Commonwealth of Massachusetts
County of Middlesex
The Superior Court

CIVIL DOCKET#: **MICV2011-00572-B**

RE: Smith et al v City Of Newton, Acting As The Newton Public Schools

TO: David Duncan, Esquire
Zalkind, Duncan & Bernstein, LLP
65A Atlantic Avenue
Boston, MA 02110

CLERK'S NOTICE

SEE ATTACHED COPIES.

Dated at Woburn, Massachusetts this 6th day of December, 2013.

Michael A. Sullivan,
Clerk of the Courts

BY: Patricia McCann
Assistant Clerk

Telephone: 781-939-2748

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

SUPERIOR COURT
CIVIL ACTION
NO. 2011-0572-B

GREG SMITH & another[1]

v.

CITY OF NEWTON, acting as
NEWTON PUBLIC SCHOOLS.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT NEWTON PUBLIC SCHOOLS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Greg Smith and Nancy Macias-Smith ("Plaintiffs") bring this action for declaratory relief to challenge the validity of the confidentiality provision contained in a settlement agreement that they entered into with Defendant City of Newton (the "City" or "Newton") in September 2010. The Plaintiffs seek to have that confidentiality provision declared void and unenforceable as against public policy, and to sever it from the remaining provisions of the parties' agreement. The case currently is before the Court on the City's motion for summary judgment under Mass. R. Civ. P. 56 on all of the Plaintiffs' claims.

After a hearing and upon careful consideration of the issues presented, the Court allows the City's motion for summary judgment. For the reasons set forth herein, a judgment shall enter that declares the confidentiality provision in the parties' settlement agreement valid and, therefore, enforceable.

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[1] Nancy Macias-Smith, the spouse of Plaintiff Greg Smith.

Factual Background[1]

Plaintiffs Greg Smith and Nancy Macias-Smith are parents of a minor child with special needs. They reside in Newton and, for a time, they enrolled their child in the Newton Public School system ("NPS"). The Plaintiffs eventually grew concerned, however, that their child's educational needs were not being met adequately in the public schools. Disagreements arose between the Plaintiffs and NPS, acting on behalf of the City, as to the appropriate educational placement for the Plaintiffs' child. Before those disagreements were fully resolved, the Plaintiffs removed their child from the Newton schools in the spring of 2010 without the consent or referral of NPS, and placed him in a private school with a specially-designed program that the Plaintiffs believed would provide him with a better education.

The Plaintiffs initially bore the full cost of their child's private school education. Very quickly, however, they sought reimbursement from the City -- as they are permitted to do under federal law -- for the costs of educating their child at the private school they had selected. Disagreements again arose between the Plaintiffs and NPS regarding the extent of the reimbursement to which the Plaintiffs were entitled. A round of negotiations ensued on a formal settlement agreement that would resolve all of the parties' differences regarding the educational placement of the Plaintiffs' child and the allocation of the costs associated with that placement. Both sides were represented in their settlement negotiations by legal counsel, the Plaintiffs by an attorney who specializes in education law.

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[1] The facts summarized herein, which are effectively undisputed, derive from the Plaintiffs' Verified Complaint For Declaratory Relief and attached exhibits (Docket No. 1) and from the City's Rule 9A(b)(5)(i) Statement Of Material Facts As To Which There Is No Genuine Issue To Be Tried (Docket No. 9), as supplemented, without challenge, by the parties at oral argument on September 17, 2013.

Among the points discussed in parties' negotiations was a provision proposed by NPS that would require the terms of any settlement agreement to be kept confidential. NPS took the position that its private educational funding agreements routinely include a confidentiality provision and insisted on the inclusion of such a provision in the proposed settlement agreement with the Plaintiffs. The Plaintiffs objected and indicated their willingness to waive the privacy protection that a confidentiality provision might afford them or their child. The City, however, continued to insist that the parties' agreement, if any, be confidential.

At some point during the negotiating process, the Plaintiffs consulted with another attorney specifically about the issue of confidentiality. They came away with the understanding that, if they did not agree to the confidentiality provision proposed by NPS, they very well might have to litigate their dispute with the City.

