
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiff:
Liam Garland

Attorneys Present for Defendants:
Craig Mordoh

Proceedings:

(IN CHAMBERS)
ORDER GRANTING IN PART, DENYING IN PART, PLAINTIFF'S MOTION TO COMPEL

*1 On March 7, 2006, plaintiff filed a complaint pursuant to the federal Fair Housing Act, 42 U.S.C. § 3601 et seq., and related California laws. Plaintiff alleges that defendants have "implemented a policy and/or practice at their twenty-eight (28) unit apartment building in Monrovia, California, that has the purpose or effect of discriminating against families with children."(Complaint ¶ 2). Defendants filed an Answer on April 7, 2006.

On August 7, 2006, plaintiff filed a "Joint Stipulation Per Local Rule 37-2 Re: Plaintiff's Motion to Compel Discovery Responses" ("the Motion"). Plaintiff moves to compel defendants to produce documents and responses to its interrogatories regarding defendants' financial condition and net worth. Plaintiff contends that such information is relevant to its claim for punitive damages. Defendants object to plaintiff's discovery requests asserting, among other things, that the requests for production seek irrelevant items and are overbroad and burdensome, and that the interrogatories are vague and/or seek irrelevant information. A hearing was held on the Motion on September 5, 2006.

At issue are Request for Production Nos. 32 and 33 of Plaintiff's First Request for Production of Documents to Defendants Robert Krug and Elizabeth Krug [FN1] and Interrogatory Nos. 4-7 of Plaintiff's First Set of Interrogatories to Defendant Elizabeth Krug. The disputed discovery requests and objections, and the court's analysis and ruling regarding such requests are set forth below.

FN1. Plaintiff served separate requests for production of documents on defendants Robert Krug and Elizabeth Krug. The requests were identical as were the separate responses from the Krugs. These separate requests and responses are therefore addressed together.

I. Applicable Standards

Pursuant to Rule 26(b)(1) of the Federal Rules of Civil Procedure, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party....For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."Fed.R.Civ.P. 26(b)(1). This rule is interpreted to allow liberal discovery of information reasonably calculated to lead to the discovery of admissible evidence. *Surfvivor Media, Inc. v. Survivor Productions*, 406 F.3d 625, 635 (9th Cir.2005) (district courts have broad discretion in determining relevancy for discovery

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purposes).

II. Request for Production Nos. 32 and 33
The Requests: These requests seek documents that relate to the net worth and current assets and/or liabilities of defendants Robert and Elizabeth Krug ("the Krugs" ') and the Krug Trust including identification and value of all properties and other assets owned in whole or in part, profit and loss statements from Fiscal Year 1996 to the present, and copies of tax returns for the same time period. Also requested are any financial statements and balance sheets that relate to assets, inventories, liabilities, gross and net income, and the amount of any undistributed business profits.

The Objections: The Krugs object on the grounds that the requests: (1) seek irrelevant documents; (2) are overbroad; (3) are burdensome; (4) seek privileged information to the extent tax returns are requested; and (5) seek non-discoverable information in the absence of factual allegations in the Complaint to show that punitive damages are warranted ("non-discoverability objection").

***2** *Ruling:*

(1) For the reasons set forth below, the Motion is granted in part, and denied in part. Within fourteen (14) days, defendants are directed to provide documents responsive to this request, except tax returns, for the period of January 1, 2004, to the present. The protective order in this case is expanded to encompass the documents produced pursuant to these requests.

(2) Defendants' relevance objection is overruled in part and sustained in part. The federal Fair Housing Act prohibits, in pertinent part, "any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate" for example, because of "familial status." 42 U.S.C. § 3605(a). The term "person" includes, individuals, associations, trusts, and trustees. 42 U.S.C. § 3602(d). The Act authorizes an aggrieved person to bring a civil action and to receive actual and punitive damages for violations of the Act. *See*42 U.S.C. §§ 3613(c)(1), 3612(o)(3). A defendant's net worth and financial condition are relevant and admissible to establish the appropriate amount of punitive damages. *See City of Newport v. Facts Concerts, Inc.*, 453 U.S. 247, 270 (1981) (noting that "evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded."); *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 284 (C.D.Cal.1998) (evidence of net worth crucial to issue of punitive damages); *United States v. Big D Enterprises, Inc.*, 184 F.3d 924, 932 (8th Cir.1999) (under federal law, evidence of defendant's financial worth traditionally admissible for purpose of evaluating amount of punitive damages).

Defendants Robert and Elizabeth Krug are parties to the litigation in their individual capacities as well as their capacities as trustees for the Krug Trust. As the complaint seeks punitive damages pursuant to the federal Fair Housing Act, the financial condition and net worth of Robert Krug, Elizabeth Krug, and the Krug Trust, are relevant and therefore such information is discoverable. While documents reflecting the financial condition and net worth of defendants from January 1, 2004, to the present are relevant and reasonably calculated to lead to the discovery of admissible evidence regarding defendants' *current* financial status, the court does not find that information earlier than January 1, 2004, is relevant.

(3) Defendants' objection based on overbreadth is sustained in part and overruled in part. As suggested by the above, the court agrees that discovery of defendants' financial information for the past ten (10) years is unnecessarily broad. Since information regarding defendants' earnings and worth from ten (10) years ago is not reasonably calculated to lead to admissible evidence on the issue of punitive damages, discovery should be limited to the period from January 1, 2004, to the present, *i.e.*, a period which provides a picture of defendants' current financial condition and net worth. *See Hughes v. Groves*, 47 F.R.D. 52, 55 (W.D. Missouri 1969).

***3** (4) Defendants' "burdensome" objections are overruled. Defendants' objections are conclusory and provide no information to support a finding that production of the requested items would unduly burden defendants. *See*F.R.Civ. P. 26(b)(2)(iii); *A. Farber & Partners, Inc. v. Garber ("Farber")*, 234 F.R.D. 186, 188 (C.D.Cal.2006).

(5) Defendants' privilege objection to the disclosure of tax returns is sustained without prejudice and overruled to the extent it is intended to encompass the other documents that are the subject of this request. Questions of privilege that arise in the course of the adjudication of federal rights are governed by the principles of federal common law.

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United States v. Zolin, 491 U.S. 554, 562 (1989) (citing Federal Rules of Evidence 501). Where, as in this case, a federal question claim and pendent state law claims are present, federal law on privilege, not state law, applies. *Agster v. Maricopa County*, 422 F.3d 836, 839 (9th Cir.), *cert. denied*, 126 S.Ct. 473 (2005). Under federal law, tax returns and related documents "do not enjoy an absolute privilege from discovery." *Premium Services Corp. v. Sperry & Hutchinson Co.*, 511 F.2d 225, 229 (9th Cir.1975); *Heathman v. United States District Court*, 503 F.2d 1032, 1035 (9th Cir.1974) (Title 26 U.S.C. § 6103(a)(2) only restricts dissemination of tax returns by government and does not otherwise make copies of tax returns privileged). Nevertheless, a public policy against unnecessary public disclosure arises from the need, if the tax laws are to function properly, to encourage tax payers to file complete and accurate returns. *Premium Services Corp.*, 511 F.2d at 229. Courts generally apply a two-pronged test to assure a balance between the liberal scope of discovery and the policy favoring the confidentiality of tax returns. *Farber*, 234 F.R.D. at 191; *Hilt v. SFC Inc.*, 170 F.R.D 182, 189 (D.Kan.1997). First, the court must find that the returns are relevant to the subject matter of the action. Second, the court must find that there is a compelling need for the returns because the information contained therein is not otherwise readily obtainable. *Farber*, 234 F.R.D. at 191; *Hilt*, 170 F.R.D. at 189.

Although, as discussed above, information from January 1, 2004, to the present regarding the Krugs' financial condition and net worth, including documents such as tax returns, is relevant to plaintiff's claim for punitive damages, the court finds there is no compelling need for defendants' tax returns at this time. Plaintiff has suggested that it can access the necessary financial information through other less intrusive means and that it would be willing to withdraw its request for discovery of defendants' tax returns while reserving the right to seek such returns at a later date if defendants' responses and production do not provide a reliable indication of their net worth. Accordingly, at this time the court will not order production of defendants' tax returns. In the event that plaintiff finds that the financial information produced by defendants is insufficient, it may file a motion to compel production of tax returns at that time.

***4** To the extent defendants may also be raising a privilege objection to production of the remaining items sought, the court notes that such any such objection is not well-taken and is overruled. Federal courts ordinarily recognize a constitutionally-based right of privacy that can be raised in response to discovery requests. *Farber*, 234 F.R.D. at 191. The court will balance the need for information sought against the privacy right asserted.*Id.* Plaintiff's need for disclosure of defendants' financial information outweighs any privacy claim by defendants in such items.

Nonetheless, because defendants have an interest in maintaining the privacy of their financial information, such information can be adequately protected by adding the items produced pursuant to these requests to the items encompassed by the existing protective order in this action. *Farber*, 234 F.R.D. at 191 (privacy concerns relating to disclosure of tax returns can be addressed by carefully drafted protective order); *CEH, Inc. v. FV "Seafarer" ("Seafarer")*, 153 F.R.D. 491, 499 (D.R.I.1994) ("[W]hile a party does have an interest in nondisclosure and confidentiality of its financial records, this interest can be adequately protected by a protective order.")

(6) Defendants' non-discoverability objection is overruled. As discussed above, information concerning defendants' finances is relevant in this case because it can be considered in determining punitive damages. Under the federal rules, a district court has discretion to control the sequence of discovery "for the convenience of the parties and witnesses and in the interests of justice."Fed.R.Civ.P. 26(d). When a punitive damages claim has been asserted, a majority of federal courts permit pretrial discovery of financial information about defendants without requiring the plaintiff to establish a prima facie case on the issue of punitive damages. *Seafarer*, 153 F.R.D. at 497-98 (and cases cited therein); *Baker v. CNA Ins. Co.*, 123 F.R.D. 322, 330 (D.Mont.1988) (not premature for plaintiff to seek discovery of information regarding defendant's financial status relevant to punitive damages claim even though plaintiff must first prevail on issue of liability before evidence of defendant's financial condition would be relevant; plaintiff should not be precluded from adequately preparing case as to damages); *Vollert v. Summa Corp.*, 389 F.Supp. 1348, 1351 (D. Hawaii 1975) (plaintiff's demand for discovery of financial information relevant to issue of punitive damages not premature; existence of liability is threshold issue in almost all actions seeking money damages and should not preclude plaintiff from preparing his case as to damages).

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III. Interrogatory No. 4
The Interrogatory: This interrogatory asks defendant Elizabeth Krug to list each of "Defendants' Properties" by: (a) address and type of property; (b) date of ownership; (c) current fair market value and original purchase price; (d) present value of her equity interest; (e) number of units; (f) the number of bedrooms and square footage for each unit; (g) her role in the operation and/or management of the property; and names and contact information for any co-owners or partners. The interrogatory does not itself include a time frame.

