SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPARTMENT 311
Miramonte
BC484111 lead case
Case Home Page
LAUSD motions for summary judgment,
summary adjudication, and protective order

LAUSD's motions for summary judgment, summary adjudication, and a protective order are denied.

I

The first issue is LAUSD's motions for summary judgment on the parents' claims for emotional distress.

It cannot be emphasized too strongly that what follows is not established fact, but only the plaintiffs' side of the story. LAUSD forcefully contests this story and has had no opportunity yet to present its version of events. The only issue for today is whether LAUSD should prevail against these parents without a trial. A trial on emotional distress, however, is necessary because the parents cite evidence that, by 2010, LAUSD had at least eight warning signs that teacher Mark Berndt posed a predictable, grave, and general risk to children. Under this view of the facts, any parent would have a serious, genuine, and reasonable fear that to expose a child to Berndt would create a significant risk of abuse.

From the plaintiffs' perspective, drawing reasonable inferences in their favor, the timeline is as follows.

A

In 1976, LAUSD hired teacher Mark Berndt.

In 1983, the Miramonte school principal recorded two complaints from parents about Berndt. One complaint was for "pictures sharing." The other was that Berndt exposed himself to students on a museum field trip. Afterwards, Berndt thanked the Miramonte principal "for the support you gave me" and wrote "I did learn one thing for sure! Not to take students to the museum while wearing baggy shorts! THANKS AGAIN, MARK." LAUSD did not discipline Berndt.

During the 1991-1992 school year, nine year old girls in the fourth grade reported Berndt masturbated in class. Berndt's desk was the same size as the students' desk. "So the desk didn't come up to his chest. It came a little lower than his stomach. And he would get close to his desk and would lean a little forward and masturbate." The girls complained because they wanted Berndt to stop. But a Miramonte employee in the school's main office called the girls out of class, told them they were lying, scolded them, and said they could get in big trouble. This frightened the girls and they spoke to no one else. No one came to Berndt's classroom to investigate and Berndt continued to masturbate in class. LAUSD did not discipline Berndt.

In 1993, a teacher visited Berndt's classroom while he was teaching about 25 students. Berndt was sitting in front of the class wearing shorts with no underwear. Berndt put his foot up on a student's desk in a deliberate act to expose his penis, testicles, and pubic hair to the visiting teacher and the students. The visiting teacher immediately reported the situation to the principal, saying "[I] got really upset and I started crying, and I remember I told [the Miramonte principal] . . . there's children in that room. We have to protect them. And then [the principal] put her arm around my shoulder and she said, I know, baby. I've had several complaints from parents, too, but there's nothing we can do about it. And then [the principal] explained to me that -- that she couldn't do anything because [Berndt] had tenure . . . . [S]he talked to me about Mark [Berndt] having tenure, and, basically, the idea that there was nothing she could do." LAUSD did not discipline Berndt.

In 1993, a Miramonte third grader was taking a test when teacher Berndt approached her from behind and tried to put his hand between her legs. She pushed him away and said no. Her mother reported the event to the Miramonte principal. The mother pleaded with school officials to move her daughter out of Berndt's class, and they said, "Oh, she's going to be safe. [Berndt] can be trusted. It's fine. Nothing happened. She will be okay. Trust us." LAUSD did not discipline Berndt.

In 2008 a parent complained about two objectionable pictures Berndt gave a student to take home. The Miramonte principal said he would not put those kinds of complaints in a teacher's file. LAUSD did not discipline Berndt.

A 2009 LAUSD review of Berndt noted that "caution should be exercised by teacher to discourage student tendencies of close physical proximity to teacher --

as observed on yard and to and from class." Also, the Miramonte principal observed Berndt holding hands with a student. LAUSD did not discipline Berndt.

In 2009 the Miramonte principal discovered Berndt videotaping students and said, "What are you -- stop. What are you doing? . . . . Why are you doing this? You're going to get in trouble and fired." LAUSD did not discipline Berndt.

