STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

Deerfield Education Association, IEA-NEA, Complainant	)	
and	)	Case No. 2019-CA-0053-C
Board of Education of Deerfield Public Schools Dist. 109, Respondent	)	

OPINION AND ORDER

I. Statement of the Case

On March 15, 2019, Deerfield Education Association, IEA-NEA (Union) filed a charge with the Illinois Educational Labor Relations Board (IELRB or Board) alleging that Board of Education of Deerfield Public Schools District No. 109 (District) committed unfair labor practices within the meaning of Section 14(a) of the Illinois Educational Labor Relations Act (Act or IELRA), 115 ILCS 5 (2018). Following an investigation, the Board's Executive Director issued a Complaint and Notice of Hearing (Complaint) alleging that the District violated Section 14(a)(5) and, derivatively, Section 14(a)(1) of the Act by refusing to provide the Union with information it requested that was necessary and relevant to its function as the exclusive representative of a bargaining unit of the District's employees. The parties waived their right to hearing and agreed to proceed upon a stipulated record. Based on the stipulated record, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order (ALJRDO) dismissing the Complaint in its entirety. The ALJ found that District legal counsel Laura Knittle's (Knittle) interview notes were not protected by attorney-client privilege, but they were protected from disclosure by the work product doctrine. As such, the ALJ determined that the District did not violate the Act by refusing to provide them to the Union. The Union filed exceptions to the

ALJRDO, and the District filed a response to the exceptions. For the reasons discussed below, we overrule ALJRDO and find that the District violated Section 14(a)(5) of the Act.

II. Factual Background

We adopt the facts as set forth in the underlying ALJRDO. Because the ALJRDO comprehensively sets forth the factual background of the case, we will not repeat the facts herein except where necessary to assist the reader.

III. Discussion

In sum, the Union argues in its exceptions to the ALJRDO that the information it requested was not protected by the work product doctrine and that the ALJ erred in finding that the work product doctrine relieved the District of its obligation to provide information requested by the Union that was relevant and necessary to its duty as the exclusive representative. In its response to the exceptions, the District asserts that the Union's exceptions are based on the introduction of new facts and arguments not properly submitted into the stipulated record and for that reason, moves to strike the Union's exceptions in their entirety. In the alternative, the District requests that we dismiss the exceptions and adopt the ALJRDO.

A. District's Motion to Strike the Union's Exceptions

The District moves to strike the Union's exceptions based on the following facts that it alleges are not contained in the stipulated record: references to an affidavit from Union Uniserv Director Mark Stein (Stein), references to verbatim statements submitted by witnesses, and that Jennifer Russell (Russell) was barred from contacting witnesses. In their Joint Motion for Entry of a Briefing Schedule and Joint Statement of Uncontested Fact (Joint Motion), the parties agreed "to rely upon this Joint Stipulation in lieu of presenting witnesses at hearing before the Administrative Law Judge, effectively waiving the ability to present evidence outside of the Joint Stipulation as provided in" Section 15 of the IELRA. The ALJ issued an order granting the Joint Motion, noting the parties' waiver of the right to present evidence outside of the stipulated record, and accepted the stipulated record in

lieu of hearing. The Joint Motion is signed by the attorneys of record for both the Union and the District.

The Union cites Stein's affidavit to assert that the District did not provide the Union with the requested names of the witnesses and the notes of the interviews. Stein's affidavit is not part of the stipulated record and thus cannot be relied upon by the Board on appeal. Witness affidavits submitted during the investigation of an unfair labor practice charge are used by the investigator and the Executive Director as an aid to determine whether a complaint should issue. For that reason, Stein's affidavit was not part of the record of the proceeding before the ALJ upon which he based his Recommended Decision and Order. Because the exceptions are an appeal to that Recommended Decision and Order, we are limited in our determination in this case to considering the record that was before the ALJ. See *College of DuPage*, 5 PERI 1196, Case No. 87-CA-0022-C (IELRB Opinion and Order, June 20, 1988). The District goes on to argue that it is not stated in the record that the Union was not provided with the names of the witnesses. This is simply not true, as the Complaint alleges that the District violated Section 14(a)(5) of the Act when it failed and refused to provide the Union with the "witness names and interview notes" pertaining to Knittle's investigatory meetings with students, parents and District staff concerning the parent complaint against Russell.

The District also objects to the Union's references to its failure to provide verbatim statements of witnesses and statements submitted by witnesses. There is no mention in the Complaint, the charge itself, or the stipulated record of verbatim witness statements or statements submitted by witnesses. It is possible that they could be part of Knittle's interview notes. If so, the Union is entitled to receive them. *See* discussion *supra* Part III.E.

The District asserts that the Union raised for the first time in its exceptions that Russell and the Union were barred from contacting the witnesses. But the Union does not state that it was barred from contacting the witnesses, it states only that Russell was barred from doing so. Russell was instructed not to discuss the parent complaint with any parents, students, or persons who made the complaint in an email from the District Superintendent. That email is in the stipulated record as Exhibit 3. Thus, the Union is not barred from raising this in its exceptions.

According to the District, the Union makes the following arguments for the first time in its exceptions: that the ALJRDO undermines a member's *Weingarten* rights, that the parties did not have reason to anticipate litigation, and that the work product doctrine is not the law that exempts an employer from the duty to provide information. These are all arguments the Union made in response to the ALJ's findings as a means of appealing the ALJRDO, thus they are appropriate and should be considered by the Board.

