

MIDDLESEX, SS.

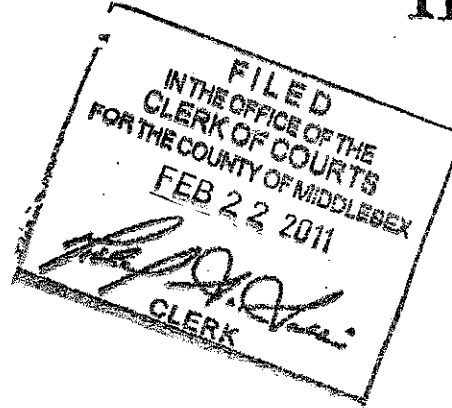
COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO.

11-0572

GREG SMITH AND
NANCY MACIAS-SMITH,
Plaintiffs

v.

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



VERIFIED COMPLAINT FOR DECLARATORY RELIEF

1. The Plaintiffs bring this complaint seeking declaratory relief, pursuant to G.L. c. 231A, § 1 *et seq.*, from the confidentiality provision of a settlement agreement (the "Agreement") between them and the defendants, and further seeking a declaration that the defendants' administrative practice of routinely requiring such confidentiality provisions as a condition of settling cases involving the claims of special needs students for services is in violation of federal and state constitutional provisions and the laws of this Commonwealth.

PARTIES TO THE ACTION

2. Plaintiffs Greg Smith and Nancy Macias-Smith, husband and wife, are residents of Newton, Massachusetts, county of Middlesex. They are the parents of a special needs student, formerly in the Newton Public Schools and currently, pursuant to the terms of the Agreement, enrolled in a private special needs school.
3. Defendant City of Newton ("Newton"), is a municipal corporation organized under the laws of Massachusetts and through its subsidiary agency, the Newton Public Schools, administers the public schools in the City of Newton.

STATEMENT OF FACTS

4. On or about September 3, 2010, the plaintiffs and the defendant (acting as the Newton Public Schools) entered into the Agreement. A copy of the Agreement is attached hereto

as **Exhibit A.**¹

5. The Agreement was the culmination of negotiations during which the plaintiffs sought to have Newton pay their son's tuition at a private special needs school pursuant to its obligations under G.L. c. 71B § 5. The defendants initially resisted paying for the plaintiffs' son's tuition at the private school the plaintiffs had placed him at.
6. The plaintiffs had withdrawn their son from his Newton public school and enrolled him in the private school in the spring of 2010, as a result of serious difficulties he had encountered in his public school. After switching schools the plaintiffs' son's academic performance and emotional state improved dramatically.
7. After some weeks of negotiations, the defendant sent a draft settlement agreement to the plaintiffs. Included in that draft agreement was a confidentiality clause, virtually identical to the confidentiality clause in the Agreement at Paragraph 13.
8. The plaintiffs, through their attorney, objected to the inclusion of the confidentiality clause and made clear that they had no desire for, and would waive, the protection it might afford to their or their son's privacy, but the defendants insisted on its inclusion, stating that they routinely included such a clause in settlement agreements.
9. Because the alternative to signing the Agreement was months of costly litigation during which the plaintiffs would simultaneously have to bear the heavy expense of the private school for their son, and in addition make him available for further evaluations by the defendant, they signed the Agreement which included the confidentiality provision.
10. Subsequent to signing the Agreement, the plaintiffs were unable, due to the confidentiality clause contained therein, to discuss the negotiations and resolution of their son's case with other Newton parents and voters, with members of the Newton Public School board or with elected Newton officials.
11. The plaintiffs believe that their experience, and the particulars of how their son's case was resolved with the defendant, bear on how special needs students are and should be treated, as a matter of policy, in their community.
12. The confidentiality clause, which the plaintiffs resisted but could not prevent from being made part of the Agreement, due to their limited resources and their son's educational needs, has restricted their rights to speak and to petition government, in violation of Art. 16 of the Massachusetts Declaration of Rights and the First Amendment to the United States Constitution.

¹ The Plaintiffs have filed a separate Motion to Impound the Agreement, and will file it as an impounded exhibit if the Court allows that Motion.