The Plaintiffs and NPS ultimately succeeded in resolving their disagreements on the various issues concerning the private educational placement of the Plaintiffs' child. On September 3, 2010, the parties entered into a written settlement agreement (the "Settlement Agreement" or "Agreement") that describes, among other things, their respective obligations concerning payment of the costs associated with that placement. With respect to confidentiality, the parties expressly agreed in Paragraph 13 of the Settlement Agreement that:

> [e]xcept 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, disclosed the terms of the Agreement to their financial, educational, and/or legal advisors and to [the private school].

The parties simultaneously acknowledged and agreed that each side had been represented in their settlement negotiations by legal counsel, that each side had read the entire Settlement Agreement, and that each side had entered into the Agreement "voluntarily and with full understanding of its terms, and without any further inducements or promises except as set forth herein...."

Since September 2010, the Plaintiffs and their child have enjoyed the benefits of the parties' Settlement Agreement in that the Plaintiffs have been able to have their child educated at the private school of their choice, and the City has funded its agreed-upon share of the costs of that placement.

In February 2011 (*i.e.*, approximately five months after signing the Settlement Agreement), the Plaintiffs brought this action seeking declaratory relief from the confidentiality obligations of that Agreement. More specifically, the Plaintiffs seek a judicial declaration that the confidentiality provision contained in Paragraph 13 of the Settlement Agreement is void and unenforceable as against public policy, but that the remainder of the Agreement, including the financial terms agreed-upon by the parties, "are still in full force and effect...."[3] Verified Complaint, dated February 18, 2011, at 4.

The City now has moved for summary judgment on the Plaintiffs' Complaint, arguing that the Settlement Agreement executed by the parties in September 2010 is valid and binding in its entirety as a matter of law. Not surprisingly, the Plaintiffs oppose the City's motion.

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[3] The "public policy" to which the Plaintiffs refer is the Plaintiffs' right to freedom of speech guaranteed under both the First Amendment to the United States Constitution and art. 16 of the Massachusetts Declaration of Rights. The rights granted by those documents are interpreted, in many circumstances, to be "coextensive," Roman v. Trustees of Tufts College, 461 Mass. 707, 713 (2012); *but see* id. (rejecting assertion that art. 16 can extend no further than comparable provisions of the First Amendment), and both sides treat them as such in this case.

Discussion

The entry of summary judgment is appropriate when, viewing the record evidence in the light most favorable to the nonmoving party, no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. Opara v. Massachusetts Mut. Life Ins. Co., 441 Mass. 539, 544 (2004). In this context, a dispute of material fact is "genuine" when the evidence would permit a reasonable jury to return a verdict for the nonmoving party, and a fact is "material" when it might affect the outcome of the lawsuit under governing law. Dennis v. Kaskel, 79 Mass. App. Ct. 736, 740-741 (2011) (*quoting* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). To be granted summary judgment, the moving party must affirmatively demonstrate the absence of a triable issue and its entitlement to judgment as a matter of law. Indus Partners, LLC v. Intelligroup, Inc., 77 Mass. App. Ct. 793, 794 (2010).

While both sides have framed and argued this matter primarily as if it was an action to compel the disclosure of a document under the Commonwealth's public records law, M.G.L. c. 66, § 10, it is, at its core, simply a contract action. The statutory disclosure mechanisms set forth in Section 10 of Chapter 66 apply in circumstances when a *third party* seeks access to certain types of records kept in the custody of a government entity. That is not the case here. Both sides in this matter already have full access to the Settlement Agreement at issue, and nothing in the summary judgment record indicates that any third party ever has requested access to that document, or that NPS ever has refused to disclose the terms of the Agreement in response to such a request. Thus, whether the parties' Settlement Agreement qualifies as an exempt "student record" under 603 CMR § 23.00 *et seq.*, or as an exempt "education record"

under the federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, are not at issue in this case.[2] What *is* at issue is whether the Plaintiffs validly waived their constitutional rights by voluntarily agreeing to keep the terms of their heavily-negotiated Settlement Agreement with the City confidential.