We strike the mention of Stein's affidavit, verbatim statements of witnesses, and statements submitted by witnesses because they are outside of the record. We decline to strike the remainder of the Union's exceptions.

B. Weingarten

The Union's argument that the ALJRDO undermines educational employees' *Weingarten* rights is without merit. In *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (l975), the United States Supreme Court held that an employer's denial of an employee's request that a union representative be present during an investigatory interview which the employee reasonably believes might result in disciplinary action constitutes an unfair labor practice in violation of Section 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. §§151 *et seq*. The Board extended *Weingarten* rights to educational employees in *Summit Hill School District 161*, 4 PERI 1009, Case No. 86-CA-0090-C (IELRB Opinion and Order, December 1, 1987). We want to make clear that our decision to overturn the ALJRDO is based on the reasons discussed below in subsections C through E and not on the Union's contention that affirming the ALJRDO would have any effect on *Weingarten* rights. Upholding the ALJRDO would not undermine educational employees' right to have a union representative present during an investigatory interview that could lead to discipline per *Weingarten*. This case is about a union's right to information requested in order to represent its membership and whether the work product doctrine does not entitle the union to that information under certain circumstances. A finding that the work product doctrine applies in this case would not in any way diminish an educational employee's right to have a union representative present during an investigatory interview.

C. District's Refusal to Provide Names of Interviewees

The Union complains that the ALJ overlooked that the names of witnesses are not protected by the work product doctrine and incorrectly assumed that the District provided the Union with those names. An employer violates Section 14(a)(5) of the Act when it refuses to provide the union with information that the union has requested that is directly related to its function as the exclusive bargaining representative and reasonably necessary for the union to perform this function. *Chicago School Reform Board of Trustees v. IELRB*, 315 Ill. App. 3d 522, 734 N.E.2d 69 (1st Dist. 2000); *Western Illinois University*, 31 PERI 201, Case No. 2014-CA-0007-S (IELRB Opinion and Order, May 21, 2015). An employer's duty to supply information arises upon the union's good-faith request for the information. *Thornton Community College*, 5 PERI 1003, Case No. 88-CA-0008-C (IELRB Opinion and Order, November 29, 1988). The Complaint alleged that the District violated Section 14(a)(5) of the Act when it failed and refused to provide the Union with the "witness names and interview notes" pertaining to Knittle's investigatory meetings with students, parents, and District staff concerning the parent complaint. In footnote 3 on page 7 of the ALJRDO, the ALJ indicates he will assume that the District disclosed the names of the witnesses for the purposes of the analysis of attorney-client privilege and the work product doctrine. On page 9, the ALJ states that Russell was aware of the identity of the parents involved with the parent complaint. Similarly, the District argues that the record shows that the Union was made aware of the individuals who made the parent complaint. This is true. The stipulated record contains an email from the District Superintendent to Russell identifying the parents and their children who made the complaint. Nonetheless, the Union requested the names of the witnesses, not the names of the people who brought the complaint. Some or all of those names may be the same, but that cannot be known without the requested information. Whether the information could have been obtained elsewhere does not excuse the District's duty to provide it to the Union. The Union asserts that the ALJ failed to consider the District's directive that Russell not contact the people who made the complaint and that disclosure of witnesses' names may have allowed the Union to conduct its own investigation in order to adequately represent Russell. Whether the ALJ erred in failing to consider this is eclipsed by the District's duty under Section

14(a)(5) to provide that information to the Union. The names themselves are not material generated in preparation for litigation, so they cannot be protected from disclosure by the work product doctrine. Thus, we find that the District violated Section 14(a)(5) of the Act by refusing to provide this information to the Union.

D. Mootness

The Union maintains that the ALJ erred when he based his dismissal of the Complaint in part upon his determination that the purpose for which the notes would have been useful had passed. That the information is no longer useful does not excuse the District's misconduct. The IELRB has noted that "a matter is not considered moot if it is capable of repetition yet evades review." *Wilmette School District No. 39*, 4 PERI 1077, Case No. 86-CA-0073-C (IELRB Opinion and Order, May 17, 1988). Further, "the right of the union to the information requested must be determined by the situation which existed at the time the request was made, not at the time the Board or courts get around to vindicating that right. Otherwise, important rights under the Act would be lost simply by the passage of time and the course of litigation." *Chicago Board of Education*, 30 PERI 162, Case No. 2011-CA-0088-C (IELRB Opinion and Order, July 23, 2012), rev'd on other grounds, 2013 IL App 122447 (1st Dist. 2013), quoting *Grand Rapids Press*, 331 NLRB 296, 300 (2000). If the information was relevant at the time of the request, subsequent events have no impact on the finding of a violation of the Act. *Lansing Automakers Federal Credit Union*, 355 NLRB No. 221 (2010). The conclusion of the proceedings for which the Union may have needed the information does not moot its entitlement to information. *Bloomsburg Craftsmen*, 276 NLRB 400 (1985). There is an on-going relationship between the parties of which the grievance process is only a part and that relationship benefits from a free flow of information. *General Dynamics Corp.*, 268 NLRB 1432, 1433 (1984). The requested information was relevant to the Union's function as the exclusive representative and was reasonably necessary for the performance of that function at the time the request was made. By its refusal to supply the requested information, the District violated Section 14(a)(5) of the Act. For these reasons, we find that the ALJ erred when he relied on the expiration of the notes' usefulness to any proceedings in dismissing the Complaint. To

hold otherwise would contravene longstanding Board precedent and could allow employers to refuse to furnish information a union is entitled to under the Act without recourse simply by the passage of time.