In 2009 or 2010, the coordinator of the after-school program at Miramonte complained to the Miramonte principal because Berndt would regularly come and get children from the after-school program and take them back to his classroom. The principal testified students could not leave the after-school program to go to classrooms unless parents gave written permission. (*Id.*, pp. 192-193.) LAUSD did not discipline Berndt.

Police began investigating Berndt in November 2010 after a pharmacy photo clerk reported questionable child photos. Police eventually discovered hundreds of images. Some pictures show Berndt feeding children his semen with a spoon or on cookies. Police found Berndt's semen in his Miramonte classroom. Some photos show children with tape or Berndt's hand over their eyes or mouths. Others show blindfolded children or children with a large cockroach on their faces. Some pictures are of Berndt, alone or with children.

Law enforcement contacted LAUSD about Berndt in late 2010 and early 2011.

On November 18, 2010, Sergeant Shawn Freeman of the Redondo Beach Police Department called Miramonte principal Martin Sandoval to say that he had "suspicious photographs" involving Berndt. Sandoval told Freeman the school was on break until January and Berndt would not return until then. Freeman said he would refer the investigation to the Los Angeles Sheriff's Department. Freeman does not recall whether he told Sandoval not to contact any parents, but he "probably would have told him not to." Sandoval wanted to see the photographs, but Freeman said could not release them to Sandoval.

On December 13, 2010, Detective Marvin Jaramilla of the Los Angeles Sheriff's Department contacted Sandoval. Sandoval told Jaramilla that Berndt and the students were on break until January 3, 2011. Jaramilla scheduled an appointment with Sandoval for January 3, 2011. Jaramilla states, "I believe, based on my general practice, that I informed Mr. Sandoval not to inform Mr. Berndt of our discussion, or my scheduled visit to Miramonte. I also believe,

based on my general practice, that I asked Mr. Sandoval to treat my visit and our conversation as confidential."

In the afternoon of January 3, 2011, Jaramilla met with Sandoval and showed him some of Berndt's photos. Jaramilla wanted to meet with Berndt's students, but Sandoval was not able to identify any of the children. Sandoval said school was dismissed at 1:00 p.m. that day and asked Jaramilla to return the next day, January 4, 2011.

On January 4, 2010, Jaramilla returned to interview Berndt and to try to identify the children in the photos. That day Jaramilla was able to identify three students. After interviewing Berndt, Jaramilla told Sandoval there was enough to continue investigating, so Sandoval removed Berndt from the classroom. Berndt never returned to Miramonte.

LAUSD paid Berndt $40,000 to resign, effective June 30, 2011. Berndt is now serving a 25-year sentence on Miramonte child abuse charges.

B

The *Phyllis P.* holding governs both the intentional and negligent infliction of emotional distress. (See *Phyllis P. v. Superior Court*, *supra*, 183 Cal.App.3d 1193, 1194, 1195, 1197-1198.) The decision in *Steven F. v. Anaheim Union High School District* (2003) 112 Cal.App.4th 904, 915 (emphasis in original) recast the holding in *Phyllis P. v. Superior Court* (1986) 183 Cal.App.3d 1193:

> [T]he result in [*Phyllis P.*] is still nonetheless explainable in terms of two ideas which have found support in subsequent cases. First, the decision by school officials not to inform the parent of the danger posed by the 13 year old was clearly a decision "directed at" the parent, not the student. Second, there is a sense of outrageousness in that decision which also makes it explainable under [a different decision's] model. The school officials in *Phyllis P.* were *DELIBERATELY* usurping the parental prerogative to protect the child.

The facts here satisfy these two elements. First, the decision by school officials not to inform parents of the danger Berndt posed was a decision "directed at" the parents, not the students. Second, there is a sense of outrageousness in that decision.

This case is considerably beyond *Phyllis P.*, which involved an abuser who attacked only one child victim. That abuser was not a general danger to all nearby students. The plaintiffs in this case, however, have a basis for arguing to the jury that LAUSD knew enough about Berndt to treat him as a general danger to all students to whom LAUSD gave him access.