***5** *The Objections:* Defendant Elizabeth Krug objects on grounds that the time period contemplated by the interrogatory as well as the term, "Defendants' Properties" are vague. Defendant Elizabeth Krug further states, "[w]ithout waiving said objections, I don't know this information."

Ruling:

(1) The Motion to Compel is denied without prejudice. Within seven (7) days Plaintiff is directed to supply Defendant Elizabeth Krug with a definition of the term "Defendants' Properties" and to circumscribe a time frame for this interrogatory (which should conform with the court's other rulings). Defendants are directed to provide plaintiff with a supplemental response to this interrogatory within (14) days of being served with the above-described definition and time frame. The protective order in this case is expanded to encompass the information produced pursuant to this interrogatory.

(2) Defendant's objections that the interrogatory is vague as to time period and as to the definition of the term "Defendants' Properties" is sustained, subject to the directive above regarding the provision of a supplemental response.

IV. Interrogatory Nos. 5, 6, and 7
The Interrogatories: These interrogatories ask defendant Elizabeth Krug to provide certain annual financial information regarding the Krugs from January 2000, to the present including their net worth, their assets and liabilities, and the identity, source and type of their income.

The Objections: Defendant Elizabeth Krug objects on grounds that the interrogatories seek irrelevant information. She further asserts that since a two-year statute of limitations applies to an action arising under the federal Fair Housing Act, she should be required to produce no more than two years' worth of financial information.

Ruling:

(1) The Motion to Compel is granted in part and denied in part. Within fourteen (14) days, defendant Elizabeth Krug is directed to provide responsive information for the period from January 1, 2004, to the present. The protective order in this case is expanded to encompass the information produced pursuant to these interrogatories.

(2) Defendant's relevance objection is overruled in part and sustained in part. As discussed above, the court concludes that defendants' current financial information and financial information since January 1, 2004, are relevant and reasonably calculated to lead to the discovery of admissible evidence concerning punitive damages. However, this court does not find that defendants' financial condition prior to that time is relevant or reasonably calculated to lead to the discovery of admissible evidence.

IT IS SO ORDERED.

C.D.Cal.,2006.
Southern California Housing Rights Center v. Krug
Not Reported in F.Supp.2d, 2006 WL 4122148 (C.D.Cal.)

END OF DOCUMENT

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EXHIBIT 19

C

United States District Court,
C.D. California.
KEITH H., an individual
v.
LONG BEACH UNIFIED SCHOOL DISTRICT, et al.
No. CV 049273SJO.

May 18, 2005.

Background: Student brought action alleging that his placement in juvenile residential facility and non-public high school violated his civil rights. Student filed various discovery motions.

Holdings: The District Court, Chapman, United States Magistrate Judge, held that:
(1) student was entitled to discovery of information relating to other juveniles at school;
(2) student was not entitled to videotape school and facility; and
(3) protective order was warranted.

Motions granted in part, and denied in part.

West Headnotes

[1] Federal Civil Procedure 170A 1262.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1262 Nature and Purpose
170Ak1262.1 k. In General. Most Cited Cases
General purpose of discovery is to remove surprise from trial preparation so that parties can obtain evidence necessary to evaluate and resolve their dispute. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

[2] Federal Civil Procedure 170A 1271

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1271 k. Proceedings to Obtain. Most Cited Cases
Party who resists discovery has burden to show discovery should not be allowed, and has burden of clarifying, explaining, and supporting its objections. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

[3] Federal Courts 170B 374

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(A) In General
170Bk374 k. Matters of General Jurisprudence; Federal Common Law. Most Cited Cases
Questions of evidentiary privilege arising in adjudication of federal rights are governed by principles of federal common law, even if complain contains both federal and pendent state law claims. Fed.Rules Evid.Rule 501, 28 U.S.C.A.

[4] Federal Civil Procedure 170A 1581

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1581 k. In General. Most Cited Cases

Federal Civil Procedure 170A 1625

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)4 Proceedings
170Ak1625 k. Protective Orders. Most Cited Cases
Student alleging that his placement in juvenile residential facility and non-public high school violated his civil rights was entitled to discovery of information relating to other juveniles at school, after redac-

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tion of all identifying information and subject to protective order, despite other juveniles' privacy rights, where information was necessary to support student's claim that school district had pattern and practice of enrolling students at non-public schools without first conducting legally required assessments, and information was not available from any other source.

[5] Federal Civil Procedure 170A 1599

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1599 k. Photographs; Right to Take Photographs in General. Most Cited Cases
Student alleging that his placement in non-public high school violated his civil rights was not entitled to videotape school and juvenile residential facility, despite student's contention that images were necessary to show jury interrelationship between school and facility, where taping could lead to disclosure of juveniles' identities, complaint did not address facility, and plans, dimensions, and distances of property were available.

[6] Records 326 32

326 Records
326II Public Access
326II(A) In General
326k32 k. Court Records. Most Cited Cases
Fruits of pretrial discovery are, in absence of court order to contrary, presumptively public. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

[7] Federal Civil Procedure 170A 1271.5

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1271.5 k. Protective Orders. Most Cited Cases
For good cause to exist for protection order, party seeking protection bears burden of showing specific prejudice or harm will result if no protective order is granted. Fed.Rules Civ.Proc.Rule 26(c), 28 U.S.C.A.

[8] Federal Civil Procedure 170A 1271.5

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1271.5 k. Protective Orders. Most Cited Cases
Student alleging that his placement in juvenile residential facility and non-public high school violated his civil rights was entitled to protective order to cover any financial information obtained from defendants, student's own juvenile court information, and juvenile court information of any other minor; financial information was private, and public access to information about wards of juvenile court would undermine protections under state law. Fed.Rules Civ.Proc.Rule 26(c), 28 U.S.C.A.

***653** Barbara A. Kreig, attorney-at-law, Bryan Cave, Santa Monica, CA, Shawna L. Parks, attorney-at-law, Western Law Center for Disability Rights, Los Angeles, CA, Michael Aaron Geibelson, attorney-at-law, Robins, Kaplan, Miller & Ciresi, Los Angeles, for plaintiff.

Defendants Long Beach Youth Home and Zinsmeyer Academy are represented by Philip Treacy and Robert J. Lynch, attorneys-at-law with the firm McMahon Treacy, Los Angeles, defendant Los Angeles County Department of Children and Family Services is represented by Gabriella E. Zielinski, attorney-at-law with the firm Kessel & Associates, Los Angeles, and Long Beach Unified School District is represented by Allen L. Thomas, attorney-at-law, Long Beach.

CHAPMAN, United States Magistrate Judge.

PROCEEDINGS: PLAINTIFF'S MOTIONS: (1) TO COMPEL DEFENDANT LONG BEACH YOUTH HOME'S PRODUCTION OF DOCUMENTS; (2) TO COMPEL DEFENDANT LONG BEACH YOUTH HOME'S SITE INSPECTION; (3) TO COMPEL DEFENDANT ZINSMEYER ACADEMY'S PRODUCTION OF DOCUMENTS; (4) TO COMPEL DEFENDANT ZINSMEYER ACADEMY'S SITE INSPECTION; AND (5) FOR A PROTECTIVE ORDER

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On April 20, 2005, plaintiff filed a notice of motions and motions to compel defendants ***654** Long Beach Youth Home ("LBYH") and Zinsmeyer Academy ("Zinsmeyer") to produce documents and permit site inspections, a joint stipulation, and the supporting declaration of Shawna L. Parks, with exhibits, and on April 20, 2005, defendants LBYH and Zinsmeyer filed, in opposition to the motions, the declaration of Robert J. Lynch, with exhibits, and the purported declaration of Robert Reilly.[FN1] On April 27, 2005, plaintiff filed its supplemental brief and the supplemental declaration of Shawna L. Parks, and on April 29, 2005, defendants LBYH and Zinsmeyer filed a supplemental brief.

> FN1. The Lynch and Reilly declarations are improperly entitled "in support of joint stipulation re: protective order" since defendants have not filed a motion for a protective order, as required by Rule 26(c), but, rather, merely argue that if plaintiff's motions are granted, the Court should sua sponte issue a protective order related to the discovery. The Court strongly disapproves of this approach.

On April 27, 2005, plaintiff filed a notice of motion and motion for a protective order, a joint stipulation [FN2] and the supporting declaration of Barbara A. Krieg, with exhibits, and on the same date, defendant Los Angeles County Department of Children and Family Services ("County") filed the declaration of Gabriella E. Zielinski in opposition to plaintiff's motion, with exhibits.[FN3] On May 4, 2005, plaintiff filed his supplemental brief, and on May 10, 2005, defendants LBYH and Zinsmeyer filed a reply.

> FN2. All parties participated in the Joint Stipulation.

> FN3. Some of the exhibits to Ms. Zielinski's declaration include copies of documents filed in the Juvenile Court, and those documents set forth plaintiff's full name, rather than his first name and the initial of his last name, as required under California law. *See T.N.G. v. Superior Court*, 4 Cal.3d 767, 771 n. 1, 94 Cal.Rptr. 813, 814 n. 1, 484 P.2d 981 (1971) ("To prevent the disclosure of the minor's identity in proceedings under the Juvenile Court Law, this court and the Courts of Appeal have generally used the juvenile's first name and the first initial of his last name in opinions and orders. Attorneys have similarly not mentioned a minor's last name in briefs and petitions."(citations omitted)); *In re M.G.S.*, 267 Cal.App.2d 329, 340, 72 Cal.Rptr. 808 (1968) ("Filing of an appeal under the initials of the minor is a logical extension of section 827 of the Welfare and Institutions Code providing for the confidentiality of records of the juvenile court."). Similarly, Exhibit 1 to Mr. Lynch's declaration includes a document in which all information has been redacted except plaintiff's full name! The Court admonishes Ms. Zielinski and Mr. Lynch for their conduct, and orders that in all documents filed with this Court, plaintiff should be identified as "Keith H." Failure to abide by this order may result in sanctions.

Oral argument was held on May 18, 2005, before Magistrate Judge Rosalyn M. Chapman. Plaintiff was represented by Barbara A. Krieg, attorney-at-law with the firm Bryan Cave, and Shawna L. Parks, attorney-at-law with the Western Law Center for Disability Rights. Defendants LBYH and Zinsmeyer were represented by Philip Treacy and Robert J. Lynch, attorneys-at-law with the firm McMahon Treacy, defendant County was represented by Gabriella E. Zielinski, attorney-at-law with the firm Kessel & Associates, and Long Beach Unified School District was represented by Allen L. Thomas, attorney-at-law.

