LAW DEPARTMENT

CITY OF NEWTON, MASSACHUSETTS

CITY HALL
1000 COMMONWEALTH AVENUE
NEWTON CENTRE, MA 02459
TELEPHONE (617) 796-1240
FACSIMILE (617) 796-1254

CITY SOLICITOR
DONNALYN B. LYNCH KAHN

ASSOCIATE CITY SOLICITOR
OUIDA C.M. YOUNG

ASSISTANT CITY SOLICITORS
EILEEN M. MCGETTIGAN
MARIE M. LAWLOR
ANGELA BUCHANAN SMAGULA
ROBERT J. WADDICK
MAURA E. O'KEEFE
JEFFREY A. HONIG

BY HAND

April 7, 2011

David Duncan, Esq.
Zalkind, Rodriguez, Lunt & Duncan LLP
65A Atlantic Avenue
Boston, MA 02110

Re: *Greg Smith and Nancy Macias Smith v. City of Newton, Acting as the Newton Public Schools*
Civil Action No. 11-0572

Dear Mr. Duncan:

You are hereby served, pursuant to Superior Court Rule 9A, with copies of Defendant's Responsive Pleading in the above-referenced matter:

1. *Newton Public Schools' Motion to Dismiss;*

2. *Newton Public Schools' Memorandum in Support of Motion to Dismiss.*

Please forward an original and one copy of any opposition within the requisite time period.

Sincerely,

Angela Buchanan Smagula
Assistant City Solicitor

Enclosures

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

GREG SMITH AND NANCY MACIAS SMITH, Plaintiffs	)	
v.	)	CIVIL ACTION NO. 11-0572
CITY OF NEWTON, acting as the NEWTON PUBLIC SCHOOLS, Defendant	)	

NEWTON PUBLIC SCHOOLS' MOTION TO DISMISS

The Newton Public Schools, ("NPS") hereby respectfully requests the above-captioned Verified Complaint for Declaratory Relief (the "Complaint") be dismissed, pursuant to Massachusetts Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted. The Complaint must be dismissed as the parties voluntarily, knowingly and intelligently entered into, with representation by counsel, a contract that included a narrowly-tailored confidentiality provision. Moreover, the contract between NPS and the Plaintiffs is a student record, not subject to the Massachusetts Public Records law. As such, there are no legal grounds whatsoever to rule the confidentiality provision void or unenforceable.

Thus, for the reasons in stated in the related Memorandum in Support, NPS respectfully requests the Verified Complaint for Declaratory Relief be dismissed in its entirety and all other ancillary relied be denied.

Respectfully submitted,

DEFENDANT
CITY OF NEWTON, acting as the
NEWTON PUBLIC SCHOOLS,
By its attorney,

Angela Buchanan Smagula (BBO #643764)
Assistant City Solicitor
City of Newton Law Dept.
1000 Commonwealth Avenue
Newton Centre, MA 02459
Tel: (617) 796-1240

CERTIFICATE OF SERVICE
I hereby certify that a true copy of the above document was served upon the attorney(s) of record for each other party by ~~mail/hand/fax~~ on 4/7/11
ANGELA B. SMAGULA

Dated: April 7, 2011

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT

GREG SMITH AND NANCY MACIAS SMITH, Plaintiffs	)	
v.	)	CIVIL ACTION NO. 11-0572
CITY OF NEWTON, acting as the NEWTON PUBLIC SCHOOLS, Defendant	)	

NEWTON PUBLIC SCHOOLS'
MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Newton Public Schools, ("NPS") hereby respectfully requests the above-captioned Verified Complaint for Declaratory Relief be dismissed, pursuant to Massachusetts Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted. In support of this Motion, NPS submits the instant Memorandum demonstrating that the parties voluntarily, knowingly, and intelligently entered into, with representation by counsel, a contract that included a narrowly-tailored confidentiality provision. Moreover, the contract between NPS and the Plaintiffs is a student record, not subject to the Massachusetts Public Records law. As such, there are no legal grounds whatsoever to rule the confidentiality provision void or unenforceable. Thus, for the reasons stated below, NPS respectfully requests the Verified Complaint for Declaratory Relief be dismissed in its entirety, and all other ancillary relief be denied.

