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August 23, 2001

Ms. Sheila Cross Reid, Chair
Board of Zoning Adjustment
441 Fourth Street, N.W.
Washington, D. C. 20001

Madam Chair:

On behalf of the Citizens Association of Georgetown, Cloisters in Georgetown Homeowners Association, Foxhall Community Citizens Association, Georgetown Residents Alliance, as well as individual ANC Commissioners Scott Polk and Peter Pulsifer, I herewith submit our statement in opposition to the motion of Georgetown University to stay the Board's final order in the campus plan, Case 16566. The leadership of the Burleith Citizens Association was unable to meet due to the late summer schedule; if you would accept later expression of their position on this issue, we would be most appreciative.

The motion to stay is untimely and fails to show good cause or meet other regulatory requirements for waiving the time limits for filing such a motion. The argument that parts of the Board's order violate federal statute is unsubstantiated and inaccurate. Moreover, the motion fails to meet its burden of proving that the applicant has satisfied the requirements for an injunction:

(a) It has not provided (nor shown that the record already contains) substantial evidence to prove that the Applicant would be irreparably injured if the stay is denied.

(b) Opposing parties will indeed be harmed if the stay is granted; the Board's very findings that university neighbors were being harmed by uncontrolled student behavior is unrebutted, and permitting continued harm cannot be justified.

(c) The public interest favors enforcement of local zoning, housing, sanitation, and motor vehicle requirements, and no showing has been made that the Applicant cannot comply both with federal law and local law.

(d) Applicant is not likely to succeed on the merits; it has not substantiated its claim of a conflict with federal law, and its motion is not supported by any evidence of the facts it asks the Board to assume.

For all these reasons, we ask that the Board deny the motion.

Sincerely,

Barbara Zartman

BZA
Case No. 16566
Exhibit No. 252

Board of Zoning Adjustment
District of Columbia
CASE NO.16566
EXHIBIT NO.269A2

OPPOSITION TO MOTION FOR STAY

I. APPLICANT'S MOTION TO STAY THE EFFECTIVENESS OF CONDITIONS 7, 10, AND 14 OF THE BOARD'S ORDER MUST BE DENIED, BECAUSE IT HAS BEEN FILED SEVERAL MONTHS LATER THAN REQUIRED, AND THE APPLICANT HAS FAILED, INDEED IT HAS NOT EVEN ATTEMPTED, TO SHOW "GOOD CAUSE," OR MEET THE OTHER REGULATORY REQUIREMENTS, UNDER 11 DCMR § 3101.6, FOR WAIVING THE TIME LIMITS FOR FILING SUCH A MOTION.

Applicant's "Motion for Stay" ("stay motion"), which was filed and served by hand on August 16, 2001, states that it is filed under "11 DCMR § 3126.2." Section 3126.2 is a part of the Board's rules that allows parties to file motions for rehearing or reconsideration "within ten (10) days from the date of issuance of a final written order by the Board." An additional three days, or thirteen days in all, are allowed for such motions where, as in this proceeding, the Board's orders are mailed to the parties, 11 DCMR § 3110.3.

Additional time could have been sought under a rule which gives the Board discretion to waive requirements of its procedural rules, with exceptions not pertinent here, (1) for "good cause shown," (2) if such a waiver "will not prejudice the rights of any other party" and (3) if the waiver "is not otherwise prohibited by law." 11 DCMR § 3101.6. Although this procedure for seeking additional time is explained by the August 6 reconsideration order, Applicant's stay motion does not seek such a waiver and does not attempt to show fulfillment of any of these three regulatory prerequisites for such a waiver (good cause, etc.).

The final order in this case - the one which contained Conditions 7, 10, and 14 which the motion asks the Board to stay - was issued and mailed on March 29, 2001, more than four months before the August 16 stay motion. The Board's August 6 reconsideration order did not change Conditions 7 and 10, and made only a clarifying change in Condition 14. The minimal extent to which the clarification changed the three conditions of the original order may be seen from the text of all three conditions set forth below, where the five clarifying words added to Condition 14's second sentence by the reconsideration order are printed in italics:

> 7. When the Applicant, 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 Applicant 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 Applicant 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.
>
> * * *
>
> 10. 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.
>
> * * *
>
> 14. The Applicant, through its Office of the Registrar, shall maintain an accurate record of the license plate numbers of motor vehicles kept by all University students. The Applicant shall direct the students to register their vehicles in the District of Columbia,

> or obtain a reciprocity sticker *if eligible to do so,* and shall consult with the D. C. Department of Motor Vehicles to determine whether such registration is completed or such stickers are obtained. The Applicant shall withhold parking privileges to students who do not comply with D. C. registration or reciprocity requirements. Failure to register student vehicles in the District or to obtain reciprocity stickers shall constitute a violation of the Code of Student Conduct.

