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September 28, 2012

(VIA HAND DELIVERY)
Angela Buchanan Smagula
Assistant City Solicitor, City of Newton
1000 Commonwealth Avenue
Newton Centre, MA 02459

Re: *Greg Smith and Nancy Macias-Smith v. City of Newton, acting as Newton Public Schools*
Civil Action Number: 11-0572

Dear Angela:

Please find for enclosed, for filing as part of the Rule 9A package, *Plaintiffs' Opposition to Defendant's Motion for Summary Judgment.* I also include a copy for your file.

Sincerely,

David Duncan

Enc.
cc: Harvey A. Silverglate (via email)
Greg Smith and Nancy Macias-Smith (via email)

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 11-05272

GREG SMITH AND
NANCY MACIAS-SMITH,
Plaintiffs

v.

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

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The plaintiffs ("Smiths") oppose the defendant City of Newton's ("City") Rule 56 Motion for Summary Judgment, which, except for one additional fact, is essentially identical to the City's earlier-filed Rule 12(b)(6) Motion to Dismiss their complaint that enforcement of a confidentiality clause in their Settlement Agreement with the City ("Agreement") regarding payment for the education of their son, a special needs student. The added fact, by way of an Affidavit from Paula Nargi Black, avers that the Agreement is exclusively maintained, along with other such agreements, in a binder in the office of the Director of Out of District office, a part of the Newton Public Schools, and in the student's file also maintained by the Newton Public Schools. The City accepts all other factual allegations of the Verified Complaint as true for purposes of their motion. Based on this factual record, the plaintiffs have made out claims that the confidentiality clause that the City insisted on including in the parties' Agreement is an improper attempt to shield the allocation of public moneys from public scrutiny in violation of Massachusett's Public Records law[1] and is therefore

[1]M.G.L. c. 66, § 10.

void as against public policy. The plaintiffs have, moreover, made out a claim that the City improperly conditioned benefits to the plaintiffs on relinquishment of their constitutional rights to speak and to petition government and have made no showing that the confidentiality clause serves any public interest. On the contrary, the confidentiality clause runs directly counter to the public interest and serves only the City's illegitimate aim to keep its allocation of funds out of public view. For these reasons, the City's Motion for Summary Judgment should be denied.

I. Facts

The plaintiffs have set out the facts in their Verified Complaint, which they incorporate herein and a copy of which is attached as Exhibit A.[2]

II. The Confidentiality Clause in the Parties' Settlement Agreement Violates the Massachusetts Public Records Law and Is Unenforceable as Against Public Policy.

The City maintains that the Settlement Agreement is exempt from the Public Records law as a "student record" because of a federal law, ironically, designed to protect the *plaintiffs'* privacy rights. The Family Educational Rights and Privacy Act, FERPA, bars the federal funding of educational institutions which have a policy or practice of releasing educational records or personally identifiable information to persons other than those specified in the statute, 20 U.S.C. § 1232g.

The Massachusetts Public Records law is broadly construed, and correspondingly, enumerated exceptions to that law are strictly construed in favor of disclosure. *Hull Mun. Lighting Plant v. Mass. Mun. Wholesale Elec. Co.*, 414 Mass. 609, 614 (1993). The plaintiffs have alleged that the Settlement Agreement, shorn of identifying information, is a public record that does not fall

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[2]The City states as a fact that it "believed [the plaintiffs' child] could be educated in the public school system . . ." (City Mem. at 2), which is nowhere averred in the Complaint or in the affidavit of Paula Nargi Black. The plaintiffs have a different view of what the City's position was, but the dispute is not material to the resolution of the City's Motion for Summary Judgment, though it is material to the plaintiffs' desire to be able to speak about the financial aspects of their case.

within any exception. Comp. ¶ 16. Indeed, the City concedes that "the bulk" of the provisions it seeks to keep from public view "concern[] the financial arrangement between the parties." City Mem. at 14.[3] It is precisely in order to keep *those* provisions confidential that the City – not the plaintiffs – insisted on a confidentiality provision. The City did not insist on the provision to protect the plaintiffs' privacy rights *or* to comply with FERPA. On the contrary, the City candidly admits that "the confidentiality provision is . . . very narrowly-tailored to the specific terms of the contract – *the bulk of which concerns the financial arrangements between the parties.*" (City Mem. at 14 (emphasis supplied)). That provision is *not* narrowly tailored to protect the plaintiffs' privacy rights or adhere to the requirements of FERPA, and indeed is unnecessary to protect their privacy rights or to comply with FERPA. To the extent, as a general matter, there are identifying provisions in an educationally-related settlement agreement, the plaintiffs do not claim that those provisions are subject to the Public Records law. But they do claim that financial, and other non-identifying provisions, are subject to that law. Com. ¶ 16. The City's added fact, that the Agreement is maintained exclusively in an office of the Newton Public Schools, a decision controlled entirely by the City and in no way mandated by any state or federal law, cannot determine whether it is, or is not, subject to disclosure as a Public Record to the extent that identifying information in it is not disclosed.