With respect to the question presented, it is well-settled that a person may waive his or her constitutional rights, *see* Spence v. Reeder, 382 Mass. 398, 411-412 (1981) (*citing* Johnson v. Zerbst, 304 U.S. 458, 464 (1938)), including his or her constitutionally-guaranteed right to freedom of speech, *see, e.g.,* Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967). In a civil case, waiver of a fundamental constitutional right never is presumed, Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); Northeast Line Constr. Corp. v. J.E. Guertin Co., 80 Mass. App. Ct. 646, 649 (2011), and a finding of waiver requires proof that the person accused of having waived "intentional[ly] relinquish[ed] ... a known right or privilege." Spence v. Reeder, 382 Mass. at 411 (*citing* Metropolitan Transit Auth. v. Railway Express Agency, Inc., 323 Mass. 707, 709 (1949)); *see also* Commonwealth v. Cavanaugh, 371 Mass. 46, 53 (1976) (*quoting* Johnson v. Zerbst, *supra*). Courts have found this standard of proof satisfied in instances where a party "voluntarily, intelligently, and knowingly" waived its constitutional right in a contract. *See, e.g.,* D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185-187 (1972); *see also* Perricone v. Perricone, 292 Conn. 187, 213 (2009) (weight of authority supports conclusion that first amendment rights may be waived by contract).

[2] For this reason, the Plaintiffs' reliance on the Superior Court's unpublished decision in Champa v. Town of Weston Public Schools, Middlesex Super Ct., Civ. No. 2012-04475 (August 23, 2013), is misplaced. In that case, a third party brought suit brought under M.G.L. c. 66, § 10 to obtain access to various settlement agreements entered into between the Weston Public Schools and the parents of students with disabilities regarding the placement of the students in private, out-of-district educational institutions. No claims have been asserted by any third party in this action, however.

Evidence establishing a waiver, however, must be "clear and compelling." *See* Curtis Publishing, *supra*; Erie Telecomm., Inc. v. City of Erie, 853 F.2d 1084, 1094-1095 (3d Cir. 1988).

The foregoing rules and standards, applied to the undisputed facts of this case, establish that the Plaintiffs voluntarily, intelligently, knowingly and intentionally waived their constitutional right to freedom of speech when they expressly agreed to maintain the confidentiality of their written Settlement Agreement with the City. The summary judgment record shows that the settlement negotiations between the Plaintiffs and NPS took place over a period of weeks; that the Plaintiffs were represented in those negotiations by an attorney experienced in education law; that the Plaintiffs sought and obtained legal advice from another attorney about the proposed confidentiality provision specifically while the parties' negotiations still were underway; and that the Plaintiffs thereafter signed the final Settlement Agreement with the City containing the proposed confidentiality provision with full knowledge of its terms. The Plaintiffs undoubtedly understood the consequences of their actions, but were willing to bargain away their right to publicly disclose the terms of their Settlement Agreement in order to enjoy the benefits that it provides to them and their child without the need for, and risk of, additional legal or administrative proceedings. On a record such as this, the Court can and does conclude that the Plaintiffs' waiver of their constitutional right to freedom of speech that is contained in the Agreement they voluntarily signed in September 2010 is valid and enforceable as a matter of law. *See* Spence v. Reeder, 382 Mass. at 411; *see also* Mugnano-Bornstein v. Crowell, 42 Mass. App. Ct. 347, 353 (1997) (upholding validity of waiver of constitutional right to trial by jury in arbitration agreement).

There are two additional, important considerations that factor into, and support, the Court's decision in this matter.

First, this is not a situation in which the Plaintiffs had no choice but to sign the Settlement Agreement with the City and thereby waive their constitutional rights. At the very least, the Plaintiffs always had the option of rejecting the settlement terms proposed by NPS and resolving their dispute with the City regarding their child's educational needs in an administrative proceeding before the Commonwealth's Bureau of Special Education Appeals ("BSEA") filed pursuant to M.G.L. c. 71B, § 2A. A parent or a school district may request mediation, an advisory opinion, and/or a hearing before the BSEA on any matter concerning the eligibility, evaluation, placement, individualized education program, provision of special education in accordance with state and federal law, or procedural protections of state and federal law for students with disabilities. The Plaintiffs affirmatively chose not to pursue an administrative remedy before the BSEA here because they apparently regarded the Settlement Agreement they had negotiated with NPS as offering, on the whole, a more desirable and more dependable outcome. That decision was not forced upon them.

