IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JOHN DOE and JANE DOE, individually and as Guardian and Next Friend of John Doe, a minor,	)	
Plaintiffs,	)	
v.	)	C.A. No. 09C-09-136 JRS
CEDARS ACADEMY, LLC, a Delaware Limited Liability Company, and ASPEN EDUCATION GROUP, INC., a Corporation of the State of California,	)	
Defendants.	)	

Date Submitted: November 18, 2010
Date Decided: January 19, 2011

Upon Consideration of Plaintiffs' Motion for Reargument.
DENIED.

O R D E R

This 19th day of January 2011, John Doe and Jane Doe (collectively "Plaintiffs"), having moved for reargument of this Court's decision granting Cedars Academy, LLC ("Cedars") and Aspen Education Group, Inc.'s ("Aspen") (collectively "Defendants") Motion to Dismiss, it appears to the Court that:

1. On October 27, 2010, the Court granted Defendants' Motion to Dismiss

Plaintiffs' complaint holding that the forum selection clause of the operative contract between the parties ("the Agreement"), selecting California as the exclusive forum, was enforceable as to all of the parties.[1] The Court concluded that the language of the Agreement demonstrated the intent of the parties to consent to the exclusive jurisdiction of California courts or arbitration panels to litigate their claims.[2] Plaintiffs have moved for reargument.

2. "A motion for reargument is the proper device for seeking reconsideration by the Trial Court of its findings of fact, conclusions of law, or judgment . . . . The manifest purpose of all Rule 59 motions is to afford the Trial Court an opportunity to correct errors prior to appeal. . . ."[3] "[The motion] will be denied unless the Court has overlooked a controlling precedent or legal principles, or the Court has misapprehended the law or facts such as would have changed the outcome of the underlying decision."[4]

3. Plaintiffs ask the Court to clarify whether Aspen is a party to the Agreement and therefore bound by the choice of forum provision. They argue that

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[1] *Doe v. Cedars Acad., LLC and Aspen Educ. Group, Inc.,* No. 09C-09-136, Mem. Op. at 2 (Del. Super. Oct. 27, 2010).

[2] *Id.* at 19.

[3] *Hessler Inc. v. Farrell*, 269 A.2d 701, 702 (Del. 1969).

[4] *Bd. of Managers of the Del. Crim. Justice Info. Sys. v. Gannett, Co.*, 2003 WL 1579170, *1 (Del. Super. Ct. Jan. 17, 2003).

Aspen is not a party to the Agreement and that an action for negligence against Aspen, grounded in a common law duty of care, would not arise from the Agreement and thus may properly be heard by this Court without regard for the Agreement's choice of forum and arbitration provisions. For the reasons that follow, the Court is satisfied that its decision to grant the Defendants' motion to dismiss properly encompassed the claims against Aspen.

4. Pursuant to Superior Court Civil Rule 19, a person (or entity) shall be joined as a party in an action "if in the person's absence complete relief cannot be accorded among those already parties. . . ."[5] The Plaintiffs allege injury sustained by John Doe while a student at Cedars Academy.[6] In order to prove negligence on the part of Aspen, the Plaintiffs necessarily would have to prove that Aspen not only owed a duty to the Plaintiff, but that such duty was breached.[7] The Court can conceive of no scenario, based on the allegations in the complaint, in which Plaintiffs might prove such a breach of duty without joining Cedars (Aspen's affiliate and the entity whose alleged negligence is at the heart of this case), over whom this Court has determined it should decline to exercise its jurisdiction pursuant to the

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[5] Super. Ct. Civ. R. 19(a)(1).

[6] Compl. ¶ 7.

[7] *Pipher v. Parsell*, 930 A.2d 890, 892 (Del. 2007).