E. Work Product Doctrine

The Union argues in its exceptions that the ALJ incorrectly found that Knittle's notes were protected from disclosure by the work product doctrine, which protects written material prepared in anticipation of litigation or for trial from disclosure. *Central Telephone Co. of Texas*, 343 NLRB 987 (2004), citing *Hickman v. Taylor*, 329 U.S. 495 (1947); *Waste Management, Inc. v. International Surplus Lines Ins. Co.*, 144 Ill.2d 178 (1991). This Board has not addressed the application of the work product doctrine to the duty to provide information. The ALJRDO does not cite cases involving the work product doctrine in the context of labor relations, but instead primarily cites cases from Illinois courts. Yet Illinois courts have not addressed the issue of the work product doctrine in the context of a union's request for information under Section 14(a)(5) of the IELRA or Section 10(a)(4) of the Illinois Public Labor Relations Act, 5 ILCS 315/10(a)(4). Nor has the Illinois Labor Relations Board addressed that issue. Luckily, the National Labor Relations Board (NLRB) has addressed the importance of work product privileges in labor law cases. *Douglas Autotech Corp.*, 357 NLRB 1336, 1353 (2011), citing *Central Telephone*, 343 NLRB 990. In particular, the NLRB has tackled the issue of the work product doctrine and an employer's duty to provide information under Section 8(a)(5) of the NLRA and found that information prepared in anticipation of litigation may be confidential. *Ralph's Grocery*, 355 NLRB 1279 (2010); *Central Telephone*, 343 NLRB 987. In *Central Telephone*, the NLRB found that notes taken during the employer's investigation of employee misconduct were protected from disclosure under the work product doctrine because they were made in anticipation of foreseeable litigation, but notes taken in the ordinary course of business are not protected by work product. 343 NLRB 987. More recently in *Public Service Co. of New Mexico*, 364 NLRB No. 86 (2016), the NLRB found that an employer's interview notes were not work product because the employer failed to establish the investigation was

undertaken with an eye toward litigation, where the work product privilege does not apply to routine investigations.

To determine whether Knittle's notes are protected by the work product doctrine, the Board must decide whether the employer has established that Knittle prepared the notes with an eye toward litigation and the investigation was not of a routine nature. *Public Service Co. of New Mexico*, 364 NLRB No. 86; *Ralph's Grocery*, 355 NLRB 1279; *Central Telephone*, 343 NLRB 987. The District argues that the severity of the allegations against Russell and the engagement of an attorney to conduct the investigation demonstrate that the investigation was conducted in anticipation of foreseeable litigation. However, in the parties' contract, they anticipated these types of investigations and determined that the interview notes created pursuant to them would be provided to the teacher/union. The only exception to providing a witness list and copies of interview notes is that they are not "precluded by law". The District cites no law that precludes producing the witness list or interview notes, or any portion thereof, to the teacher/union. Work product doctrine is not a law, it is a limitation on discoverable material. Thus, the District's contention the allegations were severe does not demonstrate that the investigation was done with an eye toward litigation.

The District also claims that it demonstrated that it anticipated litigation by the performance of the interviews by an attorney rather than one of its administrators. Section 4.4 of the CBA does not distinguish between investigations done by attorneys and non-attorneys. It does contemplate interviews conducted by persons other than its administrators, as it states that if the District delegates non-employees to investigate a complaint, an administrator will be present during any interviews. But the CBA does not say that in such situations the District is excused from providing the teacher with the interviewers' notes. Furthermore, the work product doctrine is not unique to attorneys and could apply to District administrators. It is well settled that the protection for work product in anticipation of litigation extends to materials prepared by non-attorneys. *U.S. v. Nobles*, 422 U.S. 225, 238-239 (1975). In *Central Telephone*, the NLRB found that notes prepared by a human resources specialist in anticipation of litigation were protected from disclosure under attorney work product doctrine. 343 NLRB 987. Simply having an

attorney conduct the interviews does not mean that the resulting notes were prepared with an eye toward litigation. We are not persuaded that the District conducted the investigation at issue in this matter with an eye toward litigation. Evidence that the investigation into Russell's alleged misconduct was routine is that the parties contemplated precisely this type of investigation, where witnesses are interviewed and notes are created by someone not employed by the District. The parties agreed that following this type of investigation, the District would produce a witness list and interview notes to the Union without regard to who conducted the investigation. The parties agreed that only where production was "precluded by law", would the District be absolved of its obligation to produce the documents.