BACKGROUND

Plaintiffs are parents of a child with special needs who formerly attended NPS. Complaint ("Compl.") at ¶ 2. NPS and the Parents disagreed as to the appropriate educational placement for their child. Id. at ¶¶ 5- 7. NPS believed he could be educated in the public school

system, while Plaintiffs preferred a private school. Id. at ¶ 5. When NPS and the Plaintiffs could not agree, Plaintiffs unilaterally placed their child at the private school of their choice, and in doing so, bore the burden of the cost of that private school. Id. at ¶ 6. Under federal law that governs special education in public schools, parents such as Plaintiffs may enroll their child in a private school and seek retroactive reimbursement for the cost of the private school. See 20 U.S.C. 1412(a)(10)(C)(ii); Sch. Comm. Of Burlington v. Dept. Of Educ., 471 U.S. 359, 370 (1985). Plaintiffs here did seek to do so, and a negotiation concerning the financial burden of the Plaintiffs' unilateral choice ensued. Both Parents and NPS were represented by counsel during the negotiations. Compl. at ¶ 8 ("the plaintiffs, through their attorney…"). Negotiations took place over a series of weeks directly between counsels. Id. at ¶ 7. The resulting settlement agreement outlined the financial obligations of both parties concerning the tuition of the private school going forward. Compl. at Exhibit A , ## 2-3. In addition, the settlement agreement included a provision concerning the voluntarily and knowing nature of the contract, as well as a confidentiality provision as follows:

> # 11. The Parties acknowledge that they have each *been represented by counsel,* have read this entire Agreement, and *have signed this Agreement voluntarily with full understanding of its terms*, and without any further inducements or promises except as set forth herein. (emphasis added)

The confidentiality provision states:

> #13. Except where otherwise required by law, except as necessary to enforce the terms of this Agreement, or except in any administrative or other legal proceeding between the Parties, *the Parties agree that the terms of this Agreement shall remain confidential and shall not be disclosed to third parties* by them or their advocates or attorneys from the date of the execution of this Agreement. The Parents may, without breach of the terms of this paragraph, disclose the terms of the Agreement to their financial, educational and/or legal advisors, and to Gifford.

(emphasis added). The plain language of the confidentiality provision restricts disclosure as to terms of the specific provisions of the contract only. On September 2 and 3, 2010, the parties signed the contract.

ARGUMENT

I. Standard of Review

In determining whether to grant a 12(b)(6) motion, the Court must consider whether there is sufficient factual matter to "state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). In addition, the Court should make best efforts to identify allegations that are "mere conclusions" not entitled to the assumption of truth, and rely on its experience and common sense. Ashcroft v. Iqbal, 129 S.Ct. 1937, 1940 (2009)

In determining whether a complaint alleges facts sufficient to state a cause of action, the Court need not accept a complaint's bald assertions or unsupportable conclusions. Beddall v. State Street Bank and Trust Co., 137 F.3d 12, 17 (1st Cir. 1998). When evaluating a motion to dismiss, the Court must presume true only the well-pleaded facts contained in the complaint. Iqbal, 129 S.Ct. at 1940 (2009); see also Maldano v. Fontones, 568 F. 3d, 263, 266 (1st Cir. 2009) ("Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n] —that the pleader is entitled to relief.").

Although the Court must accept as true all of the factual allegations contained in a complaint, that doctrine is not applicable to legal conclusions. Iqbal, 129 S.Ct. at 1949, citing Twombly, 550 U.S. 555 (2007)("Threadbare recitals of the legal elements, supported by mere conclusory statements, do not suffice to state a cause of action."); Gross v. Bohn, 782 F. Supp. 173, 177 (D. Mass. 1991) (legal conclusions, deductions and opinions contained in a complaint

are not given a presumption of truthfulness). Indeed, courts "need not accept as true legal conclusions from the complaint or naked assertions devoid of further factual enhancement." Maldonado, 568 F. 3d at 266.

II. The Settlement Agreement Is A Valid Contract, Entered Into Knowingly, Voluntarily, Intelligently, and with Representation by Counsel.