BACKGROUND

On November 10, 2004, plaintiff filed his initial complaint against defendants Long Beach Unified School District ("School District"), County, LBYH, Zinsmeyer and others. On January 4, 2005, plaintiff filed his First Amended Complaint ("FAC") against these same defendants, setting forth causes of action arising under: the Americans With Disabilities Act, 42 U.S.C. § 12101 et seq.; Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; Title VI of

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the Civil Rights Act of 1964, 42 U.S.C. § 2000d, 42 U.S.C. §§ 1983 and 1985(3); and under state law. The plaintiff is an African-American who the Los Angeles County Juvenile Court found was a "dependent child." The gravamen of plaintiff's claims is that on July 17, 2003, defendant County illegally, based on racial stereotyping, placed plaintiff in LBYH, a residential facility, which, in turn, required him to attend Zinsmeyer, a non-public high school, where he was placed in a highly restrictive setting, treated as a disabled student with severe emotional disturbances, and denied all access to a public school education, despite the fact that he was not disabled and that the Juvenile Court had ordered, on at least two occasions, that he receive public ***655** school education. More specifically, plaintiff alleges that he was schooled at Zinsmeyer despite not having an Individualized Education Plan ("IEP"), as required under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., and despite never having been properly designated for non-public school placement. In orders entered March 28, April 12, and April 21, 2005, District Judge S. James Otero granted, in part, motions to dismiss filed by various defendants. Defendants have now answered plaintiff's First Amended Complaint.

DISCUSSION

I

As an initial matter, the Court is extremely dismayed by the lack of cooperation between the parties, as shown by the parties' failure to agree on a protective order, despite the fact that plaintiff filed a motion for a protective order and defendants LBYH and Zinsmeyer, without filing their own motion for a protective order, have asked the Court to issue one.[FN4] Thus, the Court is mystified as to why the parties have been unable to amicably resolve this simple matter.

> FN4. Further defendant County, which opposes plaintiff's motion for a protective order, improperly attempted to join defendants LBYH and Zinsmeyer's request for a protective order.

As Judge Wayne Brazil has explained:

> [t]he discovery system depends absolutely on good faith and common sense from counsel. The courts, sorely pressed by demands to try cases promptly and to rule thoughtfully on potentially case dispositive motions, simply do not have the resources to police closely the operation of the discovery process. The whole system of [c]ivil adjudication would be ground to a virtual halt if the courts were forced to intervene in even a modest percentage of discovery transactions. That fact should impose on counsel an acute sense of responsibility about how they handle discovery matters. They should strive to be cooperative, practical and sensible, and should turn to the courts (or take positions that force others to turn to the courts) only in extraordinary situations that implicate truly significant interests.

In re Convergent Technologies Sec. Litigation, 108 F.R.D. 328, 331 (N.D.Cal.1985). The parties must understand that it is for the Court's and their own benefit that they cooperate in presenting to the Court only real discovery disputes for resolution.

Further, the Court notes that in some of defendant County's documents there are inferentially disparaging references to plaintiff's counsel. The parties are admonished that in the future this Court will strike sua sponte any document that refers in an offensive manner to the opposing counsel (or party), including documents containing abusive correspondence as exhibits. Moreover, the parties must become familiar with the Court's Civility and Professionalism Guidelines, which are available under the Attorney Admissions section of the Court's website at *http://www.cacd.uscourts.gov/*.

II

Rule 1 of the Federal Rules of Civil Procedure directs that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." As the Fifth Circuit has noted, "[t]here probably is no provision in the federal rules that is more important than this mandate. It reflects the spirit in which the rules were conceived and written, and in which they should be, and by and large have been, interpreted...." *Trevino v. Celanese Corp.*,

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701 F.2d 397, 405 (5th Cir.1983) (citation omitted).

[1][2] Rule 26(b)(1) permits discovery in civil actions of "any matter, not privileged, that is relevant to the claim or defense of any party...." Generally, the purpose of discovery is to remove surprise from trial preparation so the parties can obtain evidence necessary to evaluate and resolve their dispute. *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D.Cal.1998). Toward this end, Rule 26(b) is liberally interpreted to permit wide-ranging discovery of information even though the information may not be admissible at the trial. *Jones v. Commander, Kansas Army Ammunitions Plant*, 147 F.R.D. 248, 250 (D.Kan.1993). The party who resists***656** discovery has the burden to show discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir.1975).

[3] Rule 26(b)(1), as quoted above, specifically provides for discovery of all non-privileged matters "relevant to the claim or defense of any party." Questions of evidentiary privilege arising in the adjudication of federal rights, such as here, are governed by the principles of federal common law. Fed.R.Evid. 501; *United States v. Zolin*, 491 U.S. 554, 562, 109 S.Ct. 2619, 2625, 105 L.Ed.2d 469 (1989). This is true even where a complaint contains both federal and pendant state law claims. *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 367 n. 10 (9th Cir.1992).

Rule 34 is one of the discovery tools available to litigants in the federal courts. It broadly provides that:

> Any party may serve on any other party a request (1) to produce ... any designated documents ... which are in the possession, custody, or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

Fed.R.Civ.P. 34(a).

Documents:

The plaintiff seeks to compel responses to requests for production of documents nos. 37 [FN5] and 38 [FN6] from defendant LBYH and requests for production of documents nos. 2 through 4 [FN7] and 32 through 34 [FN8] from defendant Zinsmeyer. In response to all of these document requests, both defendants objected on the following grounds: (1) the requests are overbroad; and (2) the requests "inappropriately seek[ ] private records of minors and private information of wards of the Dependency Court, contrary to Article I, Section 1 of the Constitution of the State of California, California Welfare & Institutions Code section 827,[FN9] as well as ***657***American Academy of Pediatrics v. Lungren*, 16 Cal.4th 307, 66 Cal.Rptr.2d 210, 940 P.2d 797 (1997) and California Education Code Section 49076,[FN10] and may not be released by responding party except pursuant to the order of a court of competent jurisdiction." Jt. Stip. at 6:26-10:4 (footnotes added).

FN5. Request for production of documents no. 37 seeks:

> All documents identifying any youths who, from January 1, 2002 to the present, attending Zinsmeyer during the time in which they were placed or resided with Defendant.
>
> Jt. Stip. at 9:12-14.

FN6. Request for production of documents no. 38 seeks:

> All documents identifying youths who, from January 1, 2002 to the present, did not attend Zinsmeyer during the time in which they were placed or resided with Defendant.
>
> Jt. Stip. at 9:23-25.

FN7. Request for production of documents no. 2 seeks:

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> All Individual Services Agreements for Nonpublic, Nonsectarian School/Agency with LBUSD in effect from January 1, 2002 to the present related to the provision of educational services by Defendant.
>
> Jt. Stip. at 6:22-24. Request for production of documents no. 3 seeks:
>
> All contracts with any school district or its agents in effect from January 1, 2002 to the present relating to the provision of educational services by Defendant.
>
> Jt. Stip. at 7:7-8. Request for production of documents no. 4 seeks:
>
> All Individual Services Agreements for Nonpublic, Nonsectarian School/Agency with LBUSD in effect from January 1, 2002 to the present relating to the provision of educational services by Defendant.
>
> Jt. Stip. at 7:19-21.

FN8. Request for production of documents no. 32 seeks:

> All documents identifying students currently enrolled with the Defendant who do not have and IEP mandating placement in a nonpublic school.
>
> Jt. Stip. at 8:4-5. Request for production of documents no. 33 seeks:
>
> All documents identifying students who were formally enrolled with Defendant at any time since January 1, 2002 who did not have an IEP mandating placement in a non-public school.
>
> Jt. Stip. at 8:15-17. Request for production of documents no. 34 seeks:
>
> All documents identifying students currently enrolled with Defendants who do not have an IEP.
>
> Jt. Stip. at 8:28-9:1.

FN9. California Welfare & Institutions Code § 827 sets forth the circumstances under which a juvenile's case file may be inspected.

FN10. California Education Code § 49076 sets forth the circumstances under which a school district may release information from pupil records.

Initially, as plaintiff aptly notes, defendants have not made any relevancy objections to the requests for production of documents from plaintiff. Since defendants waived any relevancy objections by failing to raise them in a timely response to plaintiff's document requests, *Safeco Ins. Co. of America v. Rawstrom*, 183 F.R.D. 668, 671-72 (C.D.Cal.1998); *Mackey v. IBP, Inc.*, 167 F.R.D. 186, 206 (D.Kan.1996), defendants' conclusorily suggestion in the Joint Stipulation that "the relevance of any ... documents [requested by plaintiff] is in question[,]" Jt. Stip. at 21:23-22:2, is not well taken.

Defendants object that the requests are overbroad, although limited to a three-year period, since they seek "all" documents pertaining to other residents or students, including meal plans, for example.[FN11] Jt. Stip. at 25:18-25. To the extent plaintiff's requests can be read to include a request for documents relating to a student's meal plans, the requests are overbroad; however, since defendants have not identified any other irrelevant material they opine is covered by plaintiff's requests, the defendants' overbreadth objection is otherwise denied.

FN11. In their written objections to plaintiff's document requests, defendants objected that the requests were overbroad because plaintiff was a resident of LBYH and student at Zinsmeyer only from July to November 2003, and his requests for documents cover the period of January 1, 2002, to the present. However, defendants do not discuss this objection in the Joint Stipula-

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> tion; thus, the Court infers that explanation of defendant's overbreadth objection has been withdrawn.

Here, defendants primarily object to plaintiff's document requests by claiming third party privacy rights under the California Constitution, California statutes and California law. However, such reliance is misplaced since plaintiff's claims are under federal law and, as discussed above, federal common law privileges apply. Fed.R.Evid. 501; *Zolin,* 491 U.S. at 562, 109 S.Ct. at 2625; *Kerr v. United States Dist. Ct. for the N. Dist. of Cal.,* 511 F.2d 192, 197 (9th Cir.1975), *affirmed by,* 426 U.S. 394, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976); *cf. Gonzalez v. Spencer,* 336 F.3d 832, 835 (9th Cir.) (per curiam) (noting, in civil rights action, "district court could have ordered disclosure [of juvenile court file] notwithstanding state law"), *cert. denied,* 540 U.S. 940, 124 S.Ct. 334, 157 L.Ed.2d 253 (2003). Nevertheless, "[f]ederal courts ordinarily recognize a constitutionally-based right of privacy that can be raised in response to discovery requests." *Soto v. City of Concord,* 162 F.R.D. 603, 616 (N.D.Cal.1995); *Johnson ex rel. Johnson v. Thompson,* 971 F.2d 1487, 1497 (10th Cir.1992), *cert. denied,* 507 U.S. 910, 113 S.Ct. 1255, 122 L.Ed.2d 654 (1993); *see also Breed v. United States Dist. Ct. for the N. Dist. of Cal.,* 542 F.2d 1114, 1116 (9th Cir.1976) (recognizing "minors' right of privacy" in their California Youth Authority records).

