BEFORE THE BOARD OF ZONING ADJUSTMENT OF THE DISTRICT OF COLUMBIA

In Re: BZA Application No. 16566A

MOTION FOR STAY

I. INTRODUCTION

Pursuant to 11 DCMR § 3126.2, the President and Directors of Georgetown College ("Georgetown " or "the University") hereby move for an order staying the enforcement of certain conditions imposed in the Board of Zoning Adjustment Order No. 16566A (the "Order") pending the University's judicial appeal of the Order. Specifically, Georgetown seeks an order staying the enforcement of those provisions of Conditions 7, 10 and 14 that would require the University to disclose student records to third parties in violation of the federal Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g. The Order was entered on August 6, 2001, and will, pursuant to 11 DCMR § 3125.9, otherwise become effective in its entirety on August 16, 2001.

In its response to the Motion for Reconsideration of the Order, Georgetown asked the Board to clarify that the Order does not, and was not intended to, require Georgetown to take any action that would be inconsistent with its obligations to maintain the confidentiality of student records under federal law, particularly FERPA. (Response to Motion to Reconsider Order ("Response") at 1, 2.) In its filing, Georgetown specifically described its concerns regarding the conflict between reporting obligations imposed by Conditions 7, 10 and 14 and privacy constraints imposed by federal law. (Id. at 3, 4.) The Order on Reconsideration addressed issues raised by neighborhood groups and citizens and those raised by Board sua sponte, but declined to

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address Georgetown's concerns. As a result, the Order as framed places the University in the legally untenable position of having to choose to run afoul of either the conditions of the Order or the dictates of federal law and, whichever course it adopts, to subject the University to potentially severe sanctions. This Hobson's choice threatens irreparable injury to the University and its students. For these reasons, which are discussed more fully below, Georgetown respectfully requests that the Board stay enforcement of these discrete aspects of Conditions 7, 10 and 14 pending a court's resolution of the Board's authority to impose such obligations on the University.[1]

II. ARGUMENT

A. FERPA Requires the University to Maintain the Confidentiality of Student Education Records.

FERPA prohibits universities from disclosing "education records" of a student, or personally identifiable information contained in those records, without the consent of the student, unless there is a specific statutory exception permitting disclosure. 20 U.S.C. §§ 1232g (b) and (d). The law is designed to "protect [students'] rights to privacy by limiting the transferability of

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[1] Georgetown's motion does not request a stay with respect to Condition 3, although the first sentence of that particular condition is fundamentally flawed. Condition 3 is expressly premised on the notion that it is a "privilege" for Georgetown students to live in the District of Columbia community, whereas it is, of course, a right for any other citizen to live in the community. This discriminatory philosophy, which permeates the Order, contradicts the District of Columbia Human Rights Act and the United States Constitution's equal protection guarantees. Under Georgetown's Code of Conduct, the University can, in the exercise of its educational discretion and as part of a sanction for a Code of Conduct violation, condition a student's ability to remain at the University on his or her living on campus. It does not, and could not lawfully be required to explicitly tell students they have a revocable "privilege" to live as citizens among the other residents of the District of Columbia. Because Georgetown does not understand the condition to require the literal insertion of the "privilege" language in its Code, and because its current disciplinary code already affords the disciplinary discretion apparently contemplated by this condition, the University does not here seek a stay of Condition 3, though the "privilege" aspect of that condition will certainly be a focus of the University's judicial challenge to the Order.

their records without their consent." 120 Cong. Rec. 39858, 39862 (Dec. 13, 1974) (Joint Statement of Sens. Buckley and Pell in Explanation of Buckley/Pell Amendment). Under FERPA, "education records" are broadly defined as "those records, files, documents, and other materials which - (I) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution." 20 U.S.C. § 1232g (a)(4). Student disciplinary records are included within the definition of "education records" for purposes of FERPA, and must be accorded all of the protections of FERPA. See United States v. Miami University, 91 F. Supp.2d 1132, 1149 (S.D. Ohio 2000).

To the extent that several of the Order's conditions would require the University to disclose students' confidential education records, including their disciplinary records, to third parties -- landlords, District of Columbia agencies, and parents -- the University would be forced to directly violate FERPA if it complied with the Order. If forced to violate FERPA, the University could be subjected to sanctions by the Department of Education, up to and including the withholding of federal funds to the University. See 20 U.S.C. §§ 1232g(f) and 1234c. Accordingly, the University seeks an order staying enforcement of those conditions pending the outcome of the University's judicial challenge of the Order.