Section 4.4 of the CBA states, "Disputes regarding disclosure of information under this section shall be resolved pursuant to the IELRA and shall not be subject to the grievance procedure." Absent repudiation, this Board cannot address charges solely alleging a breach of a collective bargaining agreement. *West Chicago School District 33*, 5 PERI 1091, Case Nos. 86-CA-0061-C & 87-CA-0002-C (IELRB Opinion and Order, May 2, 1989), *aff'd* 218 Ill. App. 3d 304, 578 N.E.2d 232 (1st Dist. 1991); *see also City of Loves Park v. Ill. Labor Rel. Bd. State Panel*, 343 Ill. App. 3d 389, 395 (2nd Dist. 2003) (Illinois Labor Relations Board has jurisdiction to adjudicate only contractual breaches involving conduct so sufficiently lacking in good faith that they amount to a repudiation of the collective bargaining process, and constitute a refusal to bargain in good faith). The record does not demonstrate repudiation on the District's part. However, this Board has the authority to interpret a collective bargaining agreement when necessary to decide an allegation of an unfair labor practice, which we have done in this case. *Barrington CUSD No. 220*, 9 PERI 1054, Case No. 93-CA-0005-C (IELRB Opinion and Order, February 26, 1993). The District has not demonstrated that Knittle's notes are protected by the work product doctrine. As a result, the District violated Section 14(a)(5) of the Act by refusing to provide the notes at the Union's request.

Our determination that Knittle's notes are not protected by the work product doctrine is specific to the facts of this case. Should we revisit this issue in a different case, we will look at the facts in that record and decide whether the respondent has demonstrated that

the written material at issue was prepared with an eye toward litigation and not during an investigation that was routine in nature. To be clear, whether the work product doctrine applies will be determined on a case by case basis.

We overrule the ALJ's decision that Knittle's notes are protected from disclosure by the work product doctrine. The District violated Section 14(a)(5) of the Act when it failed and refused to provide the Union with a copy of Knittle's interview notes.

IV. Order

Respondent violated Section 14(a)(5) and, derivatively, Section 14(a)(1) of the Act in connection with its unlawful refusal to provide the Union with interview notes and witness names pertaining to Knittle's investigatory meetings concerning the parent complaint against Russell. For the reasons discussed above, IT IS HEREBY ORDERED that Respondent, Board of Education of Deerfield Public Schools District No 109, its officers, and agents shall:

1. Cease and Desist from:
   (a) Refusing to bargain collectively in good faith with Deerfield Education Association, IEA-NEA.
   (b) Denying Deerfield Education Association, IEA-NEA's requests for information relevant and necessary for the proper performance of its representational duties.
   (c) In any like manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them in the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act:
   (a) Provide the Union with the witness names and interview notes pertaining to Laura Knittle's investigatory meetings concerning the parent complaint against Jennifer Russell.
   (b) Post on bulletin boards or other places reserved for notices to employees for 60 consecutive days during which the majority of Respondent's employees are actively engaged in duties they perform for Respondent, signed copies the

attached notice. Respondent shall take reasonable steps to ensure that said notice is not altered, defaced, or covered by any other materials.

(c) Notify the Executive Director, in writing, within 35 days after receipt of this order of the steps taken to comply with it.

V. Right to Appeal

This is a final order of the Illinois Educational Labor Relations Board. Aggrieved parties may seek judicial review of this Order in accordance with the provisions of the Administrative Review Law, except that, pursuant to Section 16(a) of the Act, such review must be taken directly to the Appellate Court of the judicial district in which the IELRB maintains an office (Chicago or Springfield). Petitions for review of this Order must be filed within 35 days from the date that the Order issued, which is set forth below. 115 ILCS 5/16(a). The IELRB does not have a rule requiring any motion or request for reconsideration.

Decided: May 20, 2021
Issued: May 20, 2021

/s/ Lara D. Shayne
Lara D. Shayne, Chairman

/s/ Steve Grossman
Steve Grossman, Member

/s/ Chad D. Hays
Chad D. Hays, Member

/s/ Michelle Ishmael
Michelle Ishmael, Member

/s/ Gilbert F. O'Brien
Gilbert F. O'Brien, Member

Illinois Educational Labor Relations Board
160 North LaSalle Street, Suite N-400
Chicago, Illinois 60601
312.793.3170 | 312.793.3369 Fax
elrb.mail@illinois.gov

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE STATE OF ILLINOIS

THIS IS A NOTICE TO EMPLOYEES THAT MUST BE POSTED PURSUANT TO THE ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD'S OPINION AND ORDER IN Deerfield Education Association, IEA-NEA, Case No. 2019-CA-0053-C.

Pursuant to an Opinion and Order of the Illinois Educational Labor Relations Board and in order to effectuate the policies of the Illinois Educational Labor Relations Act ("Act"), we hereby notify our employees that:

This Notice is posted pursuant to an Opinion and Order of the Illinois Educational Labor Relations Board issued after an administrative proceeding in which both sides had the opportunity to present evidence. The Illinois Educational Labor Relations Board found that we have violated the Act and has ordered us to inform our employees of their rights.

Among other things, the Act makes it lawful for educational employees to organize, form, join or assist employee organizations or engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection.

WE WILL NOT refuse to bargain collectively in good faith with Deerfield Education Association, IEA-NEA.

WE WILL NOT deny Deerfield Education Association, IEA-NEA's requests for information relevant and necessary for the proper performance of its representational duties.

WE WILL NOT in any like manner, interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed under the Act.

WE WILL provide the Union with the witness names and interview notes pertaining to Laura Knittle's investigatory meetings concerning the parent complaint against Jennifer Russell.