Although the August 16 stay motion was filed well within 13 days of the Board's reconsideration order of August 6 whose reconsideration it purportedly seeks, the time in which to move for reconsideration of the March 29, 2001 order, without a waiver of the 13-day limit, expired more than four months earlier, on April 12, 2001. The stay motion, in asserting (on page 1) that it seeks reconsideration only of the August 6 reconsideration order, impliedly argues that it is timely, without a waiver, because it has been filed within 13 days of that reconsideration order.

This implied argument must be rejected because it is based on the false premise that the motion seeks only reconsideration of the Board's August 6 reconsideration order. The Board, however, substantially established the three conditions which Applicant's motion seeks to stay in the Board's initial March 29 order, not in its August 6 reconsideration order. The Board's August 6 reconsideration order only clarified the use of a term in Condition 14, and did not change Conditions 7 and 10. Applicant's stay motion, moreover, does not object to the five-word clarification of Condition 14 which the August 6 reconsideration order makes, nor does it seek a stay of that clarification alone. Rather, the stay motion seeks to set aside all three conditions in their entirety. The stay motion's self-serving self-characterization, as one seeking reconsideration only of the August 6 reconsideration order, is thus belied by that motion's own request for relief, which in substance seeks reconsideration and stay of the initial March 29 order.

Applicant first received notice of Conditions 7, 10, and 14 through the initial March 29 order. Every objection which the stay motion advances against those three conditions, as left unchanged or clarified on August 6, could have been raised against those conditions as the Board first laid them down in its March 29 order. The stay motion, in its essence, seeks reconsideration, not of anything that first became known to the Applicant through the August 6 reconsideration order, but of the three conditions in the March 29 order which the August 6 reconsideration order either leaves completely unchanged (Conditions 7 and 10) or only minimally clarifies (Condition 14).

Following essentially the same procedural rules as are now in effect, the Board has already rejected, both in the interest of promoting the finality of its decisions, and in the interest of protecting the Board's limited resources, the repetitious filing of "unlimited successive" motions for reconsideration of reconsideration orders, at least where such motions, in their essence, seek reconsideration of the Board's original order, absent a persuasive showing by the movant that the time limit for such reconsideration motions should be waived by the Board.

In BZA Application No. 16071, by the Washington International School, opponents of a use variance application that had been granted by the Board on March 26, 1997, filed, on August 28, 1997, a joint motion for reconsideration, purportedly seeking reconsideration of the Board's reconsideration order of August 15, 1997, which had upheld the Board's initial decision of March 26, 1997, to grant the variance. The Board's second reconsideration order denied the second reconsideration sought in that case, reasoning in part as follows:

> "[I]t was apparent that the movants [for reconsideration] wished to have the Board reconsider its *initial* decision to grant the application. * * * The Board noted that the

> movants' submission constituted a motion for reconsideration [of a reconsideration order] in caption only, for the body of the document did not address the standard set forth in [11 DCMR] Section 3332.4 [now, with a minor editorial change, 11 DCMR § 3126.4] [stating, 'A motion for reconsideration shall state specifically the respects in which the final decision is claimed to be erroneous, the grounds of the motion and the relief sought.'] * * * The Joint Motion submitted by the movants was, in substance, a request for a rehearing of the application. * * *" BZA Application No. 16,071, by the Washington International School, Second Reconsideration Order, entered March 20, 1998, pp. 3-4 (emphasis of the term initial in the original).

Here, for the reasons given above, the essence of the August 16 stay motion is to seek reconsideration, and a stay, not of the August 6 reconsideration order, but of the initial March 29 order.