On this view of the evidence, Berndt would be like the toxic drinking water in *Potter v. Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 976, 1002-1003. Everyone drinking the water was at risk. Every student in Berndt's classroom was at risk. There is a valid cause of action for emotional distress if a company "actually knew of these particular plaintiffs and their consumption of the water, and nevertheless sent prohibited wastes [for processing] despite a realization that plaintiffs would almost certainly suffer severe emotional distress upon their discovery of the facts." (*Id.* 1003.) There would be liability even though the company "did not know the particular names of any individual whose groundwater was contaminated by the hazardous waste . . . ." (*Id.* 1002.)

Potter was a fear-of-cancer case. This is a fear-of-abuse case. In both cases, the distress is worse when the feared event comes to pass, but there is a cause of action so long as the fear alone is "otherwise serious, genuine and reasonable." (*Id.* 974.)

LAUSD did not know the names of the students in Berndt's pictures. Under *Potter*, however, LAUSD can face liability even though it "did not know the particular names of any individual" Berndt selected for abuse. (*Id.* 1002.)

It is enough that LAUSD placed particular and identifiable students in Berndt's care. Although it did not know the names of the actual abuse victims, LAUSD did realize all parents of the particular students in Berndt's care "would almost certainly suffer severe emotional distress upon their discovery" that Berndt was a predator. (*Id.* 1003.)

II

The second issue is the so-called fourth cause of action, in which each child asserts a claim for sexual harassment under Civil Code section 51.9. A person is liable for sexual harassment under section 51.9 when the plaintiff proves that: (a) there is a professional relationship between the plaintiff and the defendant; (b) "[t]he defendant has made sexual advances, solicitations, sexual requests,

demands for sexual compliance by the plaintiff, or engaged in other verbal, visual, or physical conduct of a sexual nature or of a hostile nature based on gender, that were unwelcome and pervasive or severe[;]" (c) the plaintiff is unable to easily terminate the relationship; and (d) the plaintiff has suffered or will suffer economic loss or disadvantage or personal injury, including emotional distress or the violation of a constitutional or statutory right, as a result of the defendant's conduct. (Civ. Code, § 51.9, subd. (a).) A relationship between a teacher and a student is a professional relationship. (Civ. Code, § 51.9, subd. (a)(1)(E).) LAUSD moves for summary adjudication on this cause of action. The motion is denied.

LAUSD's Objection Nos. 1 and 18 to the evidence in support of the Manly Group Minor Plaintiff's opposition to the motion are sustained. LAUSD's other objections to the evidence in support of the Manly Group Minor Plaintiff's opposition to the motion are overruled. The declaration of Vince Finaldi is sufficient to authenticate the deposition testimony. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2014) ¶ 10:164.) LAUSD's evidentiary objections to the exhibits to the Declaration of Luis A. Carrillo are all sustained. As discussed below, witness statements in police reports are inadmissible as hearsay.

LAUSD's motion is based on three facts, each of which is undisputed. LAUSD has advanced evidence that Plaintiffs are both male and female. LAUSD cites evidence that it is a public entity. LAUSD cites evidence the Plaintiffs contend that Berndt used his position of authority to "sexually harass, molest, and abuse them" for "sexual gratification[.]" (See Separate Statement of Undisputed Material Facts in Support of Motion for Summary Adjudication by Defendant Los Angeles Unified School District as to the Fourth Cause of Action for Sexual Harassment.) LAUSD has failed to demonstrate that these three facts preclude liability under section 51.9. LAUSD has not shifted the burden to Plaintiffs to raise a triable issue of fact. (See *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850-851.)

LAUSD first contends it cannot be liable because Berndt's harassment was not "based on gender" and thus does not fall within the prohibitions of section 51.9. Civil Code section 51.9 does not apply only to conduct motivated by gender. It applies when "[t]he defendant has made sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff, **or** engaged in other verbal, visual, or physical conduct of a sexual nature **or** of a hostile nature based on gender, that were unwelcome and pervasive or severe." (Civ. Code, § 51.9, subd. (a)(2), emphasis added.) The modification "based on gender" applies to

"other verbal, visual, or physical conduct . . . of a hostile nature[.]" It does not modify "sexual advances, solicitations, sexual requests, demands for sexual compliance by the plaintiff[,]" nor does it modify "other verbal, visual, or physical conduct of a sexual nature[.]" As LAUSD concedes, Plaintiffs' claims are based on Berndt's conduct of a sexual nature. This conduct need not be based on gender to fall within Civil Code section 51.9.