13. The defendant's insistence on a confidentiality clause as a condition of settling with the plaintiffs and providing funding for the plaintiffs' son's special educational needs is an unconstitutional conditioning of statutorily-mandated benefits.
14. The Agreement is a public record of the Newton Public Schools, as defined in G.L. c. 4 § 7, clause twenty-sixth, and is presumptively available to the public pursuant to G.L. c. 66 §10(a & c). Of the enumerated exemptions from the broad statutory definition of public records, only one arguably applies to the Agreement: "materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." G.L. c. 4 §7, clause twenty-sixth (c).
15. The "specifically named individual(s)" in this case are the plaintiffs and their son, and they expressly waive any concerns that disclosure of their personal information would invade their privacy.
16. Moreover, the exemptions to the definition of public records are "strictly construed", *Hull Mun. Lighting Plant v. Mass. Mun. Wholesale Elec. Co.*, 414 Mass. 609 (1993). The Agreement, redacted of the plaintiffs' names and other identifying information is a public record.
17. The inclusion of a confidentiality agreement in the Agreement is an effort by the defendant to avoid the requirements of the Massachusetts Public Records Law.
18. The plaintiffs sought an opinion from the Attorney General, by letter from their attorney dated December 14, 2010, without revealing the contents of the Agreement, that the confidentiality clause was unenforceable. A copy of the letter sent to the Attorney General is attached as **Exhibit B**.
19. The Attorney General responded by letter dated December 23, 2010, stating that statutorily she was not authorized to render an opinion, but nonetheless noted that it was her "longstanding policy" not to include confidentiality clauses in settlement agreements involving state agencies, "on the ground that such clauses are, absent some specifically applicable statute that authorizes them, inconsistent with the state public records law." A copy of the Attorney General's letter is attached as **Exhibit C**.
20. By letter dated January 14, 2011 to the Newton City Solicitor, the plaintiffs, through their attorneys advised the defendant of the correspondence with the Attorney General, providing copies of that correspondence, and called on the defendant to acknowledge that the confidentiality clause of the Agreement is unenforceable and violates public policy as embodied in the public records law as well as violating the plaintiffs' constitutional rights. A copy of that letter is attached as **Exhibit D**.
21. By letter dated January 20, 2011, the Newton City Solicitor responded, rejecting the unenforceability of the confidentiality clause in the Agreement and claiming that the

Agreement is a "student record" and therefore not a public record. A copy of that letter is attached as **Exhibit E**.

22. The response of the defendant ignores the fact that any statutory protections afforded to the plaintiffs' or their son's identity is for their benefit, not the defendant's benefit. It further ignores that the Agreement, and all other such agreements, fall within the definition of public records except to the limited extent that personally identifying information must be redacted.
23. In fact, the defendants seek to keep from the public, not the identifying information regarding the plaintiffs and their son, as to which the plaintiffs made clear they would waive protections, but instead seek to maintain confidential terms such as the cost of the Agreement and the manner in which the Agreement was negotiated. These are, and should be, matters of public record and discussion, and the plaintiffs wish to be free to discuss these issues, including the points in their own settlement agreement, in order to further legitimate public debate and promote the public good.

WHEREFORE, the plaintiffs request that the Court:

- a. Enter judgment declaring that the confidentiality provision of the Agreement, Paragraph 13 thereof, is unenforceable and void as against public policy embodied in the Massachusetts Public Records Law, the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights.
- b. Enter judgment declaring that Paragraph 13 of the Agreement is severable from the remaining provisions of the Agreement, and that all other provisions are still in full force and effect as between the parties.
- c. Enter judgment declaring that the defendant's policy of insisting on confidentiality clauses in settlement agreements over the objection of parents violates the Massachusetts Public Records Law, the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights.
- d. Award the plaintiffs the costs of this litigation.
- e. Award such other relief as this Court deems just and proper.

GREG SMITH AND NANCY MACIAS-SMITH
By their attorneys,

Harvey A. Silverglate, of Counsel (BBO #462640)
David Duncan (BBO # 546121)
Zalkind, Rodriguez, Lunt & Duncan, LLP
65a Atlantic Avenue
Boston, MA 02110
(617) 742-6020

Dated: 2/14/11

Verification of Plaintiff

I, Greg Smith, being duly sworn, depose and say: that I am one of the plaintiffs in the above-entitled action; that I have read the foregoing complaint and know the facts alleged therein; and that the facts alleged are true of my own knowledge, except as to facts therein alleged on information and belief; and as to those matters I believe them to be true.



Greg Smith
89 Norwood Avenue
Newton, MA 02460

Sworn to me this 18 day of February, 2011.