B. Conditions 7, 10 and 14 Direct the University to Report Confidential Information to Third Parties in Violation of FERPA.

In addition to other deficiencies in the Order, the Board adopted several conditions that expressly require the University to report confidential student information to local authorities directly in violation of FERPA. Georgetown endeavored to bring this matter to the Board's attention in connection with the Motion for Reconsideration, but the Board did not respond to the

University's concerns.

Condition 7

Condition 7 on its face requires the University to share and oversee the investigatory and enforcement functions of various District of Columbia agencies with respect to the actions of University students and community residents who rent their homes to those students. Specifically, Condition 7 provides as follows:

> When the [University], upon investigation of a complaint or by any other means, receives evidence of a violation of sanitation or housing regulations involving or affecting students living in an off-campus residence, the [University] shall report the violation to the housing provider, the Department of Consumer and Regulatory Affairs, Department of Public Works, or other agency as appropriate. The [University] shall monitor enforcement of reported violations to determine whether necessary inspections have occurred and whether fines have been issued and paid, and shall keep detailed records of reported complaints and responses.

This Condition broadly imposes on Georgetown administrative responsibilities that are lawfully within the sole purview of District of Columbia administrative agencies whose public functions are supported by public funds. First, it orders Georgetown to determine whether it has "evidence of a violation of sanitation and housing regulations." In so doing, it assigns to the University the initial task of interpreting and applying statues and regulations concededly within the authority of local administrative agencies and plainly outside the University's authority and expertise. Second, this condition requires the University to report perceived "violations" of such standards to third party landlords and agencies. Finally, Condition 7 requires the University to monitor, oversee and keep detailed records about the agency's responsive enforcement activities, up to and including its collection of imposed fines.

Georgetown believes that imposition of this condition far exceeds the Board's authority, and it is unaware of any other instance in which the Board (or any other administrative agency for that matter) has ever effectively required a private party to assume the District's law enforcement function and to monitor the work of its administrative agencies. Accordingly, Georgetown intends to challenge this condition in its entirety in court.

Georgetown's request for stay with respect to Condition 7 is considerably more limited, and regards only its third party reporting obligations that directly conflict with the University's obligations under FERPA. The records at issue are "education records," both (1) directly related to the student, containing personally identifiable information about the student, such as the student's name or address, and (2) maintained by the University. As such, they are protected from disclosure by FERPA. Disclosure of this information, as required by the Order, to a landlord or a District of Columbia agency would violate the University's obligation not to disclose education records or personally identifiable information contained in such records to third parties, without the consent of the student or a specific statutory exception. The University cannot comply with both the Order to disclose this information and its obligations under FERPA not to disclose it.

In its response to the Motion for Reconsideration, Georgetown asked the Board to clarify that it did not intend to require the University to take action that would violate its obligations under FERPA, and asked for the Board to explain the source of its authority to effectively delegate the District's law enforcement functions to a private institution. The Board declined to respond on either point. Georgetown accordingly is compelled to seek a stay of this aspect of the Condition, pending judicial resolution of this and other inconsistent legal obligations that it has

created.

Condition 14

Condition 14 requires the University to collect information regarding the license plate numbers of motor vehicles kept by University students, and to direct all such students to register their vehicles with the District's Department of Motor Vehicles ("DMV"). The University believes that the Board has no authority to dictate such minutiae of the University's business, and that, in any event, such a requirement is not rationally related to any legitimate purpose or supported by substantial evidence in the record. Nevertheless, while it pursues its legal remedies, Georgetown intends to collect such information from its students this fall and will continue to advise its students of their obligation to comply with the District's motor vehicle registration requirements.

The aspect of Condition 14 that Georgetown seeks to stay relates again to the requirement of reporting to and "consulting with" a third-party regarding personally identifiable information contained in student education records. Condition 14 requires that Georgetown "consult with" the DMV to determine whether its students have complied with the registration requirements for their vehicles and whether they have obtained their residential parking stickers. As a fundamental matter, consultation with DMV regarding enforcement of motor vehicle rules is a law enforcement function that should be handled by the appropriate District agency rather than delegated to a private institution. Moreover, Condition 14 implicates the practical problems manifest in even trying to envision how (not to mention, with whom) one might "consult" within the DMV regarding the status of what may well be scores of student vehicles.