Next, LAUSD argues it cannot be liable under Civil Code section 51.9, because that statute provides a cause of action against the harasser. LAUSD contends the statute does not provide for a claim against the harasser's employer. This argument is incorrect. In *C.R. v. Tenet Healthcare Corp.* (2007) 169 Cal.App.4th 1094, the plaintiff was a patient at a medical center. The plaintiff alleged that, while she was a patient there, a certified nurse assistant at the facility molested her. (*C.R. v. Tenet Healthcare Corp.* (2007) 169 Cal.App.4th 1094, 1097-1098.) The plaintiff asserted a claim under Civil Code section 51.9 against the nurse assistant and against the medical center. The court held that the medical center that hired and supervised the nurse assistant was in a business, service, or professional relationship with the plaintiff, and thus properly subject to a claim under Civil Code section 51.9. (*C.R. v. Tenet Healthcare Corp. supra*, 169 Cal.App.4th 1094, 1106-1107.) If the patient in *C.R. v. Tenet Healthcare Corp.* (2007) 169 Cal.App.4th 1094, was in a business, service, or professional relationship with the hospital that hired and supervised the nurse assistant that molested her, then, by analogy, Plaintiffs here are in a professional relationship with LAUSD, which hired and supervised Berndt. LAUSD may be liable under Civil Code section 51.9. LAUSD's evidence is insufficient to support summary adjudication. The motion is denied.

As LAUSD has failed to shift the burden to Plaintiffs, the court need not consider Plaintiffs' oppositions. Nonetheless, the court provides the following discussion of Plaintiffs' contentions as guidance for the parties.

Plaintiffs claim Civil Code section 51.9 is part of the Unruh Civil Rights Act, and that LAUSD may be liable under that act. Section 51.9 is not part of the Unruh Civil Rights Act. "Civil Code section 51.9 has sometimes been described as being part of the Unruh Civil Rights Act, presumably because of that statute's close proximity in the Civil Code to the Unruh Civil Rights Act, which appears in section 51 of the Civil Code. [Citation] But Civil Code section 51 is the only statute comprising the Unruh Civil Rights Act. As that statute states, 'This section shall be known, and may be cited, as the Unruh Civil Rights Act.'" (*Hughes v. Pair* (2009)

46 Cal.4th 1035, 1044, fn. 1.) Thus, the Unruh Civil Rights Act cannot be the basis for LAUSD's liability. The court's November 25, 2013 ruling on LAUSD's demurrer was incorrect on this point, and the court now modifies its prior order. (See *In re Marriage of Barthold* (2008) 158 Cal.App.4th 1301, 1303.)

Plaintiffs also cite Government Code section 815.2. Under that section, "A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." (Gov. Code, § 815.2, subd. (a).) However, "a school district cannot be held *vicariously* liable for a teacher's sexual misbehavior with a student." (*Steven F. v. Anaheim Union High School Dist.*, *supra*, 112 Cal.App.4th 904, 908, emphasis original.) A school district is, however, "vicariously liable under section 815.2 for the negligence of administrators or supervisors in hiring, supervising and retaining a school employee who sexually harasses and abuses a student." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 879.)

LAUSD contends, "There is not a single allegation in the Master Amended Complaints to suggest that any supervisory or administrative employee of the School District sexually harassed any of the Minor Plaintiffs." (Motion for Summary Adjudication by Defendant Los Angeles Unified School District as to the Fourth Cause of Action for Sexual Harassment, p. 10.) This argument misinterprets the holding of *C.A. v. William S. Hart Union High School*. In that case, the court did not hold that a school district is vicariously liable only for acts by supervisory or administrative personnel. Rather, the court stated that a school district is liable for administrative or supervisory personnel's negligent hiring, supervision or retention of employees who sexually harass or abuse students. (*C.A. v. William S. Hart Union High School Dist.*, *supra*, 53 Cal.4th 861, 879.) Plaintiffs need not base their claims only on acts by administrative or supervisory personnel. However, LAUSD is correct that it cannot be vicariously liable for sexual misconduct.