Plaintiffs have gone to great lengths to try and frame this case as a complex, sexy, First Amendment issue with important public record and public policy implications. However, even a cursory review of the Complaint clearly demonstrates that this is actually a rather mundane, straightforward *contract* case. Simply put, Plaintiffs voluntarily, knowingly and intelligently, and with representation by counsel, entered into a contract with NPS, a settlement agreement, that paid to them a considerable sum of money, and included a narrowly-tailored confidentiality provision that limited all parties from disclosing the terms of the contract. This sudden pounding of the drum by Plaintiffs that their constitutional rights have been violated and that the public records law has been overtly flouted with the inclusion of such a provision is utterly misguided, suspiciously disingenuous, and ultimately misplaced.

To enter into a contract, there must be agreement on the material terms and the parties must intend to be bound by the same. See Situation Mgt. Sys. v. Malouf, Inc., 430 Mass. 875, 878 (2000) citing McCarthy v. Tobin, 429 Mass. 84, 87 (1999). Further, settlement agreements are given the same full contractual force as other contracts. See, e.g., Correia v. DeSimone, 34 Mass. App. Ct. 601, 602 (1993); Entegee, Inc. v. Weinberg, 2007 Mass. Super. LEXIS 521, *7 (Mass. Super. Ct. Nov. 26, 2007). In fact, courts across the country have given full effect to the terms of settlement agreements entered into by public school districts with the parents of their students. See, e.g., Tallman v. Barnegat Bd. of Educ., 43 Fed. App'x 490, 497 (3d Cir. 2002) (holding that parents could not argue that their child's temporary placement at a private

residential treatment school without an IEP violated the IDEA, where the parents had previously agreed to that placement with the child's public school district in a settlement agreement); Combier v. Biegelson, 2005 U.S. Dist. LEXIS 3056 *9-10 (S.D.N.Y. Feb. 25, 2005) (holding parents bound to all terms of settlement with school district concerning special education needs of child, where the parents knowingly entered into the settlement and were represented by counsel); D.R. by M.R. v. East Brunswick Bd. of Educ., 838 F. Supp. 184, 189, 195 (D.N.J. 1993) (holding that public school district was not required to pay for an additional aide for a student in an out-of-district placement where a previous settlement agreement between the district and the family stated that the district would be relieved from paying "any and all other costs" associated with the private school other than those anticipated at time of settlement).

As the above case law demonstrates, settlement agreements, like the one at bar, are not unusual with regard to documenting agreed upon terms of a financial relationship (or other services provided) by and between the school district and parents on behalf of the student. Often times such settlement agreements are negotiated directly by the school district and the parents. Other times such agreements are negotiated with the assistance of a state's Department of Elementary and Secondary Education mediation process[1]. And many times, such agreements are negotiated by counsel (sometimes through mediation), with both the parents and student, and the school district represented by separate counsel. Courts have found the terms of such settlement agreements, knowingly and voluntarily entered into with the assistance of counsel, even more likely to be left undisturbed. See, e.g., Carver v. Waldman, 21 Mass. App. Ct. 958, 960 (1986) ("in the run of cases where a settlement, agreed to by parties represented by counsel, is offered to a judge to be embodied in a judgment. . . the judge may act without assuming responsibility for

[1] The DESE sponsored mediation and resulting agreements are confidential, again by agreement of the parties and memorialized in the written mediation agreement. M.G.L. c. 71B Section 2A; 603 CMR 28.08(4).

the fairness of the terms."); Hayeck v. Fruit Sever Realty Corp., 22 Mass. L. Rep. 444 (Mass. Super. Ct. 2007) (upholding a Memorandum of Understanding entered into during mediation with the representation of counsel as a contractually binding settlement agreement) (reversed on other grounds); see also Bank of New York v. Amoco Oil Co., 35 F.3d 643, 661 (2d Cir. 1994) ("a settlement agreement in writing between parties represented by counsel is binding and, essentially, a contract").

