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BY HAND

August 29, 2012

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. Defendant Newton Public Schools' Rule 9A(b)(5)(i) Statement of Material Facts as to Which There is no Genuine Issue to be Tried;

2. Defendant Newton Public Schools' Motion for Summary Judgment;

3. Defendant Newton Public Schools' Memorandum in Support of Motion for Summary Judgment;

4. Affidavit of Paula Nargi Black

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	)	

DEFENDANT NEWTON PUBLIC SCHOOLS'
RULE 9A(b)(5)(i) STATEMENT OF MATERIAL FACTS
AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

FACTS

1. Plaintiffs are parents of a child with special needs who formerly attended Newton Public Schools ("NPS"). Complaint ("Compl.") at ¶ 2.

2. NPS and the Parents disagreed as to the appropriate educational placement for their child. Id. at ¶¶ 5-7.

3. NPS believed that he could be educated in the public school system, while Plaintiffs preferred a private school. Id. at ¶ 5.

4. 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.

5. 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.

6. 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 counsel. Id. at ¶ 7. The resulting Settlement Agreement among other things, outlined the financial obligations of both parties concerning the tuition of the private school going forward. Compl. at Exhibit A , ## 2-3.

7. 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)

8. The confidentiality provision state:

> # 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. Id.

9. The Settlement Agreement identifies the Student as a "Student with disabilities who is eligible for special education services." Settlement Agreement at 1.

10. The Settlement Agreement also states that if the Student should withdraw from the school in which he was placed to receive special education services, a Team meeting would take place, "within ten (10) days to develop an IEP." Settlement Agreement ¶4 at 2.

11. On September 2 and 3, 2010, the parties signed the Settlement Agreement. Id.

12. The Settlement Agreement is a confidential Student record, maintained in a binder bearing Student's name in the office of the Director of Out of District for NPS. See Affidavit of Paula Nargi Black at ¶ 4 ("Black Aff.").

13. Confidential Settlement Agreements between NPS and third parties, including the agreement between Plaintiffs' and NPS, are maintained as "part of the Student's confidential record and *are kept only in the Students' record files and are not kept by the City of Newton's comptroller office, or any other financial office in the City of Newton or Newton Public Schools."* (emphasis added) Black Aff. ¶ 5.

Respectfully submitted,

Defendant,
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
asmagula@newtonma.gov

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

ANGELA B. SMAGULA

Dated: August 29, 2012

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	)	

DEFENDANT NEWTON PUBLIC SCHOOLS' MOTION FOR SUMMARY JUDGMENT

NOW COMES the Defendant, Newton Public Schools (hereinafter "NPS") and respectfully requests that this Honorable Court enter summary judgment in its favor as a matter of law. In support of this motion, Defendant relies upon its Memorandum in Support of its Motion for Summary Judgment, which demonstrates that Plaintiffs voluntarily, knowingly, and intelligently entered into, with representation of counsel, a settlement agreement concerning their son's education that included a narrowly-tailored confidentiality provision. This settlement agreement between NPS and the Plaintiffs is a student record, not subject to the Massachusetts Public Records law. Contrary to Parents belief (with no basis in fact), the document is not a public record, and there are no grounds whatsoever to rule the confidentiality provision void or unenforceable.

In support of its motion, NPS also offers the affidavit of Paula Nargi Black, the current Assistant Director for Student Services for NPS and former Director of Out of District with the Student Services Department for NPS. Ms. Black's sworn statement confirms that the settlement agreement in question, and all confidential settlement agreements regarding the placement of NPS students in out of district schools, are student records, maintained by student name in the

office of the Director of Student Services for NPS, and are not publicly available. As there is no genuine issue of material fact remaining concerning whether the settlement agreement is a student record, the Defendant hereby respectfully requests that the Court grant Summary Judgment in its favor, and dismiss the Complaint in its entirety.