Plaintiffs also claim LAUSD may be liable under a ratification theory. "As an alternate theory to respondeat superior, an employer may be liable for an employee's act where the employer either authorized the tortious act or subsequently ratified an originally unauthorized tort. The failure to discharge an employee who has committed misconduct may be evidence of ratification. The theory of ratification is generally applied where an employer fails to investigate or

respond to charges that an employee committed an intentional tort, such as assault or battery. Whether an employer has ratified an employee's conduct is generally a factual question." (*C.R. v. Tenet Healthcare Corp., supra*, 169 Cal.App.4th 1094, 1110, internal citations and quotations omitted.) Ratification is another form of vicarious liability. As discussed above, a school district cannot be vicariously liable for sexual misconduct, either on a ratification or a respondeat superior theory. This argument fails. To the extent the court stated otherwise in its ruling on the demurrer, the court modifies its previous ruling. (See *In re Marriage of Barthold*, *supra*, 158 Cal.App.4th 1301, 1303.)

Plaintiffs argue that LAUSD "completely ignores [Civil Code] section 815.2, which authorizes such [a claim for sexual harassment against LAUSD] under vicarious liability principles. Were this not the case, then a cause of action against LAUSD for negligent supervision (which results in the sexual abuse of a minor by his teacher) would also be non-viable (this claim is explicitly viable per the Supreme Court's ruling in *C.A. v. William S. Hart Union High School Dist.*, *supra*, 53 Cal.4th and 871) because there is no statute directly on point stating 'a public school may be held liable for negligent supervision that leads to sexual abuse.' Liability for negligent supervision, as with [Civil Code] section 51.9 sexual harassment, is vicarious pursuant to Civil Code section 815.2." (Manly Group Minor Plaintiff Jane ME Doe's Opposition to Defendant Los Angeles Unified School District's Motion for Summary Adjudication as to the Fourth Cause of Action for Sexual Harassment, p. 15.) Plaintiffs misperceive the holding in *C.A. v. William S. Hart Union High School Dist*. In that case, the court held supervisory and administrative personnel of school districts have duties to protect students from abuse by other employees. The court further held that, under Government Code section 815.2, a school district is vicariously liable when supervisory or administrative personnel breach this duty. (*C.A. v. William S. Hart Union High School Dist., supra*, 53 Cal.4th 861, 868-869.) The court did not hold that a school district is vicariously liable for anything its employees do. Indeed, as Plaintiffs acknowledge, a school district is not vicariously liable for the sex abuse itself. (Manly Group Minor Plaintiff Jane ME Doe's Opposition to Defendant Los Angeles Unified School District's Motion for Summary Adjudication as to the Fourth Cause of Action for Sexual Harassment, p. 14.)

From this, it appears Plaintiffs contend they should be able to state a claim based on LAUSD's supervisory personnel's failure to protect students from harassment. Such a claim is viable under *C.A. v. William S. Hart Union High School*. However, such a cause of action is a cause of action for negligent supervision. (See *C.A. v.*

William S. Hart Union High School Dist., supra, 53 Cal.4th 861, 867.) It is not a cause of action under Civil Code section 51.9.

However, Plaintiffs also contend LAUSD may be directly liable under Government Code section 815.6. Plaintiffs are correct. Under that statute, "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." (Gov. Code, § 815.6.) Under Education Code section 201, school districts have a mandatory duty to prevent harassment on school grounds. (Educ. Code, § 201.) Thus, Plaintiffs contend Government Code section 815.6, in conjunction with Education Code section 201, provides a statutory basis for holding LAUSD liable under Civil Code section 51.9.