"Resolution of a privacy objection ... requires a balancing of the need for the information sought against the privacy right asserted." *Soto,* 162 F.R.D. at 616; *Johnson ex rel. Johnson,* 971 F.2d at 1497. The privacy objection also "must be evaluated against the backdrop of the strong public interest in uncovering civil rights violations...." *Soto,* 162 F.R.D. at 621. Furthermore, "a carefully drafted protective order [can] minimize the impact of this disclosure." *Soto,* 162 F.R.D. at 616; *Kelly v. City of San Jose,* 114 F.R.D. 653, 662 (N.D.Cal.1987).

[4] Here, plaintiff's document requests indisputably implicate significant privacy rights of minors who are not parties to this litigation, as plaintiff concedes. *See* Jt. Stip. at 11:16-17. On the other hand, the information plaintiff seeks is necessary to several of plaintiff's claims. For instance, the information sought could help support plaintiff's claim that "[d]efendants have a practice ... of enrolling students at non-public schools without first conducting the legally required assessments," FAC, ¶¶ 63, 73, 91, 116, and ***658** the discriminatory intent alleged in plaintiff's ADA, Rehabilitation Act, and Title VI claims. *See* FAC, ¶¶ 45-74, 82-92. Further, "[p]laintiff's need for the requested [information] is great [since it] is unlikely to be available from any other source than [d]efendants' files." *Soto,* 162 F.R.D. at 617; *Kelly,* 114 F.R.D. at 660. Additionally, as plaintiff has suggested, defendants' privacy objections can be appropriately addressed by: (1) redacting the students' identifying information-including names, Social Security numbers, dates of birth, etc.-from the documents produced and, if necessary, using pseudonyms or codes to identify the students, *see Foltz v. State Farm Mut. Ins. Co.,* 331 F.3d 1122, 1137 (9th Cir.2003) (holding third-party privacy information can be protected by "[s]imply redacting the identifying information of third parties (e.g., their names, addresses, telephone numbers, and social security numbers) from the[ir] records and disclosing the remaining information"), and, (2) producing documents under a protective order to minimize any invasion of the students' privacy rights. *Id.*; *Johnson ex rel. Johnson,* 971 F.2d at 1497; [FN12] *see also Lora v. Bd. of Educ. of the City of New York,* 74 F.R.D. 565, 568, 579-87 (E.D.N.Y.1977) (granting, subject to protective order, plaintiffs' motion to compel production of "fifty randomly selected anonymous diagnostic and referral files" from which "all references to each child's identity [were] redacted" to support claim students were assigned to "Special Day Schools for Socially Maladjusted and Emotionally Disturbed Children" in a "capricious, arbitrary and racially discriminatory manner"). [FN13] Coupled with a protective order, it is sufficient for defendants to redact each student's name, Social Security number, date of birth, address, and telephone number, as well as the student's parent's or guardian's name, address, telephone number, and Social Security number. If defendants redact the student's identification number and similar identifying numbers, they must replace those numbers with some other method of identification, e.g., John Doe I, II, III, etc., by which plaintiff can ascertain whether the documents produced relate to the same or different individuals. Pertinent information, such as the student's race or ethnicity, when the student was admitted into LBYH and Zinsmeyer, the reasons for such

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admission, whether the student had an IEP, when the IEP was formulated, etc., should not be redacted.

> FN12. Contrary to defendants' assertion, *Johnson ex rel. Johnson* does not support defendants' privacy objections; to the contrary, in *Johnson ex rel. Johnson,* the Tenth Circuit held a district court did not abuse its discretion in denying a motion to compel the***identities*** of all infants who had participated in a medical study when the defendants "did provide information about the care rendered to each participant in the study." *Johnson ex rel. Johnson,* 971 F.2d at 1497.
>
> FN13. In granting plaintiffs' motion to compel, the *Lora* court set forth other steps a court might take to protect third party privacy rights:
>
> > In addition to requiring that all identifying data be redacted and the files coded, the court may order that the information they contain be used solely for the purpose of the pending litigation; strict confidentiality may be enforced under penalty of contempt; the number of copies to be made of the documents may be rigidly regulated; files submitted to the court may be ordered sealed; and all material may be required to be returned to the defendants immediately upon conclusion of this suit. Under such a protective scheme the invasion of the children's privacy will be minimal.
>
> *Lora,* 74 F.R.D. at 582-83.

Site Inspections:

Plaintiff seeks permission to inspect and videotape both LBYH and Zinsmeyer, arguing that a videotape of both facilities would "put his claims into context by being able to present images of Zinsmeyer Academy and LBYH" and show a jury the interrelationship between defendants LBYH and Zinsmeyer since Zinsmeyer is on the grounds of LBYH. Jt. Stip. 29:17-18. Further, plaintiff states he has "agreed not to take photographs while school is in session and not to speak to any students." Jt. Stip. at 29:18-19.

Defendant LBYH opposes any on-site inspection on the ground "Plaintiff's claims revolve around the education that he received, not the residential services that he received." Jt. Stip. at 32:7-8. Nevertheless, defendant LBYH states it "is willing to give Plaintiff" the information he seeks about the "size, dimensions and layouts of the youth home and its proximity to Zinsmeyer." Jt. Stip. at ***659** 33:4-9. Defendant Zinsmeyer is "willing to allow a site inspection of its property on a non-school day...." Jt. Stip. at 30:24-25. However, defendant Zinsmeyer raises the concern that any videotape of its facility would contain images that "necessarily contain the personal effects of the students at the school, or the works of the students that are on display"; thus, the identities of the wards could be disclosed. Jt. Stip. at 31:10-13.

[5] "Since entry upon a party's premises may entail greater burdens and risks than mere production of documents, a greater inquiry into the necessity for inspection would seem warranted." *Belcher v. Bassett Furniture Indus., Inc.,* 588 F.2d 904, 908 (4th Cir.1978). Here, "plaintiff has made only a vague and general assertion of the need for the inspection[s], unsupported by a substantive declaration establishing the existence of facts demonstrating the need." *Fitzpatrick v. Arco Marine, Inc.,* 199 F.R.D. 663, 664 (C.D.Cal.2001); *Schwab v. Wyndham Int'l, Inc.,* 225 F.R.D. 538, 539 (N.D.Tex.2005). Moreover, an on-site inspection of LBYH is not relevant since the gravamen of plaintiff's complaint does not address LBYH's facility. Finally, plans, dimensions and distances of the property on which LBYH and Zinsmeyer are located can easily be obtained by appropriately framed interrogatories, requests for production of documents or deposition questions of defendants' employees or employees of defendants' parent corporation. Thus, plaintiff has not shown good cause for an on-site inspection and the photographing of LBYH, and plaintiff's motion to inspect and photograph LBYH should be denied.

However, since defendant Zinsmeyer does not oppose plaintiff's request for an on-site inspection, inspection of that facility is a different matter. More-

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over, such an inspection undoubtedly would enhance plaintiff's understanding of how the educational process is conducted at Zinsmeyer and how that compares to a public school. On the other hand, plaintiff has not set forth any persuasive rationale as to why an inspection needs to occur on a school day, when it would unnecessarily interrupt the school's activities and intrude upon the students' privacy. Therefore, plaintiff's motion to compel the inspection and the photographing of Zinsmeyer's facility should be granted, provided the photographing occurs on a non-school day when no students are present and does not include recording images containing the personal effects of students, when such effects-for instance, schoolwork with the student's name on it-would serve to easily identify a student. *N.O. v. Callahan*, 110 F.R.D. 637, 640-41 (D.Mass.1986). Moreover, the photographing of Zinsmeyer may include the exterior of the facility, which will undoubtedly, to some extent, show that facility's location vis-a-vis the location of LBYH.

III

[6][7] "It is well-established that [under the Federal Rules of Civil Procedure,] the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public." *San Jose Mercury News, Inc. v. United States Dist. Court N. Dist.*, 187 F.3d 1096, 1103 (9th Cir.1999); *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir.2002). However, Rule 26(c)"authorizes a district court to override this presumption where 'good cause' is shown." *San Jose Mercury News, Inc.*, 187 F.3d at 1103. Under Rule 26(c), a protective order should be granted when the moving party establishes "good cause" for the order and "justice requires [a protective order] to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense...."Fed.R.Civ.P. 26(c). "For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted." *Phillips*, 307 F.3d at 1210-11; *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir.), *cert. denied*, 506 U.S. 868, 113 S.Ct. 197, 121 L.Ed.2d 140 (1992). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Beckman Indus., Inc.*, 966 F.2d at 476 (internal quotations marks omitted).

[8] The plaintiff seeks a protective order to cover any financial information obtained from defendants LBYH and Zinsmeyer, plaintiff's own Juvenile Court information, ***660** and the Juvenile Court information of any other minor, and that seems quite reasonable to this Court since financial information is usually private and public access to information about wards of the Juvenile Court would undermine protections under California law. Moreover, although plaintiff is now an adult, disclosure of the personal information in his Juvenile Court records, and even the fact that he was a ward of the Juvenile Court, would be embarrassing to plaintiff. Since embarrassment is one of the factors this Court should consider in determining whether to issue a protective order, plaintiff has met his burden under Rule 26(c) to show that a protective order would be appropriate. *Phillips*, 307 F.3d at 1210-11 & n. 1; *Beckman Indus., Inc.*, 966 F.2d at 475-76.

The protective order proposed by plaintiff is a blanket protective order that goes beyond protecting the Juvenile Court records of plaintiff and other minors, and "place[s] upon the parties themselves, or others from whom discovery is sought, the initial burden of determining what information is entitled to protection." *Gillard v. Boulder Valley School Dist.*, 196 F.R.D. 382, 385 (D.Colo.2000). Since a blanket protective order "alleviat[es] the need for and delay occasioned by extensive and repeated judicial intervention [,]" plaintiff's showing of good cause for entry of a protective order supports the issuance of the protective order proposed by plaintiff. *Id.* at 367. Of course, this Court retains the power to modify or lift any protective order it has entered. *Empire Blue Cross & Blue Shield v. Janet Greeson's A Place For Us, Inc.*, 62 F.3d 1217, 1219 (9th Cir.1995); *Beckman Indus., Inc.*, 966 F.2d at 473.

ORDER

1. Plaintiff's motion to compel responses to requests for production nos. 37 and 38 from defendant Long Beach Youth Home is granted; however, defendant Long Beach Youth Home may redact from those documents the minor's name, Social Security number, date of birth, address, and telephone number, as well

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as the minor's parent's or guardian's name, address, telephone number and Social Security number. The student's identification number should not be redacted unless defendant replaces that number with some other identification method by which plaintiff can ascertain whether the documents produced relate to the same or different individuals.