Respectfully submitted,

Defendant,
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 on
ANGELA B. SMAGULA

Dated: August 29, 2012

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	)	

DEFENDANT NEWTON PUBLIC SCHOOLS'
MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant, Newton Public Schools ("NPS") has moved, pursuant to Mass. R. Civ. 56, for judgment in their favor on all counts against them set forth in the Complaint by Plaintiffs Greg Smith and Nancy Macias Smith ("Plaintiffs") in the above-captioned matter. In support of this Motion, Defendant 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 confidential student record, not subject to the Massachusetts Public Records law, and not otherwise publicly available. As such, there are no legal grounds whatsoever to rule the confidentiality provision void or unenforceable. As evidence that the contract in question is, in fact, a student record, Defendant offers the affidavit of Paula Nargi Black, Assistant Director for Student Services for Newton Public Schools and former Director of Out of District with the Student Services Department of Newton Public Schools. Ms. Black confirms that all confidential settlement agreements concerning NPS students are maintained *only* in students' confidential personal files and in the office of the Director of Out of District. These documents

are not shared with the City of Newton's Comptroller Office and are not publicly available. Thus, for the reasons stated below, Defendant respectfully requests that this Honorable Court grant summary judgment in its favor on all counts against it set forth in the above captioned complaint.

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 counsel. Id. at ¶ 7. The resulting settlement agreement outlined the financial obligations of both parties concerning the tuition for 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.

After receipt of the Complaint, NPS filed a detailed Motion to Dismiss which was heard by the Honorable Judge Wren on August 10, 2011. The Honorable Judge Wren denied the Motion to Dismiss and ruled as follows:

> "After hearing at this stage, based on the four corners of the plaintiff's Complaint, and the stated status of the record in issue as a "public record", which is the Plaintiffs' assertion in the complaint. The motion to dismiss pursuant to Rule 12-b-6 is denied;"

See Court Order, dated September 9, 2011.

ARGUMENT

I. Standard for Granting Summary Judgment

Summary judgment shall be granted where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56. See also Cassesso v. Commissioner of Correction, 390 Mass. 419, 422 (1984); Community National Bank v. Dawes, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively

demonstrating the absence of a triable issue, and if so, the moving party is entitled to judgment as a matter of law. See Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989).

Where the party moving for summary judgment is the defendant, as here, this burden may be met either by submitting affirmative evidence that negates an essential element of the plaintiff's case or "by demonstrating that proof of the element is unlikely to be forthcoming at trial". Flesner v. Technical Communications Corp., 410 Mass. 805, 809 (1991); Kouravacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). When a motion for summary judgment is supported by an affidavit setting forth specific facts demonstrating that the moving party is entitled to judgment as a matter of law, summary judgment should be granted unless an adverse party "set[s] forth specific facts showing that there is a genuine issue for trial." Mass. R. Civ. P. 56(e); U. S. Fid. & Guar. Co. v. N. J. B. Prime Investors, 6 Mass. App. Ct. 455, 457 (1978)(where plaintiff failed to controvert allegations made in defendant's affidavit, court accepted allegations as true). An adverse party "may not rest upon the mere allegations or denials of his pleading" in order to defeat summary judgment. Mass. R. Civ. P. 56(e);

The undisputed facts and applicable law in this matter demonstrate that NPS is entitled to summary judgment in its favor on all counts in the Complaint.

II. 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)[1]. However, FERPA does not provide a private right of action for people affected by such inappropriate disclosures to enforce under 42

[1] NPS receives federal funding.

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)[2],; 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").

FERPA protects students from disclosure of any records referencing a student which are "(1) Directly related to a student; and (2) Maintained by an educational agency or institution or by a party acting for the agency or institution." 34 C.F.R. § 99.3. The fact that the confidential agreement between NPS and Plaintiffs is, in fact, a student record and not a public record is supported by the fact that all settlement agreements regarding placements of NPS students in out of district schools, including the agreement in question, are maintained by NPS (an educational institution) *only* in students' confidential files, specifically in the office of the Director of Out of District in the Student Service Department of NPS, (a party acting for the institution). See Affidavit of Paula Nargi Black at ¶¶ 3-5 ("Black Aff.") attached hereto as Exhibit 1. These settlement agreements are not publicly available and are not shared with the City of Newton Comptroller's Office. Id. at ¶ 5. Federal law requires that documents maintained by a child's school and referencing that particular child are protected from disclosure. 34 C.F.R. § 99.3.