Date of Posting: _____ By: _____

As agent for **Deerfield Public Schools Dist. 109**

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 160 N. Lasalle, Ste N-400, Chicago, IL 60601 (312) 793-3170.

IL 548-0062 (11/2000)

STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

Deerfield Education Association, IEA-NEA, Complainant and Board of Education of Deerfield Public Schools District No. 109, Respondent	)	Case **No.** 2019-CA-0053-C

Administrative Law Judge's Amended Recommended Decision and Order

On March 15, 2019, Complainant, Deerfield Education Association, IEA-NEA (Complainant or Union), filed an unfair labor practice charge against Respondent, Board of Education of Deerfield Public Schools District No. 109 (Respondent or District), alleging that the District violated Section 14(a) of the Illinois Educational Labor Relations Act (IELRA or Act), 115 ILCS 5/1, *et seq.* (2014), *as amended*. After investigation, the Executive Director, on behalf of the Illinois Educational Labor Relations Board (IELRB or Board), issued a complaint and notice of hearing for Complainant's charge. On November 22, 2019, the parties filed a Joint Motion for Entry of a Briefing Schedule and Joint Statement of Uncontested Facts (Joint Motion), as well as a Joint Stipulated Record[1]. The undersigned Administrative Law Judge granted the Joint Motion on November 26, 2019 and established the briefing schedule agreed upon by the parties and contained within the Joint Motion. (Order dated November 26, 2019). The Joint Motion also contained a waiver of the parties' right, pursuant to Section 15 of the Act, to present evidence outside of the stipulated record. (Joint Motion at 1). Pursuant to the briefing schedule, the Complainant submitted its Brief in Support of its Complaint on December 20, 2019, and the Respondent filed its Brief in Response on January 21, 2020. The Complainant declined to file a Reply Brief.[2]

[1] Citations to "JSR Ex. #" refer to documents entered into evidence as part of the Joint Stipulated Record. Any other document cited in this Recommended Decision and Order will be referred to by title, except as otherwise stated.

[2] The original copy of this decision, issued September 16, 2020, contained incorrect citations to the IELRB's Rules and Regulations as it relates to the time frame for filing exceptions. This Amended RDO contains no changes to the original document except to correct those citations.

I. Findings of Fact

The following findings of fact are based on the parties' stipulations, as well as documentary evidence in the record that I find to be relevant and credible:

At all times material, the District was an educational employer within the meaning of Section 2(a) of the Act and subject to the jurisdiction of the Board. (Joint Motion at ¶ 4). The Union is a labor organization within the meaning of Section 2(c) of the Act and the exclusive representative within the meaning of Section 2(d) of the Act of a bargaining unit comprised of certain persons employed by the District, including those in the job title or classification of teacher. (Joint Motion at ¶ 5-6). The District and the Union were parties to a collective bargaining agreement (CBA) for the aforementioned unit, which was in effect from the 2015-16 school year through the 2018-19 school year. (Joint Motion at ¶ 7).

Article IV, Section 4.3 (hereinafter, Section 4.3) governs employee discipline. It requires that formal discipline, including written reprimands, be subject to the grievance process, that any employee discipline other than dismissal be for just cause, and that if requested by the teacher, the specific grounds forming the basis of a disciplinary action be made available in writing.

Article IV, Section 4.4 (hereinafter, Section 4.4) of the CBA covers investigations arising from teacher conduct complaints, and states in relevant part as follows:

> "The Administration shall immediately inform the teacher of any and all consequential complaints regarding the teacher's conduct made by any person against the teacher as soon as possible, except in those instances where notification to the teacher would disrupt any ongoing efforts of law enforcement or quasi-law enforcement officials. If the existence of a complaint has not been disclosed to a teacher due to ongoing efforts by law enforcement or quasi-law enforcement officials, the District shall not question the teacher unless done in accordance with the immunity safeguards afforded by prevailing law (see *Atwell v. Lisle Park District*). In the event that the District has reasonable cause to suspend a teacher during an ongoing investigation by law enforcement or quasi-law enforcement officials, any such suspension shall be with full pay and benefits, including the accrual of seniority. In processing any complaint, the administrator shall make every effort to assure fairness to the teacher, including investigation of such complaint. The District shall not expand the scope of the investigation beyond the scope of the original complaint unless evidence of misconduct is discovered. The teacher shall receive prompt notice of every person who is interviewed and copies of any interview notes or documents collected during the interview to the extent not precluded by law. Disputes regarding disclosure of information under this section shall be resolved pursuant to the IELRA and shall not be subject to the grievance procedure. Anonymous complaints will not be the basis of any disciplinary action against a teacher or the basis for comments on a teacher's evaluation

> unless independently verified by other witnesses and/or evidence. If requested by the teacher, a teacher/principal conference shall be held, at which time, if requested, the principal will detail the processing and investigation of the complaint. If the District delegates non-employees to investigate any complaint against a teacher, a District administrator shall be present during any interviews with students, parents, District employees or any other person, held during the course of the investigation. If a request is made by a tenured teacher, investigatory meetings with individuals who are not employed by the District will be held away from the employee's school building or work site. In the case of a non-tenured teacher, either the non-tenured teacher or the [Union] may make such a request."
>
> (JSR Ex. 1 at 5).