2. Plaintiff's motion to compel responses to requests for production nos. 2 through 4 and 32 through 34 from defendant Zinsmeyer Academy is granted; however, defendant Zinsmeyer Academy may redact from those documents the minor's name, Social Security number, date of birth, address, and telephone number, and the minor's parent's or guardian's name, address, telephone number and Social Security number. The student's identification number should not be redacted unless defendant Zinsmeyer Academy replaces that number with some other method of identification by which plaintiff can ascertain whether the documents produced relate to the same or different individuals.

3. Plaintiff's motion for an on-site inspection and videotaping of defendant Long Beach Youth Home is denied.

4. Plaintiff's motion for an on-site inspection and videotaping of defendant Zinsmeyer Academy is granted; provided, however, the videotaping occurs on a non-school day when no students are present, and such videotaping does not include recording images containing the personal effects of students that would serve to easily identify the student.

5. Plaintiff's motion for a protective order is granted, and the Court will sign the order proposed by plaintiff.

C.D.Cal.,2005.
Keith H. v. Long Beach Unified School Dist.
228 F.R.D. 652, 62 Fed.R.Serv.3d 186, 199 Ed. Law Rep. 246

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EXHIBIT 20

United States Court of Appeals,
Tenth Circuit.

Carlton JOHNSON, by Sharon JOHNSON as his next friend; Stonewall Jackson Smith, deceased, by and through Frieda Smith and John Smith; Melissa Camp, deceased, by and through Cheparney Camp; and the Spina Bifida Association of America; Plaintiffs-Appellants,
and
Sharon Johnson; and the Association for Persons With Severe Handicaps, individually and on behalf of others similarly situated, Plaintiffs,
v.
Webb THOMPSON, M.D., Chief of Staff and Medical Director, Oklahoma Children's Memorial Hospital, in his individual and official capacities; Jerry D. Razook, M.D., Attending Assistant Professor of Pediatrics, Pediatric Cardiology Service, Oklahoma Children's Memorial Hospital, in his individual capacity; Gregory Herbeck, M.D., Intern Department of Pediatrics, Oklahoma Children's Memorial Hospital, in his individual capacity; Cynthia Houdesheldt, M.D., in her individual capacity; Richard H. Gross, M.D., in his individual capacity; William R. Burkett, Patty Eaton, Reginald Barnes, W.E. Farha, Joseph W. Stafford, Jane Hartley, Virginia Kidd, John E. Orr, Wayne C. Chandler, Members, Oklahoma Commission for Human Services; Robert Bonar, Administrator, Children's Hospital of Oklahoma; Andrew A. Lasser, C.E.O., Oklahoma Medical Center; Ron Dorris, Chief Operation Officer, Oklahoma Medical Center; Laura Tull, R.N.; Ruth Tatyrek, M.S.W.; John Stuemky, M.D.; Michael P. Morris, M.D.; Benjamin Demps, Jr., Director, Oklahoma Department of Human Services; J. Andrew Sullivan, M.D.; David Yngve, M.D.; William E. Barnes, M.D.; Harriet Coussons, M.D.; and Alan Olson, M.D., Defendants-Appellees,
and
Thomas Pratt, M.D., J. Patrick Livingston, M.D., and W.J. Craig, M.D., in their individual capacities, Defendants.
No. 90-6107.

Aug. 6, 1992.

Infants born with myelomeningocele, a form of spina bifida, and their personal representatives, filed federal civil rights action against, inter alia, medical service providers and administrators at hospital. The United States District Court for the Western District of Oklahoma, Wayne E. Alley, J., 125 F.R.D. 169, denied plaintiffs' application for class certification and later entered judgment for defendants. On appeal, the Court of Appeals, Ebel, Circuit Judge, held that: (1) medical team's alleged discrimination on basis of socioeconomic status regarding its treatment recommendations for infants with spina bifida did not result "solely by reason of * * * handicap" within meaning of § 504 of Rehabilitation Act and plaintiffs did not show they were "otherwise qualified" for treatment they did not receive for purposes of other Rehabilitation Act claims; (2) for purposes of claim that discrimination on basis of socioeconomic status violated their rights to due process and equal protection, there was no evidence of discriminatory harm, and fact that infants received some medical benefits at hospital did not entitle them constitutionally to further treatment; (3) denial of motion to compel discovery of names of all participants in medical team study was not abuse of discretion; and (4) for purposes of negligence claim under Oklahoma law based on failure to obtain mother's informed consent regarding decision to administer supportive care only to her son, there was no showing of resulting injury in light of evidence that infant suffered from anencephaly and would not have survived even with vigorous treatment.

Affirmed.

West Headnotes

[1] Federal Courts 170B 776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases

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Order dismissing claim on the pleadings for failure to state claim upon which relief could be granted would be reviewed de novo. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[2] Civil Rights 78 ⚿1055

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1055 k. Publicly Assisted Programs. Most Cited Cases
(Formerly 78k107(1))
To state claim under § 504 of Rehabilitation Act, plaintiff must prove that he is handicapped individual under Act, that he is otherwise qualified for benefit sought, that he was discriminated against solely by reason of his handicap, and that program or activity in question receives federal financial assistance. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

[3] Civil Rights 78 ⚿1019(3)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1016 Handicap, Disability, or Illness
78k1019 Who Is Disabled; What Is Disability
78k1019(3) k. Particular Conditions, Limitations, and Impairments. Most Cited Cases
(Formerly 78k107(1))
Infant born with spina bifida birth defect is "handicapped individual" within meaning of Rehabilitation Act. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

[4] Civil Rights 78 ⚿1015

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1007 Bases of Discrimination and Classes Protected
78k1015 k. Other Particular Bases or Classes. Most Cited Cases
(Formerly 78k107(1))

Civil Rights 78 ⚿1033(2)

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1030 Acts or Conduct Causing Deprivation
78k1033 Discrimination in General
78k1033(2) k. Particular Cases and Contexts. Most Cited Cases
(Formerly 78k107(1))
Alleged discrimination against infants with spina bifida, based on their low socioeconomic status in relation to other infants with that handicap, was not actionable under § 504 of Rehabilitation Act, as it did not result "solely by reason of * * * handicap." Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

[5] Civil Rights 78 ⚿1045

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1043 Public Accommodations
78k1045 k. Medical Facilities and Services. Most Cited Cases
(Formerly 78k107(1), 78k110.1, 78k110)
Infants born with form of spina bifida were not "otherwise qualified" for treatment they did not receive for purposes of claim that team of doctors and other professionals at hospital violated Rehabilitation Act by using anticipated degree of handicap as basis for recommending that beneficial medical treatment not be provided. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

[6] Civil Rights 78 ⚿1045

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1043 Public Accommodations
78k1045 k. Medical Facilities and Services. Most Cited Cases
(Formerly 78k107(1))
Section 504 of Rehabilitation Act proscribes dis-

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crimination between the nonhandicapped and the "otherwise qualified" handicapped and does not create any absolute substantive right to treatment. Rehabilitation Act of 1973, § 504, as amended, 29 U.S.C.A. § 794.

[7] Federal Courts 170B ⚿776

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
District court's ruling on motion for directed verdict is reviewed de novo.

[8] Federal Courts 170B ⚿764

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
170Bk764 k. Taking Case from Jury. Most Cited Cases

Federal Courts 170B ⚿798

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)3 Presumptions
170Bk798 k. Directed Verdict. Most Cited Cases
On review of district court's ruling on motion for directed verdict, Court of Appeals looks to record to see if the evidence, construed in the light most favorable to the nonmoving party supports only one resolution of the issue.

[9] Civil Rights 78 ⚿1422

78 Civil Rights
78III Federal Remedies in General
78k1416 Weight and Sufficiency of Evidence
78k1422 k. Other Particular Cases and Contexts. Most Cited Cases
(Formerly 78k242(1))
For purposes of claim that discrimination in medical treatment of infants born with form of spina bifida based on socioeconomic factors violated their rights to due process and equal protection, there was no evidence of discriminatory harm; evidence indicated only that team of health professionals at hospital considered socioeconomic factors in making treatment recommendation and not that factors affected outcome of recommendations in individual cases, i.e., that infants' socioeconomic status was factor that caused recommendation that they receive only supportive care. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amends. 5, 14.

[10] Constitutional Law 92 ⚿4048

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)1 In General
92k4047 Duty to Protect; Failure to Act
92k4048 k. In General. Most Cited Cases
(Formerly 92k255(1))
While due process clause protects interest in life, state does not necessarily have constitutional duty to take affirmative steps to preserve life. U.S.C.A. Const.Amends. 5, 14.

[11] Constitutional Law 92 ⚿4049

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)1 In General
92k4047 Duty to Protect; Failure to Act
92k4049 k. Custody or Restraint; Special Relationship. Most Cited Cases
(Formerly 92k252.5)
Substantive due process right to medical treatment exists only in narrow circumstances, specifically, when state takes person into its custody and holds him there against his will. U.S.C.A. Const.Amends. 5, 14.

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[12] Civil Rights 78 ⚿1032

78 Civil Rights
781 Rights Protected and Discrimination Prohibited in General
78k1030 Acts or Conduct Causing Deprivation
78k1032 k. Particular Cases and Contexts. Most Cited Cases
(Formerly 78k110.1, 78k110)

Civil Rights 78 ⚿1039

78 Civil Rights
781 Rights Protected and Discrimination Prohibited in General
78k1030 Acts or Conduct Causing Deprivation
78k1039 k. Failure to Act or Protect or to Enforce Law. Most Cited Cases
(Formerly 78k110.1, 78k110)
Infants born with spina bifida did not have federal civil rights cause of action for violation of their substantive due process rights based on denial of further medical treatment, even though state provided them with some medical services. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amends. 5, 14.

[13] Federal Courts 170B ⚿666

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk665 Notice, Writ of Error or Citation
170Bk666 k. Requisites and Sufficiency; Defects. Most Cited Cases
If party's name does not appear in timely filed notice of appeal, that party has not appealed any adverse judgment.

[14] Federal Courts 170B ⚿820

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk820 k. Depositions and Discovery. Most Cited Cases
Orders relating to discovery are reviewed for abuse of discretion.

[15] Federal Civil Procedure 170A ⚿1275

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1272 Scope
170Ak1275 k. Identity and Location of Witnesses and Others. Most Cited Cases
District court could deny motion to compel discovery of names of all participants in study conducted by team of doctors and other health professionals treating newborn infants with myelomeningocele in suit alleging discriminatory treatment based on handicap and on socioeconomic status, based on its conclusion that privacy interests of the other study participants outweighed the plaintiffs' need for information sought. Rehabilitation Act of 1973, § 2 et seq., as amended, 29 U.S.C.A. § 701 et seq.; 42 U.S.C.A. § 1983.