This reporting and consultation requirement also raises problems under FERPA. In order to comply with the requirement of consultation with DMV (even if it were logistically possible from a practical standpoint) the University would by definition have to disclose license plate numbers and student names to the DMV. As with the information that Condition 7 requires the University to collect and disclose (i.e., information regarding violations of sanitation or housing regulations involving or affecting students living in an off-campus residence), license plate information is directly related to a student and, pursuant to the Order, would be maintained by the University, making this information part of students' education records and protected by FERPA. To compel the University to disclose this information to the DMV compels the University to violate FERPA. Again placed in the untenable situation again of having to violate either the Order or FERPA, the University seeks a stay pending judicial resolution of the situation.

Condition 10

Condition 10 addresses Georgetown's policies for notifying parents of students who violate the University's Code of Conduct. It provides: "The Applicant shall report a violation of the Code of Conduct to the parents or guardians of the violator to the extent permitted by law." In its Response, Georgetown explained that it was uncertain whether the Board intended the Condition to reflect and affirm existing University practice, which reflects the University's educational mission, or to require a revision of the Code that would substitute the Board's view on the subject for the University's carefully considered, well-established policies. (Response at 3.) The University's request for clarification on this point was unfortunately denied.

Either way, Georgetown believes that the Board exceeded its authority in dictating the minutiae of the University's "business," and by intruding upon sensitive educational matters like the timing and nature of communications between the University and its students' parents with respect to even routine disciplinary matters. It accordingly intends to seek judicial review of Condition 10. Pending the resolution of that challenge, however, the University seeks a stay of this Condition to the extent that it is intended to require the University to make disclosures to parents in violation of its obligations to its students under FERPA and its current code. As discussed above, FERPA establishes a broad prohibition on the disclosure of student education records, including disciplinary records, to third parties without the consent of the student. At the university level, parents are third parties for the purposes of FERPA disclosure because the rights under FERPA are held by the student alone when he or she reaches 18 years of age or enrolls in an institution of higher education. 20 U.S.C. § 1232(d); 34 C.F.R. § 99.5. Unless a statutory exception applies, student education records, including student disciplinary records cannot be disclosed, even to the student's own parents, without the student's consent.

A limited number of statutory exceptions give the University discretion to disclose student education records to parents without the student's consent. For example, the University may exercise its discretion to disclose student education records without the student's consent in connection with a health or safety emergency, 34 C.F.R. § 99.31(a)(10), or to parents of a dependent student as defined by the Internal Revenue Code, 34 C.F.R. § 99.31(a)(8). FERPA requires, however, that the University establish and disseminate a policy describing how it exercises its discretion to make these and other disclosures without the consent of the student. 34 C.F.R. § 99.7. Consistent with this FERPA requirement, Georgetown has adopted and

promulgated a Student Records Policy and Code of Conduct that carefully balance student privacy concerns with its educational and disciplinary goals, and permit disclosure of student disciplinary information in a manner consistent with FERPA.

Consistent with FERPA, the presumption of Georgetown's Student Records Policy is the protection of the student's privacy. "[I]t is the policy of the University not to provide academic and other personal information without the student's consent." University Undergraduate Bulletin at 58. This policy is balanced, however, in that "[a]n exception will be made when the University determines, on the basis of all the circumstances, that disclosure to parents is warranted because of compelling academic, health, safety or disciplinary concerns. When the University determines that disclosure is warranted, and there is no emergency, students will first be given a reasonable period of time within which to inform their parents . . . ." University Undergraduate Bulletin at 58. The Code of Conduct further explains the circumstances under which the University believes disclosure is warranted for disciplinary concerns. Under the Code of Conduct, notification to parents of dependent children is typically undertaken after a certain number of Code of Conduct violations (typically two, while notification can sometimes occur on a first violation), or when a sanction for a violation is relatively serious (such as a sanction that will effect a student's housing or status at the University).

The Order, if construed to require the University to notify parents after *any* Code of Conduct violation, would conflict with the University's existing procedure, and would necessarily mandate an amendment of the University's Code of Conduct to permit such reporting to the fullest extent permissible under FERPA. That action by the Board would usurp the discretionary authority delegated to and properly exercised by the University under FERPA.

Georgetown's concern about this issue prompted it to highlight the problem in its Response, explaining its concern that Condition 10 could arguably be intended to require the University to notify parents after *any* Code of Conduct violation. The University again asked for the Board's confirmation that it intended no change in the University's parental notification procedures, and such confirmation would have avoided the need to delve into this federal legal quagmire. The Board in its discretion declined even to address the issue. Georgetown now has no choice but to seek a court's intervention, but requests that the Board stay Condition 10 while that challenge is pending.