Notary Public

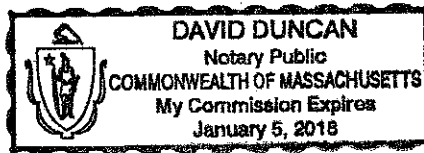


EXHIBIT A

**Exhibit A Subject to Pending Impoundment
Motion**

EXHIBIT B

Zalkind, Rodriguez, Lunt & Duncan LLP

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Emma Quinn-Judge

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Of Counsel:

Barbara Eguen Rodriguez

Harvey A. Silverglate

December 14, 2010

Attorney General Martha Coakley
Office of the Attorney General for the
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

Dear Attorney General Coakley,

We write to you on behalf of clients of ours, about a matter we believe to be of substantial public concern, seeking an opinion or advice regarding the validity of so-called "confidentiality clauses" which are increasingly and routinely imposed by public agencies in resolving disputes by agreement with private parties. We believe that, at least in the case of agreements such as the one our clients entered into, the inclusion of such a confidentiality requirement has severely impinged on his right to petition government, his first amendment and state constitutional rights as well as on the public interest.

Our clients are parents of a special needs child, who was until recently enrolled in the public school system of a municipality in Massachusetts. Concerned that their child's educational needs were not being met by the public schools, they enrolled their child in a private school with a specially-designed program they felt would provide their child with a better education than the child would receive in the public schools.

Based on the public school's obligations to provide for special needs students pursuant to M.G.L. c. 71B § 5, our clients engaged in negotiations with the school system to cover the costs of the private school. They eventually reached agreement and settled with the school district. The school district insisted on a confidentiality provision in the agreement, despite our clients' desire *not* to have such a provision.

Our clients did not want such a provision because they felt that their experience in dealing with the school district, including the negotiations and resolution of their particular dispute, were of concern to the entire community, and they wanted to be able to discuss their

what the school district's policies should be regarding the education of special needs students. Indeed, they initially feared that the School District would seek an even broader provision than the provision they now have, one that would have prevented them from even speaking about their experiences in the public schools leading up to their decision to remove their child from the public schools and place him in a private school. For that reason, although they had an attorney who specializes in education law and who was representing them in their negotiations with the school district, they consulted with us to determine if they had state and federal constitutional speech and petitioning rights that they could insist on. Our conclusion was that, for several reasons, including the Massachusetts Public Records law, the confidentiality provision that the school district included in their agreement should not be enforceable, but we also advised them that if they took that position in negotiations they would end up litigating their case.

Because they do not have unlimited means and in order to assure that their child's educational needs would be met, they signed the agreement with a confidentiality provision, as the school district insisted they must, rather than pursue the costly course of litigating their child's rights. At our advice, they insisted on a severability provision in the agreement, such that if the confidentiality provision is at any point deemed unenforceable, the remaining provisions of the agreement continue to be enforceable.

They now, as they feared, are hamstrung in their efforts to engage in a public discussion in their community about how school districts should deal with special needs students. They cannot discuss their case with their school board to influence policy decisions, and they cannot discuss their case with other citizens in the context of election of school board members. These are, they feel, bedrock constitutional rights, to speak, to petition government and to seek to influence policy through public elections. For these reasons, they seek an opinion that a requirement that they maintain the confidentiality of the settlement agreement by which their child's special needs have been met violates both the public records law and their state and federal constitutional rights. We have, you will note, even refrained from disclosing to you the precise language of the confidentiality provisions in our clients' agreement, the school district involved, or even our clients' identity, to avoid the risk that the school district would deem the agreement violated by this letter.

Inquiry into why the school district has insisted on such a provision has been met with the assertion that the school district does not want settlement agreements to be used as "precedent" by other parents. This is a ground we do not see in the Public Records law as a basis to withhold records. Indeed, the nature of such settlements with parents *should* be a matter of public record, and *should* inform the discussion of how special needs of students should best be met.

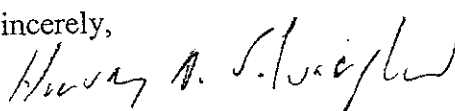
As far as we have been able to ascertain, the only available exception to the Public Records law that might shield this, and similar, agreements from disclosure would be the following exception: "personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an

Letter to Attorney General Martha Coakley
December 14, 2010
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unwarranted invasion of privacy.” M.G.L. c. 4 § 7 cl. 26(c). As against a third party requesting a copy of our clients’ settlement agreement, the school district could properly excise identifying information before providing this agreement. But as against our clients, the school district cannot properly raise their own privacy interests as a ground to keep the settlement agreement out of public view.