[16] Limitation of Actions 241 ⚿199(1)

241 Limitation of Actions
241V Pleading, Evidence, Trial, and Review
241k199 Questions for Jury
241k199(1) k. In General. Most Cited Cases
When father of infant born with form of spina bifida should have learned of relevant facts was for jury, for purposes of determining whether infant's negligence claims were untimely under Oklahoma law.

[17] Federal Civil Procedure 170A ⚿181

170A Federal Civil Procedure
170AII Parties
170AII(D) Class Actions
170AII(D)3 Particular Classes Represented
170Ak181 k. In General. Most Cited Cases
In federal civil rights suit by infants born at Oklahoma children's hospital with form of spina bifida, district court could deny application for class certifi-

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cation based on its conclusion that the number of infants denied vigorous treatment was too small to meet numerosity requirement. Fed.Rules Civ.Proc.Rule 23(a)(1), 28 U.S.C.A.

[18] Federal Courts 170B ⚿763.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
170Bk763.1 k. In General. Most Cited Cases
(Formerly 170Bk763)
Standard of review for denial of motion for reconsideration depends on nature of underlying decision.

[19] Health 198H ⚿906

198H Health
198HVI Consent of Patient and Substituted Judgment
198Hk904 Consent of Patient
198Hk906 k. Informed Consent in General; Duty to Disclose. Most Cited Cases
(Formerly 299k15(8) Physicians and Surgeons)
Under Oklahoma law, plaintiff must prove that injury resulted in order to present prima facie case of breach of duty to inform.

[20] Health 198H ⚿911

198H Health
198HVI Consent of Patient and Substituted Judgment
198Hk911 k. Minors in General; Consent of Parent or Guardian. Most Cited Cases
(Formerly 299k15(8) Physicians and Surgeons)
Under Oklahoma law, physicians were not liable for breach of duty to inform mother of their decision to administer only supportive care to infant with spina bifida, in light of evidence that infant suffered from "anencephaly," a congenital absence of the brain, and thus would not have survived even with vigorous treatment.

***1490** Larry A. Tawwater of Lampkin, McCaffrey & Tawwater, Oklahoma City, Okl. (Ben T. Lampkin and Jo L. Slama of Lampkin, McCaffrey & Tawwater, and James Bopp, Jr., Thomas J. Marzen, and Mary M. Nimz of The National Legal Center for the Medically Dependent and Disabled, Inc., Indianapolis, Ind., with him on the brief), for plaintiffs-appellants Carlton Johnson, Stonewall Jackson Smith, and Melissa Camp.

St. John Barrett, Washington, D.C., on the brief for plaintiff-appellant The Spina Bifida Ass'n of America.

Robert C. Margo (John Wiggins and Cynthia L. Sparling with him on the brief) of Short Barnes Wiggins Margo & Adler, Oklahoma City, Okl., for defendants-appellees Richard Gross, M.D., J. Andrew Sullivan, M.D., David Yngve, M.D., William Barnes, M.D., Harriet Coussons, M.D., Webb Thompson, M.D., Jerry Razook, M.D., Gregory Herbeck, M.D., John Stuemky, M.D., Alan Olson, M.D., and Cynthia Houdesheldt, M.D.

John G. Fears, Asst. General Counsel, Dept. of Human Services, Oklahoma Com'n for Human Services, Oklahoma City, Okl., for defendants-appellees Benjamin Demps, Jr., William R. Burkett, Patty Eaton, Reginald Barnes, W.E. Farha, Joseph W. Stafford, Jane Hartley, Virginia Kidd, John E. Orr, Wayne C. Chandler, Robert Bonar, Andrew A. Lasser, Ron Dorris, Laura Tull, R.N., and Ruth Tatyrek, M.S.W.

Before HOLLOWAY and EBEL, Circuit Judges, and OWEN, District Judge.[FN*]

FN* Honorable Richard Owen, Senior District Judge, United States District Court for the Southern District of New York, sitting by designation.

EBEL, Circuit Judge.

This appeal requires us to confront a variety of issues regarding the medical treatment provided to certain infants born with spina bifida. We address primarily whether the infants' rights under the Constitution and under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, were violated. The district court

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entered judgment for the defendants. We affirm.

I. Background

Plaintiffs-Appellants Carlton Johnson, Melissa Camp, and Stonewall Jackson Smith were all born with myelomeningocele ("MM"), a type of spina bifida, at Oklahoma Children's Memorial Hospital ("OCMH"). The appellants allege that they received discriminatory treatment based on their handicap and on their socioeconomic status. The parties sharply dispute many of the facts in this case. However, the record supports the following factual background.

Defendant-appellee Dr. Richard H. Gross led a team of doctors and other health professionals ("the MM team") at OCMH who treated newborn infants with myelomeningocele. This treatment, which includes surgery and the administering of antibiotics, must take place soon after ***1491** birth. In some cases, however, the infant will not survive even with treatment. In such cases, treating the infant merely prolongs his or her suffering.

In conjunction with his work at the hospital, Dr. Gross performed a study and published an article, entitled *Early Management and Decision Making for the Treatment of Myelomeningocele,* 72 Pediatrics 450 (1983). This study covered the period 1977 through 1982, during which time the MM team evaluated sixty-nine infants born with myelomeningocele. The MM team recommended "vigorous treatment," i.e., surgery and antibiotics, for thirty-six of the infants. One of these infants later died of unrelated causes; the rest survived. The team recommended "supportive care," i.e., no treatment other than making the infants as comfortable as possible, for the remaining thirty-three infants. The parents of five infants in the latter group rejected the recommendations, and three of these infants survived. Several other infants survived without treatment for several months and were subsequently treated. The remaining twenty-four infants receiving supportive care died.

The appellants allege that when the MM team made its recommendations, it considered both medical and nonmedical criteria, the latter including the parents' socioeconomic status. The appellants allege that the MM team discriminated against infants who came from families that the team believed lacked the intellectual and financial resources to provide the appropriate continuing care for a child with MM. According to the appellants, the MM team was more likely to recommend only supportive care for infants from such families. The appellants further allege that the MM team did not inform parents of its consideration of such factors when it made its recommendation. Although the appellees argue that the parents made the ultimate treatment decision, parents of sixty-four of the sixty-nine infants followed the MM team's recommendation. Thus, the appellants argue, the MM team was the true decisionmaker.

Melissa Camp and Stonewall Jackson Smith were participants in the study. The team recommended, and each infant received, only supportive care; both died. Carlton Johnson was born after completion of the study, but while the team allegedly continued to use the study's criteria to make its recommendation. The MM team recommended and Johnson received only supportive care. He survived without treatment for seventeen months, when surgery was finally performed. He was still alive at the time of trial, but suffered a severe mental handicap allegedly due, in part, to the team's failure to treat him immediately.

The hospital changed its practice in 1984. Since then, all infants born with spina bifida have received vigorous treatment, with the exception of one infant for whom treatment clearly would have been futile.

The parents of Camp, Smith, and Johnson, on behalf of their children, together with the Spina Bifida Association of America ("SBAA") and the Association for Persons with Severe Handicaps ("the plaintiffs"), filed suit against the members of the MM team, various other physicians, and a number of state officials. The plaintiffs sought class certification on behalf of 156 potential members, all infants born with MM at OCMH during the pendency of the study and all those born afterward while OCMH allegedly continued to use the study criteria. In their complaint, the plaintiffs asserted causes of action from violations of rights arising under, among other sources, the Due Process Clause, the Equal Protection Clause, section 504 of the Rehabilitation Act of 1973 ("section 504"), and state law. The plaintiffs sought compensa-

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tory and punitive damages along with declaratory and injunctive relief.

The district court denied the plaintiff's application for class certification, 125 F.R.D. 169. In addition, the court dismissed, pursuant to Fed.R.Civ.P. 12(b)(6), the cause of action brought under section 504. It granted summary judgment in favor of the defendants on the claims for declaratory and injunctive relief and accordingly dismissed from the action all defendants against whom the plaintiffs had sought only such relief. The court also ***1492** granted summary judgment in favor of defendant Dr. Alan Olson.

Trial commenced in 1990 against the remaining defendants on the plaintiffs' claims based on 42 U.S.C. § 1983 and state common law negligence. Prior to submitting the case to the jury, however, the district court directed verdicts in favor of the defendants on all claims asserted on behalf of plaintiff Stonewall Jackson Smith, all claims asserted against defendants Dr. Gregory Herbeck and Dr. Jerry D. Razook, and all claims asserted under 42 U.S.C. § 1983. The court then submitted Carlton Johnson's and Melissa Camp's negligence claims against the remaining physician defendants to the jury, which found for the defendants.

Camp, Smith, and Johnson, together with the SBAA, filed a timely notice of appeal.[FN1] We have jurisdiction pursuant to 28 U.S.C. § 1291.

> FN1. For convenience, we will refer to the infants Camp, Smith, and Johnson as "the appellants."

II. Section 504

[1] The appellants argue that the district court erred in dismissing their cause of action under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Because the court dismissed this claim on the pleadings pursuant to Fed.R.Civ.P. 12(b)(6), we review its order de novo. *Ayala v. Joy Mfg. Co.*, 877 F.2d 846, 847 (10th Cir.1989).

[2] At the time this action was brought, section 504 provided in relevant part:

> No otherwise qualified handicapped individual in the United States, as defined in [29 U.S.C. § 706(7)], shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency....

29 U.S.C.A. § 794 (West 1985).[FN2] Thus, to state a claim under section 504, "a plaintiff must prove (1) that he is a 'handicapped individual' under the Act, (2) that he is 'otherwise qualified' for the [benefit] sought, (3) that he was [discriminated against] solely by reason of his handicap, and (4) that the program or activity in question receives federal financial assistance." *Strathie v. Department of Transp.*, 716 F.2d 227, 230 (3d Cir.1983) (citation omitted); *see also Rothschild v. Grottenthaler*, 907 F.2d 286, 289-90 (2d Cir.1990).

> FN2. Section 504 was amended in 1986, after the appellants first filed this action, and again in 1988. Neither amendment substantively affects the meaning of the section as relevant to the instant appeal.

The district court held that "[w]hen the intervention of parental decision, well based on adequate medical briefings or not, necessarily lies in the path of the infant's receipt of the benefit, it cannot be said either that the infant is [']otherwise qualified[*'] or that the discrimination is [']solely [*'] because of handicap." R., Vol. I, Doc. 158, at 1. The appellants argue that if the MM team's actions rendered parental consent a sham, such "consent" cannot be considered an intervening cause that makes section 504 inapplicable. We agree with this argument by the appellants, but nonetheless conclude that the district court's dismissal of the section 504 claim was proper, albeit for different reasons.