Education Code section 201 provides, "It is the intent of the Legislature that this chapter shall be interpreted as consistent with . . . the Unruh Civil Rights Act (Secs. 51 to 53, incl., Civ. C.) . . . except where this chapter may grant more protections or impose additional obligations, and that the remedies provided herein shall not be the exclusive remedies, but may be combined with remedies that may be provided by the above statutes." (Educ. Code, § 201, subd. (g).) This language lumps Civil Code section 51.9 within the Unruh Civil Rights Act.

In dealing with similar language in Insurance Code section 1861.03, the court in *Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441 noted that Insurance Code section 1861.03 was enacted by ballot initiative, and "the voters chose the initiative language in order to subject insurance companies to Civil Code sections 51–53 and other consumer laws, and not to delineate what statutes should be considered within the scope of the Unruh Civil Rights Act[.]" (*Stamps v. Superior Court*, *supra*, 136 Cal.App.4th 1441, 1450, fn. 9.) The court concluded the reference to the Unruh Civil Rights Act was simply evidence of confusion as to which provisions constituted the Act. (*Ibid.*)

Here, as in *Stamps v. Superior Court*, *supra*, 136 Cal.App.4th 1441, the legislature's reference to the Unruh Civil Rights Act was intended to subject school districts to the remedies set forth in Civil Code sections 51-53, and not to determine which statutory provisions are within the Unruh Civil Rights Act. Thus, while the language of Education Code section 201 is not determinative on the issue of whether Civil Code section 51.9 is within the Unruh Civil Rights Act, it

does demonstrate that the legislature intended school districts to be liable for the remedies called for under Civil Code section 51.9 when a school district fails to discharge its duty under Education Code section 201 to prevent harassment on school grounds.

Under Government Code section 815.6, LAUSD is liable for "an injury of that kind proximately caused by its failure to discharge" its duty to prevent harassment. (Gov. Code, § 815.6.) Per Education Code section 201, the damages available for LAUSD's failure to prevent harassment include the "remedies that may be provided by" Civil Code section 51.9. (Educ. Code, § 201, subd. (g).) Education Code section 201, in combination with Government Code section 815.6, thus makes LAUSD liable under Civil Code section 51.9.

Plaintiffs also cite Education Code section 220, which prohibits school districts from discriminating on the basis of protected characteristics. (Educ. Code, § 220.) A claim under Civil Code section 51.9 is a claim for harassment, not for discrimination. Education Code section 220 is irrelevant.

III

The third issue is LAUSD's motion for a protective order prohibiting 20 depositions plaintiffs noticed. This motion is denied.

The court may make any order "justice requires" to protect a party or deponent from "unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." (Code Civ. Proc., § 2025.420, subd. (b).)

In response to LAUSD's ex parte application, the Manly Group Plaintiffs have narrowed their requested depositions to four: the person most qualified regarding "control cards" and human resources investigation; the deposition of the person most qualified regarding the "files project"; the deposition of Rosa Gianopoulos, and the deposition of Ira Berman. In opposition, the Carrillo Group Plaintiffs discuss the depositions of: the the person most qualified regarding "control cards;" the person most qualified regarding the email LAUSD's Office of the General Counsel sent regarding SCARs; and Roberta Fesler. This narrows the list of depositions Plaintiffs request to six. In its moving papers, LAUSD does not address these six depositions. It has not shown that the burden of taking these six depositions outweighs the testimony plaintiffs seek to obtain from these depositions. (See Code Civ. Proc., § 2017.020, subd. (a).)

These six depositions are relevant to the subject matter of this case, and are reasonably calculated to lead to the discovery of admissible evidence. (See Code Civ. Proc., § 2017.010.) Plaintiffs are entitled to take them.

Plaintiffs intent to prove that LAUSD knew or should have known of Berndt's abuse. Persons with knowledge of LAUSD's internal investigation of Berndt's abuse are likely to have information regarding LAUSD's knowledge of Berndt's abuse. At the September 12, 2014 session of his deposition, Jesus Melendez testified that Ira Berman investigated the allegations against Berndt for LAUSD. (Declaration of Alex E. Cunny, Exhibit G, p. 268.) Berman's deposition is thus within the scope of discovery.