Here, NPS has entered into a binding contract, a settlement agreement, with Plaintiffs, parents of a minor child with special needs. Plaintiffs admit they were represented by counsel and the settlement agreement at issue was negotiated over a period of weeks by counsel for both parties. Compl. at ¶¶ 7-8; Id. at Exhibit A, #11. Indeed, Plaintiffs detail that they initially objected to the inclusion of the confidentiality provision, "made clear" they had no desire to include it, *but ultimately agreed to its inclusion* and signed the agreement including that provision. Id. at ¶¶ 7-9. Such admissions in the Complaint demonstrate Plaintiffs were fully aware of what they were waiving, as well as the voluntariness of the agreement.

However, Plaintiffs now appear to imply in the Complaint some sort of duress, because of the purported threat of "costly litigation" and "further evaluations" of their child by the school district. Compl. at ¶¶ 9, 12. But, this cannot, after the fact, render the contract or a provision therein void, especially where represented by counsel.[2] See, e.g., Innis v. Innis, 35 Mass. App. Ct. 115, 118 (1993) (judgment nisi entered into by parties with assistance of counsel in divorce proceeding upheld, even though petitioner claimed depression and other stresses clouded her decision at the time she entered into the judgment, because her counsel was aware of these stresses.) Moreover, the fact that the confidentiality clause was protested during the

[2] Under no circumstances could the Plaintiffs' child undergo any evaluations by NPS involuntarily. The law requires written consent by parents, to specifically identified evaluations. 603 CMR 28.07; 28.04.

negotiations, *does not* render the execution of the contract involuntary or made under duress. See Lake James Community Volunteer Fire Dept., 149 F.3d at 281 (the fact that fire department initially and repeatedly protested the restriction on certain first amendment rights, but ultimately signed with representation of counsel demonstrated a difficult choice made, but not an involuntary execution of the agreement).

Finally, it is commonly understood that parties routinely enter into settlement agreements, in part, to avoid the cost of litigation. This is, in fact, one of the very reasons the parties did so here. Compl. at Exhibit A, at p. 1 ("Whereas there is a dispute between the parties regarding [child's] placement, but the parties desire to resolve this matter without further litigation"). Thus, raising such a concern now cannot be a basis for some sort of claim of duress.[3]

B. Parents Voluntarily, Knowingly and Intelligently, With Representation of Counsel, Legally Limited their First Amendment Rights when they Agreed to the Narrowly-Tailored Confidentiality Provision of the Settlement Agreement.

It is well settled that constitutional rights may be waived upon clear and convincing evidence that the waiver is knowingly, voluntary and intelligent. See, e.g., D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185, 187 (1972); Spence v. Reeder, 382 Mass. 398, 411 (1981)(noting a person can waive his constitutional rights, but requires intentional relinquishment). This principle of waiver has been applied specifically to First Amendment rights in civil cases. See Huynh v. City of Worcester et. al., 2010 WL 3245430 (D. Mass.)(August 2010-Slip Copy) (broad confidentiality clause limiting *any disclosure* relating to a civil rights action and the terms of the settlement *held enforceable* and not a violation of First

[3] The claim of months of "costly litigation" is also somewhat misleading as there is a specific administrative agency, the Bureau of Special Education Appeals ("BSEA") that exists solely to hear special education related claims such as payment for unilateral outside placement made by parents. M.G.L. c. 71B Section 2A; 603 CMR 28.08. That forum moves quickly and efficiently both in scheduling a hearing and generating a written decision. Id. Parents

Amendment rights); Wilkicki v. Brady, 882 F.Supp. 1227, 1231 (D.R.I. 1995); Lake James Community Volunteer Fire Dep't v. Burke County, 149 F.3d 277, 281 (4th Cir. 1998) (upholding a contract between a city and fire department, where fire department knowingly and voluntarily with counsel waived the department's First Amendment rights to petition the government); Paragould Cablevision, Inc. v. Paragould, 930 F.2d 1310, 1315 (8th Cir. 1991) (upholding a franchise agreement that limited parties' First Amendment rights, and stating that "[t]he forum for protecting its free speech rights was the bargaining table, not the courtroom"); Forbes v. Milwaukee County, 2007 U.S. Dist. LEXIS 1282 (E.D. Wis.)(January 2007) (upholding a contractual waiver of certain First Amendment rights because despite the public's interest in receiving speech, *such interest is contingent on there being a willing speaker, which may be negotiated away in a contract*); Perricone v. Perricone, 972 A.2d 666, 688 (Conn. 2009) (upholding a First Amendment waiver in a contract entered into during divorce proceedings).