The City argues (City Mem. at 7) somewhat contrary to this position, that there are many provisions of the Agreement that make it an "educational record," and proceeds to enumerate them:

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[3]In this desire the City is, apparently, in the company of other public agencies who use confidentiality agreements to shield the expenditures of public moneys from public view. *See* "State Payouts Sealed with a Promise of Silence," *Boston Globe*, by Todd Wallack, April 24, 2011(http://www.boston.com/business/articles/2011/04/24/state_payouts_sealed_with_a_promise_of_silence/).

> the agreement "identifies the student as 'a student with disabilities who is eligible for special education services' . . . 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.

All of this, the City maintains, makes the content of the Agreement "personal and specific to this particular Student." Id. It is ironic that the City is prepared to put in a public filing in this case virtually *all* of the terms of the Agreement that might be considered to make it a "student record" and stubbornly and steadfastly maintain that, in order to protect the plaintiffs' child, it seeks to protect the *financial* terms, none of which are protected by FERPA or bear in the slightest on the purpose of FERPA. The City has, effectively, publicly disclosed a substantial part of what it deems makes this agreement a "student record" subject to FERPA. What is left hidden from public view are the financial terms, which only the City has an interest in keeping confidential. The City, in citing these terms while failing to cite any of the financial terms, makes the plaintiffs' case that the agreement *can* be redacted, and that the financial terms are subject to the Public Records law.

The City seeks to coopt FERPA and the exemption for "student records" to protect information that has nothing to do with the plaintiffs' privacy. Instead, the City seeks to hide from the public the financial resolutions it enters into with parents. But this information is precisely the sort of information that the Public Records law is designed to make available to taxpayers and voters. The City asserts that "there is simply no public policy interest in the private financial arrangement made between one family and their child's individualized special education programming." (City Mem. at 15). The City is flatly wrong in this assertion. The manner in which the City expends funds for educating special needs students, and its approach to special needs education, are indeed matters of public policy interest. This is not a negotiation between two private parties, it is one between a

private party and a public entity, having to do with the expenditure of public funds and how the City conducts its governmental obligations in dealing with the families of special needs students. Moreover, even if the point were debatable, the legislature has made a determination that City records are presumptively public, including financial records. The argument holds no more sway when the financial arrangements are between the City and a parent than it would if the financial arrangements were between the City and a building contractor, or between the City and an individual suing the City for personal injury. The legislature has made the determination that such financial arrangements are matters of public concern. The City's decision to maintain the Agreement exclusively in an office of the Public School does not change the public interest in the financial terms hidden in that office.

The City argues that "no statutory language or regulation [] suggests that merely redacting a student's name from documents protected under FERPA could in any way convert them to public records." City Mem at 6. By the same token, no such statute or regulation *prevents* the redaction of identifying information and release of a document that contains merely financial information, without any information "directly related" to the student. That is precisely what the plaintiffs maintain must be done under Massachusetts Public Records law. Further, unless the Public Schools has its own financial office that handles payments required by the Agreement, the financial information in the Agreement must be shared, in order for payments required by the Agreement to be made.

Cases the City has cited do not support its position. In *Wittenberg v. Winston-Salem/Forsyth County Bd. of Educ.*, 2009 U.S. Dist. LEXIS 51774 (2009 WL 2566959 (M.D.N.C.)), the Court was acting on a joint motion of the parties to seal a settlement agreement because, in the absence of such

a court order, it would be considered a public record under North Carolina law. The Court had no occasion to resolve the tension between North Carolina's public records law and FERPA, or determine to whether some parts of the document were not covered by FERPA. *Soter v. Cowles Pub. Co.*, 174 P.3d 60 (Wash. 2007) is a case decided under an Washington's public records law, relying on exceptions involving "controversies," work-product and attorney-client privileges, none of which are relevant to this case. The Court in that case did not express any opinion of the validity of the DOE assertion quoted by the City nor did it have the slightest bearing on the arguments or resolution of that case.

In sum, the location of the Agreement does not shield those portions of it that do not identify the student from the reach of the Massachusetts Public Records law, and the City's attempt to piggy-back its efforts to conceal its financial dealings onto the requirements of FERPA should be rejected.