Agreement. Based on the facts of this case, Cedars and Aspen are so intertwined as to make Cedars a necessary party to any claim of negligence against Aspen.[8]

5. Moreover, Aspen is a third party beneficiary of the Agreement. "Intended third party beneficiaries have an enforceable right under contracts conferring a benefit to them, even though they are not parties to those contracts. . . . In order for third party beneficiary rights to be created, not only is it necessary that performance of the contract confer a benefit upon third parties that was intended, but the conferring of a *beneficial* effect on such third party . . . should be a material part of the contract's purpose."[9] Aspen expressly secured the benefit of release and indemnification under the Agreement's release provision.[10] The main purpose of the Agreement was to enroll John Doe at Cedars. The Agreement explicitly provides

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[8]35A C.J.S. Federal Civil Procedure § 142 ("A party is necessary, for purposes of the provisions governing joinder . . . when complete relief is not possible without the absent party's presence."). *See also LaSalle Nat. Bank v. Ingram,* 2006 WL 1679418, *3 (Del. Super. Ct. May 16, 2006) ("Dismissal of an action is normally granted if an indispensable party cannot be joined to an action. An indispensable party is one 'who not only [has] an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.'")(quoting *Kojro v. Sikorski*, 267 A.2d 603, 605 (Del. Super. 1970)) (*citing Shields v. Barrow,* 58 U.S. 130, 139 (1854)).

[9]*Comrie v. Enterasys Nerworks, Inc.,* 2004 WL 293337, *2-3 (Del. Ch. Feb. 17, 2004).

[10]Agreement ¶ 5 ("In consideration for being permitted to participate in the Program, Sponsor agrees to not sue, to assume all risks and to release, hold harmless and indemnify Cedars and any and all of its predecessors, successors, officers . . . or affiliated business entities, including but not limited to, Aspen Education Group, Inc. . . . who, through negligence, carelessness or any other cause, might otherwise be liable to Sponsor or Student under theories of contract or tort law.").

that, in consideration for that enrollment, Plaintiffs agreed not to sue Aspen.[11] The Court is therefore satisfied that the parties intended the Agreement's indemnity provision, releasing and indemnifying Aspen as stated therein, to be a "material purpose" of the contract. The Court is also persuaded that non-signatory third party beneficiaries are bound by forum selection clauses in underlying contracts.[12]

6. The Plaintiffs contend that a negligence action against Aspen for negligent management of Cedars does not arise out of the Agreement. As this Court previously noted, however, all of the Plaintiffs' claims are based on the alleged failure to protect John Doe while a student at Cedars.[13] Clearly, the Plaintiffs' relationship to both Cedars and Aspen arises from the Agreement pursuant to which John Doe was admitted to Cedars. Without the Agreement, Plaintiffs would have no relationship to Aspen whatsoever because John Doe would not have attended Cedars. Thus, any claims against Aspen by Plaintiffs necessarily arise from the Agreement, in the absence of which no duty flowing from Aspen to Plaintiffs would exist. Because Aspen is a third party beneficiary of the Agreement, the choice of forum provision

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[11] *Id.*

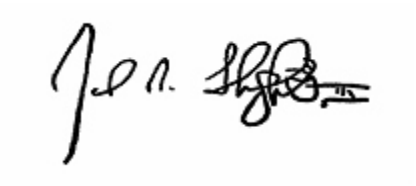
[12] *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 195 - 96 (3d Cir. 2001). ("[The Courts] have [ ] bound a non-signatory third party beneficiary to a forum selection clause in the underlying contract.").

[13] *Doe v. Cedars Acad., LLC and Aspen Educ. Group, Inc.,* No. 09C-09-136, Mem. Op. at 19 (Del. Super. Oct. 27, 2010).

is controlling as to claims against Aspen, just as it is controlling as to claims against Cedars. Delaware law is clear that "forum selection [] clauses are 'presumptively valid' and should be 'specifically' enforced unless the resisting party '[] clearly show[s] that enforcement would be unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud and overreaching.'"[14] Plaintiffs do not contend that the forum selection provision is the result of fraud or that it is somehow overreaching. Accordingly, the Court will not deviate from Delaware's well-settled respect for the parties' contractual choice of forum.

7. Based on the foregoing, Plaintiffs' Motion for Reargument is **DENIED.**

IT IS SO ORDERED.



Judge Joseph R. Slights, III

[14] *Ingres Corp. v. CA, Inc.,* 8 A.3d 1143, 1143 (Del. 2010) (quoting *Capital Grp. Cos., Inc. v. Armour,* 2004 WL 2521295, *3 (Del. Ch. Nov. 3, 2004)) (holding that "where contracting parties have expressly agreed upon a legally enforceable forum selection clause, a court should honor the parties' contract and enforce the clause, even if, absent any forum selection clause, the *McWane* principle might otherwise require a different result."). *Id.* at 1143.