In determining whether a waiver is voluntary, knowing, and intelligent a consideration of the totality of the circumstances and facts surrounding the particular case are considered. Factors include the sophistication/education of the Plaintiff to understand the terms of the agreement, whether the parties are represented by counsel, the time period over which such an agreement is considered, the nature and limit of a waiver, and a consideration of the impact on relevant public interests. See Newton v. Rumery, 480 U.S. 386, 394 (1987) (enforcing a criminal release-dismissal agreement where accused was represented by experienced criminal defense attorney and had three days to review the agreement); Leonard v. Clark, 12 F.3d 885, 890 (9th Cir. 1993) (where all union speech not banned the narrowly-tailored provision any public policy interest was not outweighed by the enforcement of the waiver); Wilkicki, 882 F.Supp. at 1234-35

chose to negotiate instead of filing with the BSEA. In fact, at anytime they could have stopped negotiating and immediately filed.

(finding officer made a rational decision of whether to waive his rights for consideration and otherwise overturning his personal autonomy to make those decisions would be a more dire outcome). Public interests favoring enforcement of contractual waivers include freedom to contract, encouraging settlement of disputes, and personal autonomy. See generally, Collins v. Sears Roebuck & Co., 164 Conn 369, 376-77 (1073)(freedom to contract); Wilkicki, 882 F.Supp. at 1234-35 (personal autonomy and encouraging settlement).

Here, *both parties*—represented by counsel[4]—agreed to a narrowly-tailored confidentiality provision in Paragraph 13 as follows:

> Except where otherwise required by law, except as necessary to enforce the terms of this Agreement, or except in any administrative or other legal proceeding between the Parties, the Parties agree that *the terms of this Agreement shall remain confidential and shall not be disclosed to third parties* by them or their advocates or attorneys from the date of the execution of this Agreement. The Parents may, without breach of the terms of this paragraph, disclose the terms of the Agreement to their financial, educational and/or legal advisors, and to Gifford. (emphasis added).

As the above case law demonstrates, parties can, and do, bargain away their right to freely speak on certain matters, in part, or in their entirety. This is exactly what occurred here. The parties agreed, in return for consideration, to limit their right to speak about the terms of the agreement. Thus, the provision is not void and not a violation of the parties First Amendment rights. Plaintiff cannot now invoke the First Amendment in hopes of "recapturing" previously "surrendered rights." See, e.g., Paragould Cablevision, 930 F.2d at 1315.

In fact, a Massachusetts federal court has found that under such facts and circumstances there is no First Amendment issue. See Huynh v. City of Worcester et. al., 2010 WL 3245430 (D. Mass.)(August 2010-Slip Copy). In Huynh the Plaintiff, represented by counsel, entered

[4] Counsel who negotiated the settlement agreement was a experienced attorney who specializes in special education law and the representation of parents against school districts.

into a settlement agreement in a civil rights case that included a very broad confidentiality provision that limited disclosure by Plaintiff and his counsel of "anything whatsoever relating to this action or the terms of this settlement. . ." Id. at * 1. However, in response to allegations of a breach by that same counsel, he argued that the confidentiality provision was unenforceable as an illegal restraint on his client's First Amendment rights. Id. at *3. The court was not impressed with such an argument or counsel's attempt to trump it up as a constitutional issue, stating:

> Attorney Tumposky's attempt to characterize the confidentiality clause as an attempt by the City to restrain his client's First Amendment Rights to Freedom of Speech is a *non-starter*. Attorney Tumposky advised his client to accept the confidentiality clause in exchange for the Defendants agreeing to settle the case for $47,000. *Plaintiff agreed to the clause and signed the Release.* Having agreed to the clause Plaintiff and Attorney Tumposky were bound to comply with it. *There is no First Amendment Issue.* Brady v. U.S., 397 U.S. 742, 748 (1970)(voluntary waiver of constitutional rights permitted); see also Charter Commc'n Inc. v. County of Santa Cruz, 304 F.3d 927, 935 (9th Cir. 2002)(First Amendment protection may be bargained away); Leonard v. Clark, 12 F.3d 885, 890 (9th Cir. 1993) (party bound itself to contract burdening First Amendment Protections). Id. (emphasis added).