III. The Validity of the Agreement as a Contract Does not Allow Enforcement of Unconstitutional Conditions Contained Therein.

The City spends substantial time belaboring the unexceptionable proposition that contracts freely and voluntarily entered into are in general enforceable. The issue presented by this case is whether the confidentiality provision is enforceable *despite* this generally-applicable proposition. The City quotes the confidentiality clause at page 2 of its Memorandum.[4] The clause begins, "[e]xcept where otherwise required by law." The issue the plaintiffs have raised is what is "otherwise required by law." They maintain that the Massachusetts Public Records law voids the

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[4]That Clause, Paragraph 13 of the parties' Settlement Agreement, states: "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 [school]."

confidentiality provision as against public policy. If that is so, then *non*confidentiality is "otherwise required by law."

IV. The Confidentiality Clause in the Parties' Settlement Agreement Violates the Smiths' First Amendment and Art. 16 Rights and their Purported Waiver is Invalid as Against Public Policy.

The City correctly states that a party can waive constitutional rights in a contract (City Mem. at 11). It also correctly states that a contract, validly agreed to, is binding on the parties. The City also accurately quotes the confidentiality provision of the Settlement Agreement, which commences with the disclaimer: "Except as otherwise required by law . . . ." (City Mem. at 13).

The City, however, may not require that the plaintiffs relinquish their constitutional rights in return for a benefit such as the one at issue here, a tailored special needs education, *Speiser v.Randall*, 357 U.S. 513 (1958); *Perry v. Sinderman*, 408 U.S. 593 (1972), unless the City can show that the restriction bears some relationship to the benefits bestowed by the City and does not run afoul of public policy. As the Ninth Circuit states in *Charter Communications, Inc. et al. v. County of Santa Cruz,* 304 F.3d 927, 935 n. 9 (9th Cir. 2002): "Our Court will not enforce a waiver [of First Amendment rights] 'if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.' [*Leonard v. Clark*, 12 F.3d 885, 889-90 (9th Cir.1993)]."

The City ignores the requirement, repeated in virtually all of the cases it cites on waiver, that waiver of constitutional rights must not thwart the public interest. While the Supreme Court in *D.H. Overmyer Co. v. Frick*, 405 U.S. 174 (1972) found that a company could waive due process rights to prior notice, it also distinguished the circumstances of *Insurance Co. v. Morse*, 20 Wall. 445, 22 L.Ed. 365 (1874) which struck down a requirement that a company waive its right to remove any

action to federal court because such a requirement would thwart Congress' authority and violate the Privileges and Immunities clause of the Constitution. 405 U.S. at 187. Similarly in the context of statutory rights, the Supreme Judicial Court in *Spence v. Reeder,* 382 Mass. 398, 413 (1981) noted that "courts have long refused to give effect to purported waivers of statutory rights where enforcement of the particular waiver would do violence to the public policy the legislative enactment" and on that basis refused to enforce the waiver at issue in that case. The Court in *Huynh v. City of Worcester*, 2010 WL 3245430 (D. MA)(Hillman, MJ) does not address whether any public policy concerns should affect a waiver determination, and apparently none were raised. The Court in *Wilkicki v. Brady*, 882 F.Supp. 1227 (D.R.I. 1995) found no First Circuit precedent for considering public policy in the context of waiver of a constitutional right, but looked to other circuits and engaged in a public policy analysis. *Id.* at 1232. The Court in *Lake James Comm'y Fire Dept. v. Burke County*, 149 F.3d 277, 280 (4th Cir. 1998) framed the issue thus: "The contractual waiver of a constitutional right must be a knowing waiver, must be voluntarily given, *and must not undermine the relevant public interest* in order to be enforceable. See *Overmyer*, [*supra*], 405 U.S. at 187, . . . ; [*Town of Newton v.*] *Rumery*, 480 U.S. [386], 398 . . . [(1987)]; *Johnson v. Zerbst*, 304 U.S. 458, 464, . . . (1938)." (Emphasis added). In *Lake James*, the Court found that the public interest supported the waiver provisions of an agreement where the public's safety and fire coverage had been jeopardized by the waiving party and the waiver provision was designed to protect the public in the event of further disruptions of a like nature. 149 F.3d at 281. Indeed, the City acknowledges that a finding of waiver was subject to determining the impact on the public interest in *Rumery, supra.* City Mem. at 12. *Forbes v. Milwaukee County*, 2007 WL 41950 (E.D. Wisc. 2007), the court also engaged in a public interest analysis, but the calculus was different because the

plaintiffs in that case did not claim that the *contract, or their agreement not to speak therein,* was invalid. Rather, they claimed that only because the defendant *breached* the contract, their agreement not to speak violated their constitutional rights. In that case, the court found that because the plaintiffs agreed not to speak, indeed suggested the term, and only complained of it because of a putative breach by the defendant, that the claim reduced to a breach of contract claim. (Id. at *9). Finally, the City cites *Perricone v. Perricone*, 292 Conn. 187 (2009). That case is inapposite as it involves a confidentiality agreement between private parties. Here, the City is a public body, and its imposition of a confidentiality agreement, in the absence of any clear public policy reason to do so, violates the defendant's First Amendment rights.

