UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

G.K., by their next friend,
Katherine Cooper, et al.

v. Case No. 21-cv-4-PB

Christopher Sununu, Governor
of New Hampshire, et al.

ORDER ON PLAINTIFFS' MOTION TO COMPEL

The plaintiffs in this putative class action are four minors with mental impairments, a record of such impairments or who are regarded as having such impairments who have been placed in the legal custody of the New Hampshire Division of Children, Youth and Families ("DCYF") due to parental abuse or neglect. They have sued New Hampshire Governor Christopher Sununu and other State officials arising out of the operation of the State's foster care system.

Plaintiffs seek declaratory and injunctive relief on behalf of themselves and a putative class on the ground that defendants are violating their rights under the Adoption Assistance and Child Welfare Act of 1990, 42 U.S.C. §§ 671 et seq., Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 et seq., and Section 504 of the Rehabilitation Act, 29 U.S.C. §§ 794 et

seq., by unnecessarily placing them in institutional and group care facilities without adequate case planning.[1]

Before the court is plaintiffs' motion to compel production of non-party foster youth case files. (Doc. No. 91). The defendants have timely objected (Doc. No. 95), and the plaintiffs have replied (Doc. No. 97). At the court's request following oral argument, the defendants submitted a declaration in support of their objection outlining the time and resources required to produce the discovery at issue (Doc. No. 108), to which the plaintiffs responded (Doc. No. 118). After considering the parties' submissions and arguments, the court grants plaintiffs' motion in part, as explained more fully below.

Background

The parties' dispute is centered on Request Number 1 in Plaintiff's Third Set of Requests for Production of Documents to DHHS ("Request No. 1), which seeks:

> All documents, regardless of time period, relating to each Older Foster Youth in the legal custody or under the protection supervision of DCYF as of April 26, 2022, including but not limited to their Case Files, information relating to each child that is contained in Bridges, and written and electronic communications concerning each child, their Case Plan, or their care.

[1]The court previously dismissed plaintiffs' claim that they categorically possess a constitutional right to counsel in certain proceedings. See Memorandum and Order (Doc. No. 49).

Def. Mem. (Doc. No. 95-1) at 1-2.[2] The plaintiffs define "older Foster Youth as foster youth between the ages of 14 and 17. DHS estimates there are approximately 180 older foster youth in DCYF custody or protective supervision. Id. The plaintiffs also concede that their request for all older youth files covers a broader range of foster youth than their putative class, which consists of older foster youth, inter alia, who have a mental impairment that substantially limits a major life activity, or have a record of such an impairment, or are regarded as having such an impairment. Compl. (Doc. No. 1) ¶ 2.[3]

Standard of Review

Rule 26 of the Federal Rules of Civil Procedure authorizes broad discovery of any non- privileged information "that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery

[2]Bridges is the New Hampshire Department of Health and Human Services' ("DHHS") child welfare information system.

[3]During oral argument, the parties agreed that they would address production of email communications not part of the files, as defined, outside the confines of this dispute.

outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). When a party fails to make requested disclosures or discovery, the requesting party may file a motion to compel. Fed. R. Civ. P. 37(a)(1). On such a motion, the party "resisting discovery, not the party moving to compel discovery, bears the burden of persuasion." Eramo v. Rolling Stone LLC, 314 F.R.D. 205, 209 (W.D. Va. 2016). Thus, once the moving party has made "a prima facie showing of discoverability," the resisting nonmovant has the burden of showing either: (1) that the discovery sought is not relevant within the meaning of Rule 26(b)(1); or (2) that the discovery sought "is of such marginal relevance that the potential harm ... would outweigh the ordinary presumption of broad discovery." Id. (internal quotation marks omitted). Moreover, "[d]istrict courts generally have broad discretion in managing discovery, including whether to grant or deny a motion to compel." Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., 43 F.3d 922, 929 (4th Cir. 1995).

Discussion

The court starts by noting that the defendants do not argue that the plaintiffs are seeking information that is not relevant to the plaintiffs' claims. See Dwayne B. v. Granholm, Civ. No. 06-13548, 2007 WL 2372363, at *4 (E.D. Mich. Aug. 17, 2007) ("It is difficult to imagine subject matter more relevant to Plaintiffs' claims of improper administration of [a state's]

Child Protective System than the very records of that system.").[4] Instead, the defendants posit two theories under which they need not produce the requested files. First, they assert that the burden of production – in terms of both time and available staff – is disproportional to the needs of the case. Second, the defendants argue that state confidentiality laws bar the disclosure of the requested information.