The Board further stated, in the Washington International School case:

> "[T]his is the first time in the memory of both the Board and the staff that there has been a second Motion for Reconsideration filed in a case, requesting reconsideration of a denial of reconsideration and requesting a second reconsideration of an order. * * * The Board * * * does not interpret * * * [its procedural] rules to provide for the filing of an unlimited successive Motions for Reconsideration, nor do the rules reasonably contemplate 'reconsiderations of reconsiderations.' Such a practice would unduly impose upon the resources of the Board, and would unfairly prejudice the prevailing party to an application, whether it is the applicant or the opposition. This practice would also create confusion and uncertainly as to whether the Board's decision is every really 'final' in a case. * * * There is a need for certainty and finality of Board decisions. The Board takes this opportunity to admonish future parties that the Board's interpretation of its own rules allows for the filing of only one Motion for Reconsideration." Id. at page 4.

Nor is the Applicant aided by its prior untimely attempt to articulate similar concerns about several conditions of the Board's March 29 order, including Conditions 7, 10, and 14, in the portions of its "Response" of May 10, 2001, which sought reconsideration of the original March 29 order. Applicant's expression of such concerns, in May 2001, shows that the original March 29 order was more than sufficient to provide Applicant with notice of those features of the Board's final order to which the Applicant again belatedly objects. Applicant's May 10 filing thus undermines its August 16 stay motion's claim that it seeks reconsideration of the August 6 reconsideration order. Clearly, there was more than enough in the March 29 order to enable Applicant to raise the type of concerns which Applicant again belatedly seeks to raise, after the time allowed to do so has expired, and again without attempting to comply with the requirements in the Board's rules, which the August 6 reconsideration order explicitly cited and explained, for asking for a waiver of the time limit for "good cause shown."

II. THE STAY MOTION'S MAIN ARGUMENT - THAT CONDITIONS 7, 10, AND 14 OF THE BOARD'S MARCH 29 ORDER VIOLATE THE FEDERAL FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT OF 1974 ("FERPA") - IS UNSUBSTANTIATED AND FALSE.

A. The Motion Fails to Substantiate, With Persuasive Evidence, its Main Argument That Conditions 7, 10, and 14 of the March 29 Order, as Amended, Violate the Federal Family Educational Rights and Privacy Act of 1974 ("FERPA").

Whether federal FERPA requirements might prevent GU from complying with any conditions of

the Board's order is, at least for the D. C. Board of Zoning Adjustment, a factual question on which the Board needs expert testimony which the motion and the record fail to provide. It is burdensome and irrational to ask the Board to construe a federal law such as FERPA, when expert testimony on FERPA compliance issues could have been offered. The stay motion, however, totally lacks any evidentiary support of any kind. It neither attached supporting affidavits, nor contains any references to evidence already admitted into the exclusive record of this proceeding. The stay motion instead contains only two zoning attorneys' speculative arguments that the Board's order conflicts with federal FERPA requirements.

The zoning attorney arguments, which the stay motion does provide, are not credible evidence of either the existence or the likelihood of any such conflict as the motion alleges. Those attorneys are known to the Board to practice, and be knowledgeable in, D. C. zoning law and procedures at most. They are not known to the Board, and they have not been shown to be, expert witnesses in the area of FERPA compliance, the main legal issues on which the stay motion's arguments are advanced. They have not been sworn to tell the truth, as expert witnesses normally would be in an affidavit or at a Board hearing. Nor have they been examined by the Board, or subjected to cross-examination by the parties, as they could be at a hearing, so as to test their credibility concerning the asserted conflict between FERPA and Conditions 7, 10, and 14 of the Board's order.

Thus, the stay motion does not contend, nor could it, that any evidence received by the Board in the exclusive record of this proceeding supports the motion's surprising claim that the University cannot comply with Conditions 7, 10, and 14 and with FERPA.

Although the stay motion purports to have been filed under the Board rule allowing motions for reconsideration or rehearing (11 DCMR §§ 3126), the motion clearly does not ask for a rehearing, either for the purpose of providing any evidence supporting the motion's unsubstantiated claim that the University cannot comply with both the Board's final order and with FERPA, or for any other purpose. Applicant's motion also does not allege or attempt to show that there exists any "new evidence which could not reasonably be presented at the original hearing" supporting its motion's factual claim that the University cannot comply with Conditions 7, 10, and 14 of the Board's order without violating FERPA. 11 DCMR § 3126.6.