The facts and circumstances of Huynh are very similar to the case at bar. Here, however, the confidentiality provision is actually much less broad and very narrowly-tailored to the specific terms of the contract—the bulk of which concerns the financial arrangements between the parties. But the import is the same—and the Court phrases it so eloquently—Plaintiffs' First Amendment argument here is also a "non-starter." Plaintiffs, represented by counsel, received a considerable sum of money and in return bargained away their freedom to disclose the terms of the agreement, including that sum. Any restriction that was placed on their speech as a result, was self-imposed, when they agreed to the confidentiality provision. See, e.g., Forbes, 2007 U.S. Dist. LEXIS 1282 at *26.

Even putting aside the validity of the clause and a party's right to restrict its freedom of speech, Plaintiffs are simply wrong when they blithely state that the confidentiality provision has "restricted their rights to speak and petition government in violation of the Massachusetts Declaration of Rights and the First Amendment to the United States constitution." Compl. at ¶12. The language of the provision is plain, specific, and narrow, and applicable to both parties. The Parties are restricted in disclosing only the "terms of the Agreement." Thus, Plaintiffs are not, in fact, restricted from, for example, discussing their child's special education experience at NPS; any special education topic they may be concerned about; the fact that their child is at a private school; or more generally their desire to publically expound on "how special needs students are and should be treated, as a matter of policy, in their community,"—whenever and with whomever they choose. Compl. at ¶¶10-11. To the extent they want to publically share "their experience" with the legions of people they identify in the Complaint—other "Newton parents, voters, members of Newton Public School Board, and elected Newton officials,"—they can do so. They simply cannot discuss "*terms of the agreement,*" for example the specifics of the financial relationship outlined therein. That Plaintiffs are not so restricted has been explained to them numerous times, most recently in writing this past January to counsel in the instant case. See Compl. at Ex. E (January 2011 letter from City Solicitor ("...they are free to discuss all other issue regarding the Newton Public School that are outside the items set forth in the Agreement").

Furthermore, there simply is no public policy interest in the private financial arrangement made between one family and their child's individualized special education programming. Plaintiffs' personal limited waiver does not compromise a fundamental right of the public or even all of Plaintiffs First Amendment rights. Plaintiffs *did not waive their rights* to discuss their

child's special education status and needs in a public forum, nor are they, in anyway, restricted by the language of the confidentiality provision from criticizing NPS or any aspect of the special education services offered by NPS, or even their child's experience with NPS in the community or the numerous public forums they identify in their Complaint. There is no public interest in the private individualized negotiated financial arrangement between one particular set of parents and NPS. The fact that confidentiality provision or waiver of constitutional rights is limited or narrowly-tailored to advance the private and individual nature of the settlement agreement on behalf of a child with special needs further strengthens the validity of such a clause. See Leonard v. Clarke, 12 F.3d 885 (9th Cir. 1993)(noting that First Amendment waiver in collective bargaining agreement was narrowly-tailored where it did not ban *all* union speech, just very specific and limited subjects related to the objectives to entering such an agreement); Lake James Community Volunteer Fire Dept., 149 F.3d at 280 (upholding narrowly-tailored waiver of right to sue in court); Perricone, 292 Conn. at 222 (holding confidentiality clause valid and not violative of public policy favoring speech where restrictions on speech tailored to advance primary purpose of protecting value of business). And even if there were, any such policy is outweighed by the policy interest of families and the district to be able to autonomously enter into waiver agreements, and to privately settle individual disputes. See, e.g., Wilkicki v. Brady, 882 F. Supp. at 1234-35.