Jennifer Russell is employed by the District in the job title or classification of Teacher. (Joint Motion at ¶ 8). She is a member of the Union's bargaining unit. (Joint Motion at ¶ 8). On or about October 17, 2018, she was informed by the District Superintendent of a complaint lodged against her for the alleged mistreatment of past and present students (Parent Complaint). (JSR Ex. 2). At this meeting, Russell was made aware of the identity of the parents who lodged the complaint. (JSR Ex. 2, 3). On or about October 27, 2018, Russell received written notice of the complaint. (Joint Motion at ¶ 17). On or about November 5, 2018, Russell met with Union UniServ Director Mark Stein, District legal counsel Laura Knittle, and District Assistant Superintendent of Human Resources Dale Fisher. (Joint Motion at ¶ 19). Knittle was engaged as legal counsel for the District for the purposes of investigating the Parent Complaint, and in that capacity was an agent of the District authorized to act on its behalf, subject to review by District Superintendent Anthony McConnell. (Joint Motion at ¶ 11-12). In this capacity, Knittle interviewed students, parents, and District staff including Russell. (Joint Motion at ¶ 18).

On or about November 26, 2018, Russell and Stein met with Fisher, McConnell, and Ellen Rothenberg, an attorney who regularly represents the District in labor relations matters. (Joint Motion at ¶ 20). At the November 26 meeting, the District informed Russell that she would receive a Notice to Remedy pursuant to Knittle's investigation into the Parent Complaint. (JSR Ex. 3). Later that day, Stein requested Knittle's interview notes, but the District refused to provide the notes because Knittle was retained as legal counsel to the District and her notes therefore were protected by attorney-client privilege or, in the alternative, were protected work product. (Joint Motion at ¶ 21).

The District issued a Notice to Remedy to Russell on December 10, 2018. (JSR Ex. 4). Russell received the Notice to Remedy on December 13, 2018. (Joint Motion at 24). On March

4, Russell wrote a letter to Fisher, objecting to the Notice of Remedy. (JSR Ex. 5). Russell noted that many of the allegations set forth in the Notice were vague, leaving her with no opportunity to respond. (JSR Ex. 5). She stated that the investigation arose out of an allegation that she struck a child in the head in front of the whole class, but that allegation was dismissed as unfounded by the Department of Children and Family Services. *Id.* Finally, she noted that none of these allegations have ever before been brought up in an evaluation or in any other setting, and stated that, because the District took no disciplinary action other than the Notice to Remedy, that she had no legal means to challenge the District's findings other than to issue the rebuttal. *Id.*

Russell has returned to work, effective November 27, 2018. (JSR Ex. 4 at 3). A co-teacher was placed in her classroom upon her return and will remain in Russell's classroom until administration no longer deems it necessary to do so. (JSR Ex. 4 at 3).

II. The Unfair Labor Practice Charge

The Union alleges that the District violated Section 14(a)(5) and, derivatively, (1) of the Act when it refused to provide Knittle's interview notes. Section 14(a)(5) of the Act prohibits educational employers from refusing to bargain in good faith with an employee organization that is the exclusive representative of a bargaining unit. 115 ILCS 5/14(a)(5). Part of an employer's obligation to bargain in good faith includes the duty to provide the Union with information upon request. Thornton Community College, 5 PERI 1003 (IELRB Opinion and Order, November 29, 1988). A union is entitled to information from an educational employer about matters related to wages, hours, and terms and conditions of employment, or information that is otherwise relevant to the Union's function as the exclusive bargaining representative and "reasonably necessary for the performance of that function. Chicago School Reform Board of Trustees v. IELRB, 315 Ill. App. 3d 522 (1st Dist. 2000); Harden County Community Unit School District No. 1, 7 PERI 1038 (IELRB Opinion and Order, March 8, 1991). The relevant standard is "the probability that the desired information is relevant, and that it would be of use to the Union in carrying out its statutory duty and responsibilities." Alton Community Unit School District 11, 21 PERI 79 (IELRB Opinion and Order, March 23, 2005), *citing* Allied Mechanical Services, Inc., 332 NLRB 171 (2001). An educational employer's failure to produce information to which the Union is entitled is a violation of Section 14(a)(5) of the Act.

Here, there is no question that the employer is refusing to provide the Union with Knittle's interview notes. The issue at hand, then, is whether the withheld notes are

information to which the Union is entitled. The District argues that, because the Union does not have the right to file a grievance or any other challenge as it relates to the Notice to Remedy, the Union is not entitled to the information because the information is not relevant to any potential proceedings, nor is it otherwise relevant or reasonably necessary for the Union to fulfill its role as the exclusive bargaining representative. It also argues that the information is protected by attorney-client privilege and the work product doctrine and argues that the work product doctrine would apply even if attorney-client privilege does not.

The Union argues that Section 4.4 requires disclosure of interview notes unless precluded by law. It argues further that, despite the employer's argument that it does not have the right to file a grievance against the Notice to Remedy, that Section 4.3 gives it the right to do so because of the requirement that any discipline be for "just cause," and that the Notice to Remedy constitutes a written reprimand that the Union is permitted to grieve. Finally, it argues that attorney-client privilege does not apply because the conversations at issue were not held with clients of the attorney investigating the complaints, and that because the District argues that the Union has no legal right to grieve or otherwise challenge the Notice to Remedy, that the work-product doctrine does not apply because there is no litigation for which the District might be seeking to prepare.