Under the Board's rules, the Applicant generally has the burden of proof, 11 DCMR § 3119.2. No reason is suggested by the stay motion why the Applicant, which is also the moving party, should not have the burden of proving the unsubstantiated facts on which its stay motion purports to be based. The stay motion totally fails to substantiate any such conflict. This lack of any evidence to support the motion's claimed conflict between FERPA and the Board's order is particularly noteworthy in view of the fact that FERPA compliance is an area in which the Applicant itself should have considerable knowledge and experience if, as the stay motion implies (but does not specifically allege), it is important to Applicant that it comply with FERPA.

The total lack of any supporting evidence is also noteworthy in view of the further fact that the Applicant, without asking for leave to do so, has taken several months, without leave, in which to file its motion, rather than the 13 days which the Board's rules allow, 11 DCMR §§ 3110.3 & 3126.2. The Applicant cannot claim, and does not, that it did not have enough time in which to obtain supporting affidavits from its own administrators, from the federal administrators with whom it would presumably work on FERPA compliance issues, or from independent expert FERPA compliance consultants, to provide sworn expert testimony supporting the alleged conflict between FERPA and the Board's order. Since the motion neither offers any relevant evidence, nor even asks for an opportunity to provide any, the motion totally fails to meet the Applicant's burden of proving that the alleged conflict between FERPA and the Board's three

conditions is likely, let alone unavoidable.

B. The Stay Motion's Speculation, that FERPA Conflicts with Conditions 7, 10, and 14 of the Board's Order, Is Contradicted by the Relevant Provisions of FERPA Itself.

Applicant's motion, moreover, mischaracterizes FERPA's requirements, in ways that cast considerable doubt on whether, in fact, any conflict, such as the stay motion alleges, would ever develop between FERPA and the Conditions 7, 10, and 14 of the Board's order.

The motion states, "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). * * * Under FERPA, 'educational records' are broadly defined as 'those records, files, documents, and other materials which - (1) 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)." Stay Motion, pages 2, 3. Concerning statutory exceptions, the stay motion only mentions, and explains the inapplicability of, the statutory exceptions to the alleged prohibition. Stay Motion, pages 8, 9.

These assertions incorrectly represent what FERPA actually says in several ways.

Among other things, FERPA contains exceptions to its definition of the term "educational records" which the motion fails to mention or discuss, one of which would appear to prevent any such conflict as the stay motion now alleges.

Contrary to the stay motion, which says in part, "Under FERPA, 'educational 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)," FERPA's definition of the term 'educational records' in § 1232g(a)(4) actually states as follows:

"For the purposes of this section, the term 'education records' means, except as may be provided otherwise in subparagraph (B), 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) (A) (emphasis added).

This direct quote of the statutory language contradicts the stay motion, according to which the term "educational records" is "broadly defined," and apparently lacks any exceptions worthy of mention.

Among the several statutory exceptions in § 1232g(a)(4)(B) which are not mentioned by the stay motion, one states as follows:

"The term 'education records' does not include - * * * (ii) records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement * * * ." 20 U.S.C. § 1232g(a)(4) (B).

This exception indicates that compliance with both FERPA and the Board's order could be as simple as authorizing or designating one or more units within the University's organization as "law enforcement units" for the purpose of complying with the three conditions in the Board's order to which the motion objects. Since the Board's orders are issued under D. C. zoning enabling legislation, and generally have the force and effect of law, compliance with the Board's

orders does serve a law enforcement purpose. Federal regulations implementing FERPA indicate that the term "law enforcement unit" has a broad meaning in this context of FERPA:

"Law enforcement unit means any individual, office, department, division, or other component of an educational agency or institution, * * * that is officially authorized or designated by that agency or institution to - (i) Enforce any local, State, or Federal law, or refer to appropriate authorities a matter for enforcement of any local, State, or Federal law against any individual or organization other than the agency or institution
itself * * *." 34 C.F.R. §99.8(a)(1)(i).