The settlement agreement at issue is a valid and enforceable contract and the parties knowingly, voluntarily and intelligently with representation of counsel agreed to the narrowly-tailored confidentiality provision therein. Further, the confidentiality provision does not implicate or violate Plaintiffs' First Amendment rights, as they are free to waive or limit such rights, and they did exactly that.

III. The Settlement Agreement is A Student Record, Not a Public Record and Thus not Subject to the Public Record Laws.

The Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, prohibits the federal funding of educational institutions that have a policy or practice of releasing education records or any personally identifiable information contained therein to unauthorized persons. Gonzaga Univ. v. Doe, 536 U.S. 273, 276 (2002)[5]. However, FERPA does not provide a private right of action for people affected by such inappropriate disclosures to enforce under 42 U.S.C. § 1983. Gonzaga, 536 U.S. at 276; Frazier v. Fairhaven Sch. Comm., 276 F.3d 52, 70 (1st Cir. 2002); Zona v. Clark Univ., 436 F. Supp. 2d 287, 290 (D. Mass. 2006). Settlement agreements between public school districts and parents of a student, in a dispute pertaining to the student, are considered an educational record for the purposes of FERPA. See, e.g. Wittenberg v. Winston-Salem/Forsyth County Board of Education, 2009 U.S. Dist. LEXIS 51774 *3-4 (Court reasoned that a settlement agreement between the family of a special needs student and a public school district amounted to a school record under FERPA and the IDEA)[6],; see also Soter v. Cowles Publ'g Co., 174 P.3d 60, 67 (Wash. 2007) (noting in dicta that "an official in the Department of Education had warned that the investigation records and the settlement agreement would be protected by FERPA and could not be disclosed absent parental consent").

Plaintiffs' public records argument is misplaced, and consequently any public policy argument based on public records law is specious. What Plaintiffs fail to appreciate is that the public policy principle guiding disclosure of public records is entirely different from the public policy governing FERPA and the Commonwealth's protection of student records. The public

[5] NPS receives federal funding.
[6] IDEA is the Individual with Disabilities Education Act, which governs special education in public schools. 20 U.S.C. Section 1400 et. al. (2007).

has the right to know what is happening in their government, thus the presumption of disclosure. In contrast, a student record is presumptively private and protected and the public does not have the right to access the specifics of a child's record.

As the settlement agreement is a student record under FERPA, it is not subject the public records laws and not presumptively available for disclosure. In fact, in Massachusetts, student records are specifically excluded from disclosure under the Massachusetts Public Records law—Exemption (a) the Statutory Exemption. See M.G.L. c. 4 Section 7(26)(a) (records excluded that are specifically or by necessary implication exempted from disclosure by statute). This statutory exception specifically applies to student records as access to such records is expressly limited to a defined group of individuals. See M.G.L. c. 71 Section 34D and 34E; see also Secretary of the Commonwealth Division of Public Records Guide to the Massachusetts Public Records Law Appendix of Specific Examples of Exemption (a) Statues (identifying and listing "Student Records, M.G.L. c. 71 Sections 34D and 34E "). And to be clear, because the public policies behind public records versus student records are diametrically different, nothing prevents the individuals with access to student records from agreeing to even more restrictions, for example a confidentiality provision, that would otherwise limit those with access from disseminating the information under FERPA or M.G.L. c. 71 Sections 34D and 34E. There is no violation of public policy as presented in the Complaint.

CONCLUSION

For the foregoing reasons, NPS respectfully requests that this Court dismiss the Verified Complaint and Declaratory Action as filed in its entirety.

Respectfully submitted,

DEFENDANT,
CITY OF NEWTON, acting as the
NEWTON PUBLIC SCHOOLS,

By its attorney,

Angela Buchanan Smagula (BBO #643764)
Assistant City Solicitor
City of Newton Law Department
1000 Commonwealth Avenue
Newton Centre, MA 02459
Tel: (617) 796-1240

CERTIFICATE OF SERVICE
I hereby certify that a true copy of the above document was served upon the attorney(s) of record for each other party by ~~mail/hand/fax~~ on 4/7/11
ANGELA B. SMAGULA

Dated: April 7, 2011