We raise the Public Records law because we believe it embodies a legislative judgment that public discourse is best served when the acts and decisions of governmental bodies is subject to maximal disclosure. This legislative judgment reinforces our clients’ individual judgments in this matter, and buttresses their First Amendment and state constitutional rights, to speak, to petition government and to engage in a public discussion of how the government should respond to the educational needs of children with special needs. To maintain the confidentiality of this, or any other settlement agreement, in order to avoid “precedent” flies directly in the face of the legislative judgment that is embodied in the Public Records law, and in the face of our clients’ constitutional rights as citizens. We ask that you review this matter and render an opinion or other form of advice that a confidentiality provision imposed by a public body in resolving a dispute regarding its statutory obligations to a private citizen is both contrary to the public records law and unconstitutional as applied to them.

Sincerely,

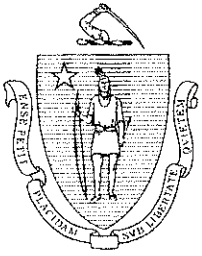


Harvey A. Silverglate



David Duncan

EXHIBIT C



MARTHA COAKLEY
ATTORNEY GENERAL

THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

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December 23, 2010

Harvey A. Silverglate, Esquire
David Duncan, Esquire
Zalkind, Rodriguez, Lunt & Duncan LLP
65a Atlantic Avenue
Boston, Massachusetts 02110

Re: Request for Opinion

Dear Msrs. Silverglate and Duncan:

I am writing in response to your December 14, 2010, request seeking a legal opinion regarding the enforceability of "confidentiality clauses" imposed by public agencies in resolving disputes by agreement with private parties.

The Attorney General's statutory authority to render formal legal opinions extends only to opinion requests by state officials, district attorneys, and branches and committees of the Legislature. Mass. G.L. c. 12, §§ 3, 6 and 9. More specifically, under G.L. c. 12, § 3, the Attorney General is authorized to provide representation and other legal services to "the commonwealth and . . . state departments, officers, and commissions." Therefore, I regret that we are unable to provide you with a legal opinion on this matter.

By way of further information, I note that the Attorney General has a longstanding policy against including confidentiality clauses in settlement agreements resolving litigation against state agencies and officials, on the ground that such clauses are, absent some specifically applicable statute that authorizes them, inconsistent with the state public records law. As your letter notes, information within such agreements that is within an exemption to the public records law may be redacted before the agreement is produced in response to a public records request.

Very truly yours,

A handwritten signature in cursive script that reads "Peter Sacks".

Peter Sacks
Deputy Chief, Government Bureau
617-963-2064

PS/sc



EXHIBIT D

Zalkind, Rodriguez, Lunt & Duncan LLP

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Rachel Stroup

Ruth O'Meara-Costello

Emma Quinn-Judge

Monica R. Shah
also member of NY Bar

Of Counsel:

Barbara Equen Rodriguez

Harvey A. Silverglate

January 14, 2011

Donnalyn Kahn, Esq.
City Solicitor for the
City of Newton
1000 Commonwealth Avenue
Newton, MA 02459

RE: Settlement Agreement between Newton Public Schools and Greg and Nancy Macias-Smith

Dear Ms. Kahn:

We represent Greg Smith and Nancy Macias-Smith, who are parents of Sebastian, a special needs student formerly enrolled in the Cabot School and currently enrolled at the Gifford School, and of Philip and Sabrina, who are currently enrolled at Newton North High School. The Smiths entered into an agreement (we attach a copy) with the Newton Public Schools ("Newton") negotiated with your office, calling for Newton to pay for part of Sebastian's tuition at the Gifford School through June, 2014. Over the Smiths' objections, Newton required a confidentiality provision in the agreement, which reads 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."

Letter to Donnalyn Kahn,
Newton City Solicitor
January 14, 2011
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The Smiths were represented in negotiations with your office by Attorney Tim Sindelar. They have consulted us about several related issues, including the legality (or not) of the above-quoted confidentiality requirements. On their behalf we sought an opinion from the Attorney General of Massachusetts, since we were highly confident that the confidentiality requirement was unlawful and we wanted to see if the Attorney General was in agreement.