A. Burdensomeness

The defendant's argument that the burden of producing the requested information is disproportional to the needs of the case can be further broken down into two discrete parts. Initially, DHHS argues that it has already provided aggregated data to the plaintiffs concerning putative class members' placement, medical diagnoses and treatment that is sufficient to allow plaintiffs to determine whether the placements, diagnoses and treatments are appropriate. Relatedly, DHHS estimates that assembling the information would require between 540 and 1620 hours of work from DHHS staff, in addition to attorney time for redaction of personal identifying or attorney-client privileged information. Defendant asserts that in the absence of overall electronic storage and retrieval capability, responding fully to the production request would require DHHS personnel to "manually

[4]Indeed, it is possible that the defendants will need some of the information at issue to defend the plaintiff's claims.

search for, gather, review, and copy electronic and paper files in district offices and electronic systems" for the children at issue. Adding more detail, the defendant asserts that:

> because the Case Files for each child are maintained in paper form by each child's caseworker, DHHS staff and/or counsel would need to, among other things, locate all of the physical paper that is part of each child's Case File; manually scan those thousands-upon-thousands of paper documents; generate an electronic copy of case contact logs from the Bridges systems; cross reference the compiled records with documents stored electronically on the caseworker's network drive and in the Bridges system; and supplement the Case File with any documents found in the network drive or the Bridges system that were not in the original set of paper documents.

Def. Mem. (Doc. No. 95-1) at 4-5.[5]

As to the data already produced, the court is persuaded by the plaintiff's argument that the data is incomplete, and, at times inaccurate. See Pltf. Mem. (Doc. No. 91-1) 8-10. Of particular concern to the court is the absence in some of the data already produced of placement start and end dates and mental health or behavioral health needs and diagnoses. Id. at 9. In addition, defense counsel confirmed to plaintiffs' counsel that electronic data retrieved from the Bridges system

[5]Although defendant includes the burden of producing written and electronic communications and information relating to DHHS's Medicaid program to the objection, the court notes that the plaintiffs do not seek Medicaid information maintained by DHHS outside the foster care system or beyond defendant's possession custody or control. Pltf. Mem. (Doc. No. 91-1) at 4.

might be less complete than paper files because the electronic system required manual input by DHHS staff that may not have occurred. As especially relevant here, counsel stated that "if staff do not input a child's diagnosis in Bridges, Bridges will not show that the child has that diagnosis, even though the child's case file may contain record of that diagnosis. Id. at 9 n.3.

Nor is the court persuaded that the burden of the time and effort required to produce the requested information is disproportional to the needs of the case. This is especially true in this case, where the parties have not bifurcated class discovery and merits discovery. As noted, there is likely no more probative evidence of the defendant's operation of the state's child welfare system than the older youth files at issue. See, e.g., Dwayne B., 2007 WL 2372363, at *4. Ultimately, though, the defendant's burdensomeness argument is almost inextricably tied to its own record-keeping methods.[6] Such an obstacle cannot inure to the detriment of plaintiffs' legitimate discovery requests. "Plaintiffs may not excuse themselves from compliance with Fed. R. Civ. P. 34 by utilizing

[6]At oral argument, defense counsel noted that while the state had announced a policy to convert its record-keeping to an entirely electronic storage in 2019, that conversion was incomplete, and implementation varied among locations throughout the state.

a system of recordkeeping, which conceals rather than discloses relevant records, or makes it unduly difficult to identify or locate them, thus rendering the production of the documents an excessively burdensome and costly expedition." Flynn v. Love, No. 3:19-CV-00239-MMD-CLB, 2021 WL 4891071, at *3 (D. Nev. Oct. 19, 2021) (citing Kozlowski v. Sears Roebuck & Co., 73 F.R.D. 73, 76 (D. Mass. 1976); see also Swenson v. Mobilityless, LLC, No. 3:19-30168-MGM, 2022 WL 2347113, at *2 (D. Mass. June 29, 2022) (rejecting defendant's claim of burdensomeness due to lack of searchable database where plaintiffs sought documents "reasonably related . . . to identifying potential class members.").[7]

Nevertheless, while the burden of producing the requested discovery does not shield DHHS from its discovery obligations, the parameters of that burden should not exceed the scope of the case. Therefore, defendant need only produce files of older foster youths with mental impairments, a record of such impairments, or who are regarded as having such impairments who

[7] Moreover, defense counsel's declaration detailing the time spent producing the named plaintiffs' files (Doc. No. 108) demonstrates that the burden of document production decreases proportionally to the extent that files have already been stored electronically. But counsel also indicated at oral argument that the defendant cannot estimate the percentage of files at issue that have been converted to electronic format. This important – but unknown – variable calls into question the reliability of the defendant's time estimates.

have been placed in the legal custody of the New Hampshire Division of Children, Youth and Families ("DCYF") due to parental abuse or neglect.[8]

In addition, given that the older foster youths whose files are at issue in this case are not parties, the defendant may redact the responsive files of all personal identifying information. Should redaction be impractical, the court is satisfied that the parties' Joint Protective Order will protect the interests at stake. Nevertheless, in an abundance of caution, given that the files at issue relate to non-parties who, unlike the named plaintiffs, lack appointed next friends, any unredacted files shall be produced, in the first instance, with an "attorneys' eyes only" designation. The parties shall thereafter meet and confer as to any proposed alternate designation. If they are unable to agree, the parties may seek the court's assistance, either through motion practice or by utilizing the court's informal discovery resolution process.

B. State Law Confidentiality Protections

In addition to its disproportionality argument, DHHS also asserts that the plaintiffs' motion should be denied because state law prohibits the requested disclosures. See N.H. Rev.