Second, there are strong public policy reasons why this Court should respect and enforce the parties' Settlement Agreement as written. Massachusetts has a "well-established public policy favoring the private settlement of disputes." Cabot Corp. v. AVX Corp., 448 Mass. 629, 638 (2007). Settlement is an efficient means of resolving legal disagreements. It avoids costly and time-consuming litigation, and offers near-term certainty concerning the parties' respective rights and obligations. In the cases involving governmental entities, settlement also helps to conserve scarce public resources. These collateral benefits have real

value for the participants in a settlement, and for society as a whole, that should not be lightly disregarded or negated. *See* Starr v. J. Abrams Constr. Co., 16 Mass. App. Ct. 74, 81 (1983) (refusing to void purportedly illegal "side agreement" where "[p]arties of equal bargaining strength appear to have come to an accommodation by which they would circumvent official procedures, thereby providing themselves with a benefit (of time not lost to the bureaucratic process) of value to each.").

Similarly, Massachusetts law generally encourages the right of parties to freely contract with one another on terms that they deem to be mutually-acceptable. *See, e.g.*, TAL Fin. Corp. v. CSC Consulting, Inc., 446 Mass. 422, 430 (2006) ("Under freedom of contract principles, generally, parties are held to the express terms of their contract, and the burden of proof is on the party seeking to invalidate an express term."); L.D. Willcutt & Sons Co. v. Driscoll, 200 Mass. 110, 121 (1908) ("[T]he rule of freedom to contract is founded upon principles of public policy"). The principle of freedom of contract "rests on the premise that it is in the public interest to accord individuals broad powers to order their affairs through legally enforceable agreements." E.A. Farnsworth, Contracts § 5.1, at 345 (2d ed. 1990); *accord* Restatement (Second) of Contracts ch. 8, Intro. Note, at 2 (1981) (stating principle of freedom of contract).

Invalidating the confidentiality terms of the parties' Settlement Agreement in this case would contravene both the Commonwealth's strong policy favoring the settlement of disputes and its strong policy favoring freedom of contract. It is not clear that the countervailing public policy considerations cited by the Plaintiffs (*e.g.*, ensuring the public disclosure of "the financial resolutions [the City] enters into with parents" and "exposing public agencies'

workings to the public" (Plaintiffs' Opposition to Defendant's Motion for Summary Judgment at 4, 10)) have greater societal importance, or that giving them precedence in the present circumstances would better serve the public interest. The Massachusetts Supreme Judicial Court warned long ago that courts "should proceed with extreme caution when called upon to declare a transaction void on grounds of public policy, and prejudice to the public interest should clearly appear before any such declaration is made." Council v. Cohen, 303 Mass. 348, 352 (1939); *see also* Starr, 16 Mass. App. Ct. at 81 (same). Given all the circumstances, this Court is of the view that the overarching interests of the public would be poorly-served if the Plaintiffs were permitted to retain the benefits of their carefully-negotiated and voluntarily-executed Settlement Agreement with the City, while simultaneously shedding, after the fact, other elements of that Agreement they deem to be undesirable and unduly constraining.

Order

Accordingly, IT IS HEREBY ORDERED that Defendant City of Newton's Motion for Summary Judgment is ALLOWED, and Judgment shall enter declaring that the Settlement Agreement entered into by and between Plaintiffs Greg Smith and Nancy Macias-Smith and Defendant City of Newton, on or about September 3, 2010, is valid and enforceable in its entirety.

Brian A. Davis
Associate Justice of the Superior Court

Date: November 29, 2013

Commonwealth of Massachusetts
County of Middlesex
Superior Court

MIDDLESEX, SS. 14 CIVIL DOCKET# **MICV2011-00572**
Greg Smith, Nancy Macias-Smith,
Plaintiff(s)

vs.

City Of Newton, Acting As The Newton Public Schools,
Defendant(s)

SUMMARY JUDGMENT M.R.C.P. 56

This action came on to be heard before the Court, Brian A. Davis, Justice, presiding, upon motion of the defendant(s), City Of Newton, Acting As The Newton Public Schools, for Summary Judgment pursuant to Mass. R. Civ. P. 56- the parties having been heard - and the Court having considered the *pleadings-depositions-answers to interrogatories-admissions- and affidavits, finds there is no genuine issue as to material fact and that the defendant is entitled to a judgment as a matter of law,

It is **ORDERED and ADJUDGED:**

The Settlement Agreement entered into by and between Plaintiffs

Greg Smith and Nancy Macias-Smith and Defendant City of Newton,

on or about September 3, 2010, is valid and enforceable in its entirety.

Dated at Woburn, Massachusetts this 5th day of December, 2013.

Patricia M. McCann
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Assistant Clerk