As argued in Part II of this Memorandum, there is a powerful, explicit legislative interest that public agencies' documents should, subject to narrowly-conscribed exceptions, be available to the public. A confidentiality clause such as the one at issue in this case, designed to keep financial allocations made by a public agency out of the public eye, runs afoul of that very strong public policy. Enforcing a gag on the plaintiffs' First Amendment rights, and their cognate state constitutional rights, to speak and to petition government, undermines that policy. On the City's part, it cannot point to any legitimate relationship between the requirement it imposed on the plaintiffs that they waive their constitutional rights, and some need to maintain confidentiality. The only *legitimate* confidentiality concerns belong to the plaintiffs, not to the City. Only the City's *illegitimate* interest in keeping from the public the financial decisions it has made justifies the confidentiality provision it has insisted on, and insists on as a matter of general policy, not just with the plaintiffs but with all parents. Com. ¶ 8.

The City concedes that the plaintiffs are not restricted from disclosing their child's experiences in the Newton Public Schools; that their child is in a private special needs school, and the name of that school (City Mem. at 15). Presumably the plaintiffs are free to disclose the fact that they have entered into the Settlement Agreement with the City, since the City states that only the *terms* of the Settlement Agreement are confidential (Id). The plaintiffs are thus, according to the City (and properly so) free to discuss many, if not all, of the matters that FERPA would require the City not to disclose without the plaintiffs' consent.

Financial decisions, on the other hand, and especially taken in total over all such settlements the City may enter into, are *not* educational records protected by FERPA, and that is the *only* information the City seeks to protect by the confidentiality agreement. That information is presumptively subject to release to anyone requesting it pursuant to the Public Records law. The plaintiffs have properly stated a claim that the Agreement, redacted to remove identifying information, is a public record. That being the case, the confidentiality clause runs afoul of the overwhelmingly strong public interest in exposing public agencies' workings to the public. Precisely this public interest impels the Attorney General *not* to include confidentiality clauses in settlement agreements (See Comp. Ex. C).

The issue the plaintiffs have raised is not whether they negotiated this agreement with the aid of an attorney, knowingly and intelligently, and are therefore bound by its terms. The issue is whether the City can enforce a term that directly contravenes a legislative determination of public policy. Contracts that contravene public policy are not enforced. *See, e.g., T.F. v. B.L.*, 442 Mass. 522, 528 (2004). Regardless whether the parties voluntarily agreed to such a contract or not, public policy overrides the parties' intent. The City cannot hide behind the privacy rights of the plaintiffs

in order to protect itself from public scrutiny as to financial matters that have nothing to do with the plaintiffs' privacy rights as protected by FERPA.

Where a strong public policy is thwarted by the requirement that the plaintiffs waive their constitutional rights in return for educational benefits, the provision is unenforceable as an unconstitutional condition. The City has not established that it is entitled to judgment as a matter of law. To the contrary, the undisputed record establishes that the City is seeking to enforce an unconstitutional condition on the plaintiffs, in contravention of clear public policy.

V. Conclusion

The City in its Memorandum accuses the plaintiffs' position as "misguided, disingenous, and ultimately misplaced." City Mem. at 8. It is, rather, the City's *routine* inclusion of confidentiality clauses in settlement agreements with parents of special needs students in order to shield its public expenditures of funds and decisions regarding the education of special needs students from public view that is misguided and misplaced. The City acknowledges that financial terms, which are quintessentially public information, form the bulk of that which it seeks to keep private, but must rely on the *plaintiffs'* privacy rights in its attempt to do so. The facts demonstrate that the First Amendment and Massachusetts Public Records law, render the confidentiality clause a nullity. The City's motion should be denied.

GREG SMITH AND NANCY MACIAS-SMITH
By their attorneys,

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September 28, 2012

Certificate of Service

I certify that on this 28th day of September, 2012, I served the foregoing document upon by hand delivery upon Angela Buchanan Smagula, Assistant City Solicitor, City of Newton Law Department, 1000 Commonwealth Avenue, Newton Centre, MA 02459.

David Duncan