[8]Although the plaintiffs assert that the defendant's record-keeping methods make it "impossible" to determine which older foster youths fit this category, Pltf. Mem. (Doc. No. 91-1) at 2 n.1, the defendant has not made such an assertion.

Stat. Ann. § 170-G:8-a. The court has previously rejected this argument in this case, see Order on Motion to Compel (Doc. No. 75), and does so again.

The First Circuit has established a two-part test for determining whether a federal court should recognize a privilege created by state law: (1) "would the New Hampshire courts recognize the privilege?" and (2) "is the asserted privilege 'intrinsically meritorious' in the federal court's own judgement?" Smith v. Alice Peck Day Mem. Hosp., 148 F.R.D. 51, 54-55 (D.N.H. 1993) (Barbadoro, J.) (citing In re Hampers, 651 F.2d 19, 22-23 (1st Cir. 1981)).

As to the first factor, the court agrees with the defendant that New Hampshire state courts would consider the privilege. The plaintiffs do not argue otherwise. But the court also notes that section 170-G:8-a(IV) allows "[a]dditional access to case records and all other records of the department . . . pursuant to the terms of a final order issued by a court of competent jurisdiction." And, in the context of confidential juvenile records, the New Hampshire Supreme Court has indicated that it was "within the trial court's discretion to grant access . . . ." Petition of State, 172 N.H. 493, 500 (2019). In light of these provisions, the court finds that the statute is not as restrictive as the defendant claims.

The second factor, "intrinsic meritoriousness," requires the court to consider four points before applying the state law privilege in federal court: (i) the communication must originate in a confidence that it will not be disclosed; (ii) this confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (iii) the relation must be one which ought to be sedulously fostered; and (iv) the harm that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation." Smith, 148 F.R.D. at 55-56 (internal citations omitted).

Here, there seems to be no dispute regarding the first three points. Thus, the court's analysis is essentially a balancing test. See Marshall v. Spectrum Medical Group, 198 F.R.D. 1, 4 (D. Me. 2000) (observing that "courts have basically balanced the interest served by the state privilege against the federal interest in favor of disclosure.")

While the court has already rejected the defendant's assertions regarding the necessity of the files to the plaintiffs' case, the court does not disagree with the defendant's assertions regarding the "extraordinarily sensitive" nature of the information in the files at issue. Def. Mem. (Doc. No. 95-1) at 12. The defendant next observes, correctly, that courts have balanced the competing interests presented by

the disclosure of confidential information by granting access only on a de-identified basis. Id. (citing cases). But rather than relying on these cases as a compromise measure, the defendant reiterates her argument that de-identification itself would be too burdensome.[9] In the court's view, the defendant is trying to have it both ways; arguing that they cannot produce the documents due to privacy concerns, but that they cannot alleviate those privacy concerns by an otherwise acceptable method because of the burden of implementing that method.

Finally, the court must consider this entire dispute in light of the parties' Joint Protective Order, which the court has already found to be sufficient to protect the interests of the named plaintiffs and others who may be referenced in their files. See Order on Motion to Compel (Doc. No. 75). While, as the defendant asserts, the JPO does not eliminate the risk of harm if the records are produced, see Def. Mem. (Doc. No. 95-1) at 13, "elimination of risk" is not the prism through which this

[9]The court is unpersuaded by the defendant's reliance on Walker v. City of New York, No. CV 2012-2535(WFK)(MDG), 2013 WL 12358693 (E.D.N.Y. 2013). The defendant correctly noted that the court recognized "that serious harm to the integrity and confidentiality of the child-abuse investigation system could result from wholesale disclosure of records that could reveal the identities of persons involved in the investigation, even if the specific names are redacted." Id. at *1. But the Walker court placed great weight on the existence of a protective order and ultimately permitted the disclosures at issue after modifying that order. Id. at 2-3.

dispute must be viewed. In addition, the court recognizes that the "additional [confidentiality] safeguard" of plaintiffs' next friends, Order (Doc. No 75) at 13, are not present with respect to the older foster youths presently at issue. Nevertheless, as previously noted, the court remains confident that the combination of the JPO's confidentiality provisions, redaction or, if unredacted, attorneys' eyes-only designations, and plaintiffs' attorneys' ethical obligations and representations to the court, will protect the older foster youth at issue while still allowing the plaintiffs to pursue their claims and plaintiffs' counsel to assemble their arguments for class certification.

Conclusion

In light of the foregoing, plaintiffs' motion to compel (Doc. No. 91) is granted, in part, as follows. DHHS shall produce, documents responsive to request No. 1 of plaintiff's third set of requests for production of documents, on or before December 1, 2022. The production is limited to those files of older foster youth with mental impairments, a record of such impairments or who are regarded as having such impairments, who have been placed in the legal custody of the New Hampshire Division of Children, Youth and Families ("DCYF") due to parental abuse or neglect. The defendant may redact personal identifying information from its document production or produce

unredacted documents for attorneys' eyes only. This Order is without prejudice to any party seeking relief regarding the same or similar subject matter should the posture of the case change with respect to class certification or in any other way.

SO ORDERED.

Andrea K. Johnstone
United States Magistrate Judge

October 19, 2022

cc: Counsel of Record