I find, for the below reasons, that the interview notes are not protected by attorney-client privilege but are protected from disclosure by the work product doctrine.

A. Knittle's interview notes with parents, students, and District employees are not protected by attorney-client privilege because there is no evidence that any person interviewed during the investigation was part of a control group with decision making authority.

When legal advice is sought from an attorney, any communications between an attorney and client are protected by attorney-client privilege unless the privilege is waived. Robert R. McCormick Foundation v. Arthur J. Gallagher Risk Management Services, 2019 IL 123936 at 19. The attorney-client privilege exists to encourage "full and frank communication" between attorneys and their clients. Upjohn Company v. United States, 449 U.S. 383, 389 (1981). The purpose of the privilege is to ensure that an attorney has all information necessary to fulfill their professional mission. Upjohn at 395, *citing* Trammell v. United States, 445 U.S. 40, 51 (1980). However, it is the task of the party claiming the

privilege to demonstrate the facts which give rise to the privilege. Consolidation Coal Co. v. Bucyrus-Erie Co., 89 Ill. 2d 103, 119 (1982).

The Illinois Supreme Court has made it clear on multiple occasions that there is a strong public policy interest in the disclosure of information. *See, e.g.*, McCormick, 2019 IL 123936 at ¶20; Waste Management Inc. v. International Surplus Lines Ins. Co., 114 Ill. 2d 178, 190 (1991); Consolidation Coal at 119 (1982). The contractual provision at issue in this matter, Section 4.4, states that disputes regarding the disclosure of information shall be resolved pursuant to the IELRA. IELRB rules call for a hearing officer to follow Illinois rules of evidence, but that hearing officers will receive evidence that is material, relevant, and would be relied upon by reasonably prudent persons provided that rules related to privileged communications and topics are observed. 80 Ill. Adm. Code 1105.190(a).

As opposed to the federal rules, as applied in Upjohn, Illinois uses a control group test to determine which employees qualify as "the client" as it relates to attorney-client privilege. Consolidation Coal at 120; Doe v. Township High School Dist. 211, 2015 IL App (1st) 140857 at ¶ 104. The control group typically consists of two tiers of employees:

> "(1) top management who have the ability to make a final decision; and (2) employees who advise top management in a particular area such that a decision would not normally be made without their advice or opinion, and whose opinion forms the basis of any final decision made by those with actual authority."
>
> Doe at ¶ 105 (internal quotations omitted).

As it relates to the second tier of employees, the privilege applies to communications containing opinion or advice, but not to communications which merely convey information. Consolidation Coal at 120. In one case, an employee was held to be within the "control group" where evidence showed that the employee is part of a group that is consulted from time to time on matters of legal action and strategy, and whose opinion was part of the decision-making process on those matters. Mlynarski v. Rush Presbyterial-St. Luke's Medical Center, 213 Ill. App. 3d 427, 431 (1st Dist. 1991).

In this case, Knittle's interview notes summarized investigatory meetings she had with, according to the stipulation agreed to by the parties, students, parents, and District

staff, including Russell. Joint Motion at ¶ 18. The Union requested the interview notes, and the names of those interviewed. Joint Motion at ¶ 21. The District declined to turn over the interview notes because, it argued, they were protected by attorney-client privilege and the work product doctrine.[3] The District does not argue that Knittle interviewed any District administrators, nor does it argue that the requested interview notes contain communications between Knittle and any District employee with the ability to make a "final decision". Nor does the District argue that any employee was interviewed by Knittle so that the employee could provide their advice or opinion where the advice or opinion would form the basis of any decision made by those with the authority to make such a decision. There is also no evidence that the Union sought information having to do with any legal advice that Knittle issued to the District, nor any memoranda or other communications concerning her reasoning for said advice.

The District relies upon Upjohn and Sandra T.E. v. South Berwyn School District 100, 600 F.3d 612 (7th Cir. 2010) to support the proposition that when an attorney conducts a factual investigation in connection with legal services, notes or memoranda concerning client interviews or other client communications are protected by attorney-client privilege. However, those cases interpreted federal law, not Illinois law, and the common law regarding Illinois's attorney-client privilege is much more narrow than its federal counterpart. *See, e.g* Consolidated Coal, 89 Ill. 2d at 673 (arguing that, despite the Supreme Court's decision in Upjohn, the control group test best balances the purpose for attorney-client privilege against the obstacles it poses in the search for truth). Accordingly, I find that there is no evidence that employees, students, or parents interviewed by Knittle were part of a "control group," and that such conversations are therefore not protected by attorney-client privilege.

B. Knittle's interview notes with parents, students, and District employees are protected from disclosure by the work product doctrine because they contain her mental impressions and opinions of the interviewees, and were prepared in anticipation of potential litigation including but not limited to action taken by the parents of the students allegedly harmed by Russell's conduct.

[3] For the purposes of the analyses regarding the applicability of attorney-client privilege and the work product doctrine in this matter, I will assume that the District disclosed the names of those interviewed, but not the substance of the interviews.