In reply, LAUSD cites the testimony of Martin Sandoval. At his deposition, Sandoval testified that he did not investigate Berndt. (See Declaration of Alison K. Beanum, Exhibit B, pp. 547-548.) This testimony does not establish that LAUSD did not investigate the allegations against Berndt, particularly as Jesus Melendez testified that Ira Berman investigated the allegations against Berndt. Sandoval's testimony does not obviate the need for Berman's deposition.

Melendez also testified that he had seen "control cards," which he described as "an annotation by the office [of employee relations] on a specific individual about certain conduct or misconduct alleged against that person." (Declaration of Alex E. Cunny, Exhibit G, p. 299-303.) If LAUSD had control cards on Berndt, these cards would provide evidence LAUSD knew of Berndt's abuse. Plaintiffs are entitled to question witnesses on the control cards.

In reply, LAUSD argues that it has represented to plaintiffs that there were no control cards about Berndt. (See See Declaration of Alison K. Beanum, Exhibit A.) This does not end the relevant inquiry. Plaintiffs have obtained evidence of instances in which Berndt was accused of inappropriate conduct. According to Melendez's testimony, these instances should have been compiled on a control card about Berndt, but, according to LAUSD, there is no control card about Berndt. Plaintiffs are entitled to seek evidence about the control card process in an attempt to determine why there is no control card about Berndt.

The "files project" is a review of documents LAUSD Superintendent John E. Deasy ordered the District's principals to undertake. Deasy instructed all principals to review documents at their schools to determine whether school employees had made all necessary reports to law enforcement or the Department of Children and

Family Services. (See Declaration of Alex E. Cunny, Exhibits N, Q.) If, in undertaking the files project, LAUSD personnel discovered that Miramonte employees failed to report suspected instances of abuse, that evidence would suggest LAUSD failed to prevent Berndt's abuse. This deposition is relevant.

In reply, LAUSD argues that evidence about the files project is irrelevant, because it occurred after Berndt's arrest. (See Declaration of Alison K. Beanum, Exhibit C, p. 283.) This argument is incorrect. As discussed above, if the files project revealed that Miramonte personnel failed to properly report suspected abuse, that evidence would suggest LAUSD failed to prevent Berndt's abuse. Evidence about the files project is relevant.

In response to this court's September 11, 2014 order, LAUSD's Office of General Counsel sent an email to "approximately one hundred" LAUSD employees, inquiring as to whether they knew anything about the destruction of SCARs, which purportedly occurred in at some point in 2008. LAUSD states that no one indicated they had any information about the destruction. (See Response to Amended Ruling Re September 11, 2014 Hearing, p. 1.) Plaintiffs intend to inquire about this email to determine to whom LAUSD sent this email. (See Carrillo Group Plaintiffs' Opposition to Defendant LAUSD's Motion for Protective Order, p. 7.) Plaintiffs previously deposed LAUSD's person most qualified to testify regarding the destruction of the SCARs. LAUSD represented that Roberta Fesler gave the order to destroy the SCARs. However, the person LAUSD designated as its person most qualified to testify on the destruction of the SCARs admitted he had not interviewed Fesler about the destruction. Despite repeated attempts, Plaintiffs have been unable to obtain definitive evidence regarding the destruction of the SCARs. This evidence is relevant. If LAUSD had SCARs about Berndt in its possession, those SCARs would be evidence that LAUSD was on notice of Berndt's abuse. LAUSD contends it destroyed all SCARs in its possession in 2008. Subsequently, LAUSD has located two sets of SCARs. Rosa Gianopoulos is the person who located the second set of SCARs. In light of this, Plaintiffs seek evidence on whether any SCARs were, in fact, destroyed in 2008, and, if not, what happened to the SCARs LAUSD maintained. Plaintiffs are entitled to take these depositions.

LAUSD contends this court has ruled that the SCARs are irrelevant to this litigation. The court has not done so. The court ruled that the SCARs are not discoverable. The court has not ruled that evidence regarding LAUSD's maintenance or possession of SCARs is not discoverable.