Whether section 504 applies to "individual medical treatment decisions involving handicapped infants" is a controversial issue that the Supreme Court has expressly left open. *See Bowen v. American Hosp. Ass'n.*, 476 U.S. 610, 624, 106 S.Ct. 2101, 2110, 90 L.Ed.2d 584 (1986) (plurality opinion). The appel-

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lants argue that the MM team's conduct constituted discrimination in violation of section 504 based on two principal grounds. They argue primarily that the team recommended only supportive care for Camp, Smith, and Johnson because their families were of low socioeconomic status. They argue secondarily that, in general, the team recommended supportive care for those infants as to whom they anticipated a greater degree of handicap. In addition, the SBAA makes a third argument that the hospital discriminated ***1493** against *all* infants born with MM. We deal with each argument in turn.

A. *Discrimination Based on Socioeconomic Status*

In essence, the appellants argue that but for (1) having spina bifida and (2) being of low socioeconomic status, the MM team would not have recommended that they receive only supportive care. Because of the discrimination based on these two conditions, the appellants assert a violation of section 504. To evaluate their claim, we consider whether the appellants have met section 504's four conditions.

[3] The Supreme Court's decision in *Bowen* establishes that the first condition-that infants born with spina bifida are "handicapped individuals" under the Rehabilitation Act of 1973-has been met. Although the Supreme Court did not issue a majority opinion in that case, seven Justices agreed that the term encompasses "an infant who is born with a congenital defect." *See Bowen,* 476 U.S. at 624, 106 S.Ct. at 2110 (opinion of Stevens, J., joined by Marshall, Blackmun & Powell, JJ.); *id.* at 652, 106 S.Ct. at 2125 (opinion of White, J., joined by Brennan & O'Connor, JJ.).

[4] The appellants' complaint fails to satisfy both the second and third conditions. However, for purposes of our holding with regard to these particular allegations, we need address only the third condition, that the discrimination resulted "solely by reason of [the] handicap." 29 U.S.C. § 794. In essence, the appellants argue that the team discriminated against them in relation to other infants with spina bifida because of their low socioeconomic status. Section 504, by its very terms, does not cover discrimination among similarly handicapped persons. *See Clark v. Cohen,* 613 F.Supp. 684, 693 (E.D.Pa.1985), *aff'd on other grounds,* 794 F.2d 79 (3d Cir.), *cert. denied,* 479 U.S. 962, 107 S.Ct. 459, 93 L.Ed.2d 404 (1986). The word *solely* provides the key: the discrimination must result from the handicap and from the handicap alone. If others with the same handicap do not suffer the discrimination, then the discrimination does not result "solely by reason of [the] handicap." Here, the appellants allege that the discrimination resulted at least in part from their low socioeconomic status. That discrimination is not actionable under section 504. Accordingly, we hold that the district court correctly dismissed the causes of action based on those allegations for failure to state a claim under section 504.

B. *Discrimination Based on Degree of Handicap*

[5] The appellants argue that the MM team "used the anticipated degree of handicap as a basis for recommending that beneficial medical treatment not be provided" and in so doing violated section 504. Corrected Br. in Chief of Appellants Carlton Johnson, Stonewall Jackson Smith and Melissa Camp at 30 [hereinafter Appellants' Br. in Chief]. We reject this argument because the appellants fail to satisfy the second condition of section 504, that they were "otherwise qualified" for the treatment they did not receive.

The "otherwise qualified" language, when considered in conjunction with the "solely" language of the third condition, poses a formidable obstacle for anyone alleging discrimination in violation of section 504 based upon the failure to receive medical treatment for a birth defect. Such a plaintiff must prove that he or she was discriminatorily denied medical treatment because of the birth defect and, at the same time, must prove that, in spite of the birth defect, he or she was "otherwise qualified" to receive the denied medical treatment. Ordinarily, however, if such a person were not so handicapped, he or she would not need the medical treatment and thus would not "otherwise qualify" for the treatment.

We agree, therefore, with the Second Circuit's analysis in *United States v. University Hospital, State University of New York at Stony Brook,* 729 F.2d 144 (2d Cir.1984). In that case, the court considered the application of section 504, and its second requirement in particular, to infants born with multiple birth de-

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fects. The court stated that the term *otherwise qualified**1494** cannot ordinarily be applied "in the comparatively fluid context of medical treatment decisions without distorting its plain meaning. In common parlance, one would not ordinarily think of a newborn infant suffering from multiple birth defects as being 'otherwise qualified' to have corrective surgery performed." *Id.* at 156. The court reasoned, "[w]here the handicapping condition is related to the condition(s) to be treated, it will rarely, if ever, be possible to say ... that a particular decision was 'discriminatory.' " *Id.* at 157.[FN3]

> FN3. Several jurists have hypothesized situations in which the handicap that forms the basis of the section 504 discrimination bears no relation to the medical treatment sought but denied. For example, Justice White stated in *Bowen:*
>
> > An esophageal obstruction, for example, would not be part and parcel of the handicap of a baby suffering from Down's syndrome, and the infant would benefit from and is thus otherwise qualified for having the obstruction removed in spite of the handicap. In this case, the treatment is completely unrelated to the baby's handicapping condition. If an otherwise normal child would be given the identical treatment, so should the handicapped child if discrimination on the basis of the handicap is to be avoided.
>
> *Bowen,* 476 U.S. at 655, 106 S.Ct. at 2127 (footnote omitted) (White, J., dissenting); *see also University Hospital,* 729 F.2d at 162 (Winter, J., dissenting). We do not decide whether section 504 might apply in such a situation, but it would seem that the "otherwise qualified" condition might be satisfied under such a scenario. *See Glanz v. Vernick,* 750 F.Supp. 39, 45-46 (D.Mass.1990) (AIDS patient denied treatment for ear perforation stated claim under section 504). We do not find such a situation here.

C. *Discrimination Against All Infants with MM*

The SBAA argues that the team discriminated against all infants with MM by designating them as subjects of a medical research project without their parents' knowledge or consent. Because all infants with MM were part of the study during its pendency, the SBAA contends the discrimination was "solely" due to the handicap, thereby meeting the third condition.

Under this argument, the appellants still fail to satisfy the second condition. The infants required the medical treatment sought only because they were born with MM. Thus, they were not "otherwise qualified" to receive the medical treatment denied to them because of the alleged discrimination.

[6] Section 504 proscribes discrimination between the nonhandicapped and the "otherwise qualified" handicapped. It does not create any absolute substantive right to treatment. As the plurality stated in *Bowen,*" 'Section 504 seeks to assure evenhanded treatment'; 'neither the language, purpose, nor history of [section] 504 reveals an intent to impose an affirmative-action obligation' on recipients of federal financial assistance." *Bowen,* 476 U.S. at 640, 106 S.Ct. at 2118 (plurality opinion) (citations omitted). The plurality also noted that "nothing in the legislative history ... even remotely suggests that Congress contemplated the possibility that 'section 504 could or would be applied to treatment decisions [ ] involving defective newborn infants.' " *Id.* at 645 n. 33, 106 S.Ct. at 2121 n. 33 (citation omitted; alteration added). Without a showing that the nonhandicapped received the treatment denied to the "otherwise qualified" handicapped, the appellants cannot assert that a violation of section 504 has occurred.

In sum, we hold that the appellants failed to state a claim for violation of section 504 and that the district court therefore did not err in dismissing the claim brought under this section.

III. Section 1983

In their complaint below, the appellants asserted that discrimination based on socioeconomic factors violated their procedural due process and equal protection rights, that the MM team's failure to provide vig-

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orous treatment violated their substantive due process rights, that discrimination on the basis of handicap violated their rights under section 504, and that the MM team's recommendations deprived the parents of the opportunity to make decisions regarding their children's care in violation of their fundamental right to privacy. For each of these alleged violations of federal rights, the appellants brought a cause of action ***1495** under 42 U.S.C. § 1983. The district court granted the appellees' motions for directed verdicts on all of these causes of action. The appellants now argue that the district court erred in doing so.

[7][8] We review de novo the district court's ruling on a motion for directed verdict. *Hill v. Goodyear Tire & Rubber, Inc.*, 918 F.2d 877, 880 (10th Cir.1990). We look to the record to see if the evidence, construed in the light most favorable to the nonmoving party, supports only one resolution of the issue. *See* Ralston Dev. Corp. v. United States, 937 F.2d 510, 512 (10th Cir.1991).

A. *Discrimination on the Basis of Socioeconomic Status*

[9] The appellants argue that discrimination on the basis of socioeconomic status violates their right to due process and equal protection. The district court directed a verdict on this issue after concluding that no evidence supported the claim:

The article makes reference to socioeconomic factors as being considered, theoretically, but we don't have any evidence here that the children who were selected for [vigorous] treatment enjoyed a socioeconomic status any different from the ones that were recommended for supportive [care]. We don't have any evidence that wealthy parents' babies lived and poor parents' babies died; we don't have any evidence of a racial basis or anything other than a medical determination based upon degree of handicap and not on mere presence of handicap.

R., Vol. XX, at 592.

On appeal, the appellants argue that "[t]he constitutional right to be free from discrimination requires no citation." Appellants' Br. in Chief at 38. However, the district court did not direct a verdict because of a defect in the appellants' legal theory-it directed the verdict because of a lack of evidence. The appellants do not point us to any evidence that the district court may have overlooked. Indeed, they do not discuss the evidence at all.

The appellants presented as evidence only Dr. Gross' article, which indicates that the MM team considered socioeconomic factors in making its recommendation. However, the appellants presented no evidence that these factors affected the outcome of the recommendations in their individual cases. In other words, there is no evidence to establish that the appellants' socioeconomic status was a factor that caused the recommendation that they receive only supportive care. After our review of the record, we therefore agree with the district court that the appellants presented no evidence of discriminatory harm and that the district court correctly granted the motion for a directed verdict.

B. *Substantive Due Process*

The appellants argue that the appellees' conduct violated their substantive due process rights by depriving them of their liberty interests in their own lives. Because of this deprivation, the appellants urge us to reverse the district court's decision to direct a verdict for the appellees on the appellants' section 1983 claim based on substantive due process.

[10] The Due Process Clause does protect an interest in life. *E.g.*, *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 271, 110 S.Ct. 2841, 2853, 111 L.Ed.2d 224 (1990). It does not follow, however, that the state necessarily has a constitutional duty to take affirmative steps to preserve life. In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), the Supreme Court explained:

The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those

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interests do not come to harm through other means.

Id. at 195, 109 S.Ct. at 1002.

[11] In effect, the appellants argue that substantive due process implies a right to ***1496** treatment. Such a right exists only in narrow circumstances, however. Specifically, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.* at 199-200, 109 S.Ct. at 1005 (citations omitted); *see Youngberg v. Romeo*, 457 U.S. 307, 324, 102 S.Ct. 2452, 2462, 73 L.Ed.2d 28 (1982) (involuntarily committed mental patient entitled to adequate medical care).