The work product doctrine provides broader protection than attorney-client privilege, in that it protects any relevant material generated in preparation for a trial that contains the mental impressions, opinions, or trial strategy of an attorney, unless the other party can show that obtaining similar information from other sources is impossible. Waste Management, Inc. v. International Surplus Lines Ins. Co., 144 Ill. 2d 178, 196 (1991). The doctrine is designed to protect the right of an attorney to prepare their case and to prevent an adversary from trying the case "on wits borrowed from the adversary." Hickman v. Taylor, 329 U.S. 495, 516 (1947). Notes and memoranda of an attorney's oral conversations while conducting an investigation are typically considered as protected work product because they are indicative of an attorney's mental impressions or mental processes in evaluating statements made by the person the attorney is speaking with. Consolidation Coal at 109. However, Illinois courts have granted exceptions in the rare case that it is impossible to obtain similar information from other sources. Consolidation Coal at 111.

In Consolidation Coal, the Defendant withheld a "metallurgical report" prepared by one of its employees and memoranda and interview notes of employees prepared by the Defendant's in-house counsel. 89 Ill. 2d at 107. The Illinois Supreme Court held that the "metallurgical report" was discoverable, but the memoranda and interview notes regarding conversations held with employees of the Defendant were protected work product. *Id.* at 111-12. The Court reasoned that the memoranda and interview notes necessarily contained the attorney's mental impressions and could be indicative of a trial or litigation strategy, and that it was not impossible to obtain similar information from other sources because the Defendant made documents available during discovery that contained substantially the same material as were contained in the interview notes. *Id.* at 111.

Here, the District is withholding interview notes that, as in Consolidated Coal, necessarily will include the mental impressions or processes of the attorney drafting the notes. The District employed Knittle to conduct the investigation, and to advise the District on the legal ramifications of what Knittle discovered in the course of the negotiation, because Russell's alleged conduct was of a type that the District believed could lead to litigation filed by the parents of the kids affected by the conduct. (Joint Motion at ¶ 11-12, Joint Motion at

¶ 22). In this capacity, Knittle interviewed parents, staff, and students. Throughout the process, Russell was aware of the identity of the parents involved with the complaint. She was also aware of the specific allegations against her as contained in the October 27 email and discussed in the meeting on November 5. (JSR Ex. 2, Joint Motion at ¶ 17, 18, 19). It is difficult to see, and the Union does not specify, what further information would be available to the Union in these interview notes that it is impossible to glean from another source.

It is equally difficult to determine what proceedings the Union has available to it for which these notes might be useful. The Union argues that the meeting notes would have assisted in defending Russell in the time period between when the District recommended that a Notice to Remedy issue and the School Board meeting at which the Notice to Remedy issued.[4] In the alternative, the Union argues that it could grieve the notice that Russell was given in which she was informed of the recommendation. In either case, even if we assume that the information was impossible to obtain elsewhere and would have been useful for that purpose, the Union's charge still fails because the purpose for which the notes would have been useful had passed. The recommendation was given to Russell on or about November 26, 2018. The School Board voted on issuing the Notice to Remedy on or about December 10, and Russell received the Notice on or about December 13. Even accepting the Union's argument at face value, the only time these notes would have been of value to the Union would have been the period between November 26 and December 10. This charge, however, was not filed until March 15, 2019, well after any point the Union argues that the notes would have been useful. Because the Union cannot prove that a necessity exists, both because the information contained within the interview notes was substantially available to the Union and because the Union could not prove that the information not already available to the Union was necessary for it to fulfill its duty as the exclusive bargaining representative, Knittle's interview notes are protected from disclosure by the work product doctrine.

[4] The Union, correctly, declines to argue that it could successfully file a grievance to challenge the Notice to Remedy directly. Rockford School Dist. No. 205 v. IELRB, 165 Ill. 2d 80 (1995) (Section 10(b) of the Act precluded application of a "just cause" contract provision to overturn a Notice to Remedy through the contractual grievance procedure because it conflicted with the School Code).

III. Recommended Order

For the reasons discussed above, I recommend that the Complaint be dismissed in its entirety.

IV. Right to File Exceptions

Pursuant to Section 1120.50(a)(1) of the Board's Rules and Regulations, 80 Ill. Admin. Code 1120.50(a)(1), the parties may file written exceptions to this Recommended Decision and Order and briefs in support of those exceptions no later than 21 days after receipt of this decision. Exceptions and briefs must be filed with the Board's General Counsel. At this time, parties are highly encouraged to direct said exceptions and responses, if at all, to the general email account at ELRB.mail@illinois.gov. If no exceptions have been filed within the 21-day period, the parties will be deemed to have waived their exceptions. Under Section 1100.20 of the Board's Rules, 80 Ill. Adm. Code 1100.20, parties must send a copy of any exceptions they choose to file to the other parties and must provide the Board with a certificate of service. A certificate of service is "a written statement, signed by the party effecting service, detailing the name of the party served and the date and manner of service." 80 Ill. Adm. Code 1100.20(e). If a party fails to send a copy of its exceptions to the other parties or fails to include a certificate of service, that party's appeal rights with the Board will end.

Dated: September 16, 2020
Amended: September 21, 2020
Issued: Chicago, Illinois

Nick Gutierrez
Administrative Law Judge

Illinois Educational Labor Relations Board
160 North LaSalle Street, Suite N-400
Chicago, Illinois 60601
(312) 793-3170 / (312) 793-3369 Fax