We thus wrote to the Attorney General, asking for guidance as to the applicability of the Public Records law to this agreement, without revealing the particular terms of the agreement or the particular parties to the agreement since we did not want our clients to be open to a claim by Newton that they breached the agreement merely by disclosing it to the Attorney General. We received a response from Peter Sacks, deputy chief of the Government Bureau, on December 23rd of last year. We enclose both our letter to the Attorney General and Mr. Sacks' response. As you can see, while the AG's office is not authorized to render a formal opinion to a private party such as our clients, that office has made it abundantly clear that a confidentiality clause such as the one imposed on the Smiths by Newton would not, as a matter of policy, be incorporated into any agreement approved by the Attorney General. Mr. Sacks' letter speaks for itself, and we think makes it unequivocally clear that the confidentiality clause in the agreement between Newton and the Smiths is unlawful as well as poor public policy, and hence unenforceable.

As the Smiths feared, they have been stifled by the confidentiality clause in their agreement with Newton and prevented from fully engaging in an important public debate about how special needs education should be conducted in the Newton school system. This clause has not only affected *their* free speech and petitioning rights, it has deprived the entire community of their voices and contributions to a discussion that unquestionably should be public. For these reasons they have asked us to write to you and seek your acknowledgment, in light of the letter we received from Mr. Sacks, that Newton should conform to the Attorney General's "longstanding policy against including confidentiality clauses in settlement agreements . . . on the ground that such clauses are, absent some specifically applicable statute that authorizes them, inconsistent with the state public records law." Our review of the agreement between our clients and Newton reveals only one such exception that even arguably could apply to the Smiths' situation, and that exception is to protect individuals from "unwarranted invasion of privacy." M.G.L. c. 4, §7, cl. 26(c). But in this instance, any privacy rights belong to the Smiths, and Newton cannot maintain a right to a confidentiality clause in this agreement as against the Smiths on the grounds that it seeks to protect the Smiths' privacy.

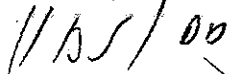
The public records law is meant to insure that decisions made by public agencies be subject to review and debate by the public. The Smiths seek, in this case, to subject Newton's decision in their case, and more generally in all cases of special needs students, to public scrutiny

Letter to Donnalyn Kahn,
Newton City Solicitor
January 14, 2011
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and debate. As citizens they are entitled to do so, and Newton should, following the practice of the Attorney General, recognize that the confidentiality clause it insisted on in the agreement with the Smiths is both anti-democratic and illegal under Massachusetts law, and acknowledge that the Smiths are not bound by it. In our view it is an acknowledgment that you should be eager to make, as it will enlarge and strengthen the debate on this important area of educational policy.

We look forward to hearing from you.

Sincerely,

Handwritten signature of Harvey A. Silverglate in black ink, appearing as "HAS/00".

Harvey A. Silverglate

Handwritten signature of David Duncan in black ink, appearing as a stylized arrow pointing left.
David Duncan

Encs.

cc: Greg Smith and Nancy Macias-Smith

EXHIBIT E

LAW DEPARTMENT



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January 20, 2011

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

Re: Smith Settlement Agreement

Dear Mr. Silverglate:

I am in receipt of your letter dated January 14, 2011 concerning a confidentiality clause set forth in an Agreement executed by your clients, the Smiths.

Please be advised that the City of Newton Law Department does not agree with your analysis of the clause at hand. First, it is our position that the Agreement constitutes a student record which is not subject to production pursuant to the Massachusetts public records law. Second, your clients were represented by counsel at the time they voluntarily agreed to keep the contents of the Agreement confidential. Respectfully, it is neither anti-democratic nor illegal for parties to willingly agree to keep the terms of a certain student record confidential.

Finally, while the Attorney General may have a policy regarding confidentiality clauses in agreements involving state agencies, Mr. Sacks clearly indicates that he is "unable to provide you with a legal opinion on this matter." There is therefore no opinion stating that a confidentiality clause in a student record agreed to by private parties is unlawful.

Harvey A. Silverglate, Esq.

January 20, 2011

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The City of Newton stands by the Agreement and its terms, including the confidentiality clause. However, as your clients may or may not understand, they are free to discuss all other issues regarding the Newton Public Schools that are outside the items set forth in the Agreement.

Very truly yours,

A handwritten signature in cursive script that reads "Donnalyn B. Lynch Kahn". The signature is written in dark ink and is positioned above the printed name.

Donnalyn B. Lynch Kahn
City Solicitor

DBLK/dab