C. The University Is Entitled to a Stay of These Unlawful Conditions.

In deciding whether to grant a motion for stay, the Board must consider the following four factors: 1) whether irreparable injury will result if the stay is denied; 2) whether the opposing parties will be harmed if the stay is granted; 3) whether the public interest favors granting a stay; and 4) whether the applicant is likely to prevail on the merits. Kuflom v. District of Columbia Bureau of Motor Vehicle Services, 543 A.2d 340, 344 (D.C. 1988). All of those factors weigh heavily in favor of granting Georgetown's motion in this matter.

As demonstrated above in considerable detail, enforcement of Conditions 7, 10 and 14 will cause Georgetown to suffer irreparable injury in the absence of the requested stay by requiring it to choose between complying with federal law or the Order, violation of either one of which subjects the University to serious consequences. Moreover, even without regard to the potential consequences of such violations, the very fact of placing a university in such a situation

is unjustifiable and constitutes irreparable harm. Senior United States District Judge Louis F. Oberdorfer recently concluded in George Washington University v. District of Columbia Board of Zoning Adjustment, No. 01-AA-571, that to put a university in the position of having to violate a Board Order in order to maintain its compliance with other obligations to its students is by definition irreparable harm. (June 15, 2001 Op. at 6.). The harm can certainly be no less irreparable if the choice is between violating the Order or federal law.

With respect to the harm to the community if the stay is granted, it is difficult to imagine how there could be any appreciable harm to anyone as a result of staying implementation of just these three reporting requirements pending judicial review. Issuance of the requested stay also would serve the public interest. Indeed, compliance with federal law is by definition in the public interest. See generally Pearson v. Shalala, 130 F. Supp. 2d 105, 119 (D.D.C. 2001) (granting preliminary injunction and holding that government compliance with laws is in the public interest).

Finally, the University is likely to succeed on the merits of its legal challenge to the Order. As the discussion above demonstrates, in addition to interfering with the minutiae of the University's exercise of its lawful discretion as to how to best fulfill its academic mission, the Order directs the University to take action in violation of the dictates of federal law. It is axiomatic that a local land use body has no authority to effectively preempt federal law in its efforts to manage the activities of a property user. Fidelity Fed. Sav. & Loan Ass'n v. De LaCuesta, 458 U.S. 141, 153 (1982) (holding that even in the regulation of real property, local law is pre-empted by federal law where "'compliance with both federal and state regulations is a physical impossibility'") (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132,

142-43 (1963)). The invalidity of the Order's reporting requirements under FERPA alone establishes the virtual certainty that the University will succeed on the merits of its challenge to those obligations.

Conditions 7, 10 and 14, along with other aspects of the Order, are vulnerable as well on other legal grounds. The District of Columbia Court of Appeals has held that it is fundamental that the Board may regulate the use of land, but *may not* regulate the "business" of the user. Nat'l Black Child Dev. Inst., Inc. v. D.C. Bd. of Zoning Adjustment, 483 A.2d 687, 691 (D.C. 1984) ("Personal conditions impermissibly regulate the business conduct of the owner, rather than the use of his property, and are unlawful *per se*.") In this case, the Board has dramatically exceeded its authority to regulate the use of the land, and has ventured deeply into the territory of dictating the details of the "business" – in this case, the educational mission – of the property user.

Such an overstepping of the Board's lawful bounds is all the more legally objectionable when the property user is a university. While Georgetown has never maintained, and certainly does not contend here, that it is exempt from reasonable land use regulation by virtue of its status as a university, the federal courts have for years recognized the importance of a university's self-governance under notions of "academic freedom" protected by the First Amendment to the United States Constitution, and strive to limit regulators' interference with a university's affairs. See, e.g., Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."); Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000), cert. denied, 121 S. Ct. 759 (2001). The

Board's intrusion into the details of the University's business, including prescribing the terms of its disciplinary code and its communication with its students' parents, is unlawful under both of these legal theories. In short, there is ample reason to believe that the University has a strong likelihood of success on the merits of its challenge to Conditions 7, 10 and 14.

Even if the Board disagrees as to the merits of Georgetown's views of the deficiencies in the reporting requirements of Conditions 7, 10 and 14, a stay is nevertheless warranted. At a minimum, the Board cannot dispute that the University has established serious and substantial issues going to the merits of its legal challenge to the Order. Where, as here, the balance of hardships and public interest weigh heavily in favor of a stay, a stay will issue, if the moving party has demonstrated such serious issues going to the merits of its claims. See, e.g., Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (denying motion to vacate stay of injunction); Barry v. Washington Post Co., 529 A.2d 319, 320-21 (D.C. 1987) ("When the last three factors strongly favor interim relief, only a 'substantial' showing of likelihood of success, not a 'mathematical probability,' is necessary for the Court to grant a stay.").