LAUSD also argues Plaintiffs cannot depose these witnesses because they are all employees of LAUSD's Office of General Counsel. "California applies a three-prong test in considering the propriety of attorney depositions. First, does the proponent have other practicable means to obtain the information? Second, is the information crucial to the preparation of the case? Third, is the information subject to a privilege?" (*Carehouse Convalescent Hospital v. Superior Court* (2006) 143 Cal.App.4th 1558, 1563.)

The information Plaintiffs seek is not subject to any privilege. A client has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the client and the lawyer. (Evid. Code, § 954.) "'[C]onfidential communication between client and lawyer' means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship." (Evid. Code, § 952.) The privilege attaches to an entity client's communication with inhouse counsel and outside counsel. (*Alpha Beta Co. v. Superior Court* (1984) 157 Cal.App.3d 818, 825.)

If Fesler instructed LAUSD employees to destroy the Child Abuse Reporting Office's records while she was working as inhouse counsel for LAUSD, her instruction would be "advice given by the lawyer in the course of that [attorney-client] relationship." (Evid. Code, § 952.) It was privileged.

But, LAUSD has waived the privilege. A client waives the attorney-client privilege "with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone." (Evid. Code, § 912, subd. (a).) A client waives the attorney-client privilege over a communication when the client discloses the fact that a communication with the attorney occurred, and discloses "some detail as to its contents." (See *Julrik Productions, Inc. v. Chester* (1974) 38 Cal.App.3d 807, 811.)

LAUSD publicly acknowledged that its lawyers advised it on the destruction of the records, and disclosed some details of the advice. LAUSD thus waived the attorney-client privilege over communications about the destruction of the records. Similarly, LAUSD publicly filed a response to this court's September 11, 2014 order, in which it discussed the mail the Office of General Counsel sent about the destruction of the SCARs. (See Response to Amended Ruling Re September 11, 2014 Hearing, p. 1.) It thereby waived any privilege covering that email. LAUSD also publicly filed a declaration from Gianopoulos about her discovery of the second set of SCARs. LAUSD waived any privilege covering Gianopoulos's discovery of the SCARs.

Evidence regarding the destruction of the records is crucial to Plaintiffs' case. Plaintiffs intend to prove LAUSD knew or should have known of Berndt's abuse. Reports about Berndt would suggest LAUSD was on notice of his abuse. LAUSD may claim it did not know of Berndt's abuse because it does not have any reports on him. Plaintiffs must have the opportunity to counter this assertion with evidence that LAUSD no longer has reports about any teachers because it destroyed the records of its child abuse unit.

Plaintiffs have demonstrated they lack other means to obtain the evidence they seek. Plaintiffs took the deposition of the person LAUSD designated as its person most qualified to testify regarding the destruction of the SCARs, but that witness admitted he had not spoken to the person who gave the order. The witness LAUSD designated as its person most qualified was inadequate. Despite its repeated representations that it destroyed all SCARs in its possession in 2008, LAUSD has since disclosed that it has located two sets of SCARs that were not destroyed. In response to Plaintiffs' complaints, this court ordered LAUSD to obtain information about the destruction of the SCARs, and LAUSD has failed to identify anyone with information about the destruction. Under these circumstances, Plaintiffs have demonstrated that they lack other means to obtain information about the destruction of the SCARs. Plaintiffs must be permitted to depose witnesses from the Office of General Counsel.

The Manly Group Plaintiffs seek sanctions in the amount of $2,500. The Manly Group Plaintiffs contend LAUSD brought this ex parte application in bad faith, as it noticed 34 depositions in another matter shortly before it filed this motion. LAUSD's conduct in other matters does not bear on whether the depositions Plaintiffs noticed in this action were unduly burdensome. While the court appreciates that counsel for LAUSD and Plaintiffs in this case also represent parties

in that action, the cases are distinct, and discovery that is unduly burdensome in one action might not be in the other.

The Manly Group Plaintiffs also seek sanctions on the ground that Plaintiffs agreed to narrow their requested depositions. Plaintiffs have not demonstrated they withdrew the requested depositions prior to the noticed date. Thus, Plaintiffs have not demonstrated LAUSD acted without justification in seeking relief.