Infants born with spina bifida do not fall into the above category; accordingly, such infants cannot claim a constitutional right to treatment. Without such a right, the appellants cannot claim a deprivation of their liberty interest if the state failed to treat them. *Cf. DeShaney*, 489 U.S. at 196-97, 109 S.Ct. at 1003-04 ("If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.") (footnote omitted).

[12] The fact that the state did provide some medical services does not alter this analysis. The First Circuit recently stated in an analogous situation involving a section 1983 claim:

Although the [state] may have played some causal role in the harm, it did so only because [the plaintiff] voluntarily availed himself of a [state] service. The [state] did not force [the plaintiff], against his will, to become dependent upon it. Thus, the [state's] actions, while possibly negligent or even willfully indifferent or reckless, did not take on the added character of violations of the federal Constitution.

Monahan v. Dorchester Counseling Center, Inc., 961 F.2d 987, 993 (1st Cir.1992). Similarly, the fact that the appellants had received some medical benefits at OCMH did not entitle them to further treatment based on substantive due process.

We accordingly affirm the district court's decision to grant a directed verdict for the appellees on the appellants' section 1983 cause of action for violation of their substantive due process rights.

C. *Section 504*

The appellants assert a violation of their rights under section 504. We held in Part II of this opinion that no violation occurred, even taking all of the appellants' allegations as true. We therefore hold that the district court did not err in directing a verdict for the appellees on the appellants' section 1983 claim for violation of rights secured by section 504.

D. *Parental Rights*

The parents argue that the MM team deprived them of the right to choose what type of medical care their children should receive. They contend that this right is inherently part of the right to privacy protected by the Fourteenth Amendment. Thus, they argue, the district court erred in directing a verdict for the appellees on their section 1983 cause of action for violation of their right to privacy.

[13] The parents did not file a notice of appeal in their own right, however, but rather took this appeal only as representatives of the infants. If a party's name does not appear in a timely filed notice of appeal, that party has not appealed any adverse judgment. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314-18, 108 S.Ct. 2405, 2407-09, 101 L.Ed.2d 285 (1988). The parents therefore are not parties to this appeal except as representatives of the infants,[FN4] and they have no standing to assert claims on their own behalf. Accordingly, we have no jurisdiction to hear the parents' argument regarding violation of their own rights.

FN4. Sharon Johnson, Carlton Johnson's mother, originally appeared as a plaintiff. She voluntarily dismissed her claims without prejudice and is no longer a party except as a representative of her son. *See* R., Vol. V, Doc. 469, at 2.

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***1497** IV. Denial of Discovery of Identities of Study Participants

[14][15] The appellants argue that the district court erred in denying their motion to compel discovery of the names of all participants in the MM team's study. We review orders relating to discovery for an abuse of discretion. *See* Willner v. Budig, 848 F.2d 1032, 1035-36 (10th Cir.1988), *cert. denied,* 488 U.S. 1031, 109 S.Ct. 840, 102 L.Ed.2d 972 (1989). We hold that the district court did not abuse its discretion in denying the motion.

The magistrate who initially decided the appellants' motion concluded that the privacy interests of the other study participants outweighed the appellants' need for the information. The appellants appealed this decision to the district court, which upheld the magistrate's judgment.

The appellants argue that the information sought went to the heart of their allegations. The appellants presented the MM team's article as preliminary evidence. The members of the team contend, however, that they did not actually make "recommendations" to the parents, but rather only presented options to them, and that they did not actually base medical decisions on socioeconomic data. Thus, the appellants sought testimony from other study participants to show the existence of a concerted plan to use socioeconomic criteria in making recommendations for appropriate treatment and to refute the appellees' contention that they merely presented options to parents who made the final choice. To obtain such testimony, the appellants sought to learn the identities of these other participants.

The decision whether to administer heroic life-sustaining treatment to a severely handicapped newborn is one of the most heartwrenching decisions a parent can be called upon to make. *See* American Academy of Pediatrics v. Heckler, 561 F.Supp. 395, 396-97 (D.D.C.1983). Parents who have had to make such a decision are entitled to privacy and confidentiality. We believe that the magistrate was correct to balance the relevance and necessity of the information the appellants requested against the rights of other participants to maintain their privacy. *See* Lukaszewicz v. Ortho Pharmaceutical Corp., 90 F.R.D. 708, 709 (E.D.Wis.1981).

The appellees did provide information about the care rendered to each participant in the study. However, the appellees did not disclose the identities of the other infants. Thus, if the appellants desired to impeach the appellees' representations regarding treatment to those other infants, the appellants had to ascertain the identities of the infants' families through other means. That no doubt presented a difficult-perhaps impossible-task for the appellants. Nonetheless, given the important interests of the other infants and their families to preserve the confidential nature of their contacts with the physicians and the hospital, we cannot say that the magistrate abused his discretion in refusing to order this discovery.

V. Other Issues

The appellants raise a number of other issues, which we need only discuss briefly.

A. *Statute of Limitations*

[16] The appellants argue that the district court erred in submitting to the jury the issue of whether Melissa Camp's negligence claim was time-barred. Because her father testified without contradiction that he did not learn of the MM team's actions until 1986, the appellants argue that the district court should have directed a verdict on this issue in favor of Melissa Camp. Instead, the court submitted the issue to the jury, which decided that Melissa Camp's claims were barred by the statute of limitations.

Under Oklahoma law, the relevant statute of limitations requires that a plaintiff bring a suit within "two years from the date [the] plaintiff knew or should have known, through the exercise of reasonable diligence[,] of the existence of the death, injury or condition complained of." Redwine v. Baptist Medical Center of Okla., Inc., 679 P.2d 1293, 1295 (Okla.1983). Moreover, "[w]hether plaintiff exercised 'reasonable diligence' in ascertaining the ***1498** cause of ... death is a question of fact to be determined by the jury." *Id.* Because the issue was not when Melissa's father learned of the relevant facts,

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but rather when he should have learned of them, the district court properly denied the motion for a directed verdict.[FN5]

FN5. In view of our resolution of this issue, the appellee's Motion to Strike Juror Affidavit and Request for Corrected Brief in Chief is moot.

B. *Class Certification*

[17] The appellants contend that the district court erred in denying their application for class certification. We review the district court's decision for abuse of discretion. *Pilots Against Illegal Dues v. Air Line Pilots Ass'n*, 938 F.2d 1123, 1134 (10th Cir.1991). The district court held that the number of infants denied vigorous treatment was too small to meet the numerosity requirement of Fed.R.Civ.P. 23(a)(1). Given our deferential standard of review, we cannot say that the court's decision was in error. *See Rex v. Owens*, 585 F.2d 432, 436 (10th Cir.1978) ("no set formula" to determine whether numerosity requirement was met; instead, this is a fact-specific inquiry best left to discretion of district court).

C. *Declaratory and Injunctive Relief*

The appellants argue that the district court erred in granting summary judgment to the appellees on the claims for declaratory and injunctive relief. Declaratory relief is discretionary, *Green v. Mansour*, 474 U.S. 64, 72, 106 S.Ct. 423, 427, 88 L.Ed.2d 371 (1985), and we find no abuse of that discretion in the court's declining to exercise jurisdiction over the appellants' claims for such relief. With regard to injunctive relief, we agree with the district court that the appellants' failure to present any evidence of continuing discrimination since 1984 renders concerns of future recurrence purely speculative. We therefore affirm the district court's grant of summary judgment on these issues.

D. *Jury Instructions*

The appellants argue that the district court instructed the jury incorrectly regarding the differing standards of conduct applicable to appellees Dr. Gross and Dr. Thompson. We find no error in the district court's reliance on *Fox v. Oklahoma Memorial Hospital*, 774 P.2d 459 (Okla.1989), which held that a plaintiff must show gross negligence to overcome the sovereign immunity enjoyed by a physician employed at a state hospital at the time of Melissa Camp's birth. *Id.* at 461. Furthermore, the court specifically explained to the jury that it was to apply a different standard of negligence to Carlton Johnson's claims because they arose at a time when Oklahoma law was different. *See* R., Vol. V, Doc. 480, Instruction No. 15.

The appellants also challenge the adequacy of the informed consent instruction given to the jury. However, the appellants failed to object to the instruction below, and on review we do not find the instruction to be plain error.

E. *Summary Judgment for Dr. Olson*

[18] The appellants appeal the district court's denial of their motion for reconsideration of the dismissal of appellee Dr. Alan Olson on summary judgment. The standard of review for the denial of a motion for reconsideration depends on the nature of the underlying decision. *See Federal Kemper Ins. Co. v. Rauscher*, 807 F.2d 345, 348-49 (3d Cir.1986). In this case, because the motion was for reconsideration of summary judgment, our review is de novo. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990). After reviewing the record, we agree with the appellees that Dr. Olson's status as an attending physician did not connect him sufficiently to the treatment decisions made and that summary judgment was appropriate.

F. *Directed Verdicts for Dr. Herbeck and Dr. Razook*

The appellants argue that the district court incorrectly directed verdicts for appellees***1499** Dr. Herbeck and Dr. Razook regarding the decision to administer supportive care to Stonewall Jackson Smith. The appellants had argued below that Smith's mother had not given informed consent to withhold vigorous treatment.

[19] Under Oklahoma law, a plaintiff must prove that injury resulted in order to present a prima facie case

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of breach of duty to inform. *Scott v. Bradford,* 606 P.2d 554, 557-59 (Okla.1979). The appellees sought to avoid liability by showing that Smith would not have survived even with vigorous treatment. In support, they introduced evidence that Smith suffered from anencephaly, a congenital absence of the brain; when such a condition is present, an infant cannot survive with or without treatment.

[20] In response, the appellants introduced evidence that the test the appellees used to test for anencephaly was not always accurate. They also introduced testimony that Smith might have survived if the test were inaccurate and he did not have anencephaly. The appellants presented no evidence, however, that the test was in fact inaccurate in this particular case or that Smith would have survived. They therefore failed to show that an injury resulted from the lack of informed consent, as required under *Scott.* Under these circumstances, we affirm the district court's decision to direct a verdict.

G. *Other Rulings*

The appellants challenge various evidentiary rulings and a ruling denying a mistrial. After reviewing the record, we find no abuse of discretion on these rulings.

The appellants also list several other issues in their "Statement of the Issues," but fail to brief them. In general, we do not address issues not briefed. *See American Airlines v. Christensen,* 967 F.2d 410, 415 n. 8 (10th Cir.1992) ("It is insufficient merely to state in one's brief that one is appealing an adverse ruling below without advancing reasoned argument as to the grounds for appeal.") (citing Fed.R.App.P. 28(a)(4), recodified as Fed.R.App.P. 28(a)(5)).

VI. Conclusion

Because we hold that the district court committed no reversible error, we AFFIRM its judgment.

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