III. CONCLUSION

The University respectfully requests that the Board stay enforcement of its decision as to the reporting requirements in Conditions 7, 10 and 14 as requested herein, pending the University's judicial appeal. As demonstrated in this motion, each of those conditions arguably places Georgetown in the impossible position of having to either violate federal law or the Order. That result surely could not have been intended by the Board and cannot fairly be imposed on the University.

Dated: August 16, 2001

Respectfully submitted,

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By:

Deborah B. Baum

Maureen E. Dwyer

DRAFT ORDER GRANTING STAY

Application No. 16566A of the President and Directors of Georgetown College ("University"), pursuant to 11 DCMR § 3104.1, for a special exception for the review and approval of the University Campus Plan – Years 2000-2010 under Sections 210 in the R-3 and C-1 Districts at premises bounded by Glover Archbold Parkway to the west, the National Park Service property along the Chesapeake & Ohio Canal and Canal Road to the south, 35th Street, N Street to 36th Street, and 36th Street to P Street to the east, and Reservoir Road to the north. (Square 1222, Lots 62, 801-810; Square 1223, Lots 85-86, 807-810, 812, 815, 826, 827, 831, 834, 846-47, 852-53, 855, and 857-58; Square 1226, Lots 91, 94-101, 104-105, 803-804, 806, and 811-815; Square 1248, Lots 122-125, 150-157, 800-802, 804-806, 829-31, and 834-835; Square 1321, Lots 815-817.)

Hearing Dates:	June 13, and July 18, 2000
Decision Date:	September 5, November 8, and December 5, 2000
Order Date:	March 29, 2001
Reconsideration Decision Dates:	June 5 and July 31, 2001
Order on Reconsideration:	August 6, 2001

ORDER GRANTING STAY

The Board of Zoning Adjustment issued a final Decision and Order in this case on March 29, 2001 ("Order"). On April 11, 2001, Cloisters in Georgetown Homeowner's Association ("CAG"), a party to the proceeding, filed a timely motion for reconsideration. On May 10, 2001, the University filed a response to the motion for reconsideration, and asked that the Board clarify that the Order did not require the University to take action that would be inconsistent with its obligations to maintain the confidentiality of student records under federal law.

On August 6, 2001, the Board of Zoning Adjustment granted the motion for reconsideration, but did not address the matters raised by the University regarding its confidentiality obligations under federal law.

On August 16, 2001, the University filed a "Motion for Stay" of enforcement of certain provisions of Conditions 7, 10, and 14 of the Order pending the University's judicial appeal of the Order.

Upon consideration of the University's "Motion for Stay," and the oppositions thereto, the Board has determined that a stay pending judicial resolution of the University's appeal of the Order is warranted. The University has demonstrated that it will suffer irreparable harm in the absence of a stay, that the parties opposing the stay will not be harmed by a stay of the provisions of Conditions 7, 10, and 14, and that the public interest is served by the issuance of a stay.

Furthermore, the University has established serious and substantial issues going to the merits of its legal challenge to the Order.

Based on the above, it is hereby ORDERED that the following aspects of Conditions 7, 10, and 14 of the Order in Application No. 16566A are STAYED pending judicial resolution of the University's appeal of the Order:

(1) With respect to Condition 7, the University shall not be required to disclose to third parties, including District of Columbia agencies, education records of students, including but not limited to records relating to alleged or possible violations of sanitation or housing regulations involving or affecting students living in an off-campus residence;

(2) With respect to Condition 10, the University shall not be required to alter its existing practices with respect to parent notification of student Code of Conduct violations; and

(3) With respect to Condition 14, the University shall not be required to disclose to third parties, including District of Columbia agencies, education records of students, including but not limited to records of license plate numbers of vehicles kept by University students, names of students keeping vehicles, and student vehicle registration information.

VOTE: By Order of the D.C. Board of Zoning Adjustment

ATTESTED BY:

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Secretary to the Board

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached document were sent by hand delivery this 16th day of August 2001, to the following parties:

Advisory Neighborhood Commission (ANC) 2E
c/o Jellef Boys Club
3265 S Street, N.W.
Washington, D.C. 20007

Hillandale Homeowners Association
Scott Anderson, General Manager
3939 Hillandale Court, N.W.
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Georgetown Residents Alliance
Don W. Crockett, Esq., Chairman
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