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

There is no statutory language or regulation which suggests that merely redacting a student's name from documents protected under FERPA could in any way convert them to public records. Plaintiff's suggestion that redaction of a student's name somehow converts an educational record into a public record is patently incorrect. The character of a document does not change through redaction. In fact, public records are often redacted before being released to third parties where they are, *in the first instance*, public records. These documents do not *become* public records by the act of redaction. By Plaintiff's logic, any private document could be transformed into a public record by simply removing identifying personal information.

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 "). Massachusetts broadly defines a student record as "the transcript and the temporary record, including all information...concerning a student that is organized on the basis of the student's name or in a way that such student may be individually identified, and that is kept by the public schools of the Commonwealth." 603 CMR 23.02. The term as used in 603 CMR 23.00 shall mean all such information and materials regardless of where they are located, except for the information and materials specifically exempted by 603

CMR 23.04. The Settlement Agreement in question is, in fact, organized on the basis of the Student's name and individually identified. See Black Aff. at ¶ 4.

Furthermore, Plaintiff's suggestion that the financial information contained in the settlement agreement somehow converts an educational record into a public record is also incorrect. The settlement agreement, in addition to including financial information, identifies the student as "a student with disabilities who is eligible for special education services" (Settlement Agreement at 1), and discusses the student's need for an IEP, stating that if the Student should withdraw from the school in which he was placed to receive special education services, a Team meeting would take place "within ten (10) days to develop an IEP." Id. at 2, ¶4. The Agreement also reveals that the student was placed out of district as a result of his disability. The content of this agreement is personal and specific to this particular Student, necessitating that NPS maintain the document in his confidential student record and requiring that the Settlement Agreement be protected under state and federal law from disclosure.

Simply put, there is no question that Plaintiffs' public records argument is misplaced, and consequently any prior 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 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. 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. As there is no question (or genuine issue of material fact) as to whether the Settlement Agreement is a student record, there is no violation of public policy as presented in the Complaint.

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

While 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,—it simply is not. The trojan horse argument of public record vs. student record has been resolved supra. And a cursory review of the Complaint illustrates that this, in fact, is a rather mundane, straightforward *contract* case. It is undisputed that 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 after-the-fact 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 misguided, 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[3]. 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, are even more likely to be left undisturbed. See, e.g., Carver v. Waldman, 21 Mass. App. Ct. 958, 960 (1986)

[3] 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).

("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 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.[4] 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

[4] 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.

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 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.[5]

IV. 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.

[5] 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 *chose* to negotiate instead of filing with the BSEA. In fact, at any time they could have stopped negotiating and immediately filed for hearing.

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 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 (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[6]—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

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

(D. Mass.)(August 2010-Slip Copy). In Huynh the Plaintiff, represented by counsel, entered 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 quite 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 a writing in January 2011 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.

CONCLUSION

For the foregoing reasons, NPS respectfully requests that this Court grant its Motion for Summary Judgment, and dismiss the Complaint in its entirety.

Respectfully submitted,

Defendant,
NEWTON PUBLIC SCHOOLS,
By its attorney,

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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 August 29, 2012
ANGELA B. SMAGULA

Dated: August 29, 2012

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX SUPERIOR COURT

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

AFFIDAVIT OF PAULA NARGI BLACK

1. I am currently the Assistant Director of Student Services for the Newton Public Schools.

2. Prior to taking that position, I was the Director of Out of District in the Student Services Department for the Newton Public Schools. I held that position for five years from September 2006 to August 2011, and during all relevant times as it relates to the above captioned matter.

3. I am making this affidavit as to facts of my own personal knowledge in support of the Newton Public Schools' Motion for Summary Judgment in the above-captioned matter.

4. In my capacity as the Director of Out of District, I have custody of and maintain in my private office all confidential settlement agreements concerning the placement of Newton Public School students at out of district schools.

5. The confidential settlement agreements are kept in a binder under each individual student's name in the Director of Out of District personal office which is part of the Student Services Department of Newton Public Schools, as well as in individual student personal files identified by the student's name.

6. These confidential settlement agreements are part of the student's confidential student record, are maintained in the students files, and are not held, kept, or maintained by the City of Newton's Comptroller Office or any financial office in the City of Newton or Newton Public Schools.

Signed under the pains and penalties of perjury this 27 day of August, 2012.

Paula N. Black

Paula Nargi Black
Assistant Director of Student Services
Newton Public Schools