The three zoning conditions to which the motion objects, moreover, are primarily ones which also seek to promote compliance with D. C. legal requirements relating to housing, sanitation, and motor vehicle registration. Applicant's motion fails to allege or show that the Applicant made an effort to invoke the exception in 20 U.S.C. § 1232g(a)(4) (B) to achieve compliance with both FERPA and the Board's order, or why such an effort might be unsuccessful.

The stay motion's failure to offer any evidence of any prospective compliance effort is telling. Although FERPA can be enforced by withholding of federal funds, FERPA is clear that such withholding cannot be implemented summarily, and that the federal government can withhold funds only as a last resort:

> "The Secretary shall take appropriate actions to enforce this section and to deal with violations of this section, in accordance with this chapter, except that action to terminate assistance may be taken only if the Secretary finds there has been a failure to comply with this section, and he has determined that compliance cannot be secured by voluntary means." 20 U.S.C. §1232g(f).

FERPA's implementing regulations indicate that the Applicant would not have to create any new organizational units inside its own organization in order to gain the benefits of the exception for records of a "law enforcement unit" - all that a recipient has to do is "authorize" or "designate" a preexisting unit to perform such law enforcement functions:

> "A component of an educational agency or institution does not lose its status as a law enforcement unit if it also performs other, non-law enforcement functions for the agency or institution, including investigation of incidents or conduct that constitutes or leads to a disciplinary action or proceedings against the student." 34 C.F.R. §99.8(a)(2).

Thus, the Applicant could use its existing organizational structure to comply with the conditions in the Board's order.

The stay motion's failure either to acknowledge the existence of a relevant statutory exception, or to allege any facts that would show that Applicant had made a good faith effort to investigate how it might successfully comply with both the Order and FERPA, underscores how little weight must be given to Applicant's unsworn and unsubstantiated allegations, through its zoning attorneys, that there is a conflict between FERPA and the Board's order which would operate to Applicant's detriment. Not only is there no argument or evidence to show that such a conflict would be unavoidable; the motion's unsubstantiated and argumentative speculation about such a conflict is based on misrepresentations and omissions concerning what FERPA and its implementing regulations actually provide.

The motion's failure to mention the highly pertinent "law enforcement" exception to FERPA's definition of an "educational record" that is protected from release or disclosure is not the only inaccurate representation made by stay motion about FERPA. FERPA also does not, as the

motion claims, prohibit 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." FERPA instead says, in this respect, "No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization, other than to the following - * * * ." 20 U.S.C. § 1232g(b)(1). There are several potentially significant differences between what FERPA says, and what the stay motion says.

First, FERPA does not "prohibit" universities from doing anything; FERPA's requirements instead come into play only if a university or other university voluntarily elects to accept federal funds that are offered by the federal government to that university in a federal program that is subject to FERPA' s conditions. Thus, there is no unavoidable "conflict" between FERPA and the Board's order such as the stay motion implies - a conflict between state and federal requirements in which the federal requirements must prevail because of Federal supremacy under the U. S. Constitution or "preemption" by federal law of state or local law.

Although the stay motion implies such a "preemption" by asserting both the existence of a federal-state "conflict," by asserting that the Applicant will go to Court concerning it, and by asserting that the stay would be in the public interest because it would promote compliance with Federal law, the motion carefully avoids citing either the Supremacy Clause of the Federal Constitution, or any other legal basis, by which any of FERPA's optional federal requirements concerning the use of certain federal funds might override the mandatory requirements of the Board's order.

Another way that the Applicant could comply with Conditions 7, 10, and 14 of the Board's order, without raising FERPA compliance questions, would be simply not to apply for, or accept, federal funding subject to FERPA conditions. This is not intended to suggest that the Applicant should, or would need to, forego any such federal funding. But it does show that FERPA, since it only contains conditions for granting certain federal funds whose acceptance is not mandatory, cannot provide a legal basis for invalidating the local zoning requirements to which Applicant objects.

Secondly, the Applicant's stay motion offers no evidence concerning whether the Applicant actually accepts federal funds that are subject to FERPA's requirements. Nor does the stay motion provide sufficient information about the sources of Applicant's federal funding, if any, for anyone to attempt to verify whether, or to what extent, the University might accept federal funds subject to FERPA conditions. FERPA's scope is limited, in part, to "funds * * * made available under any applicable program," language that suggests that federal funds may also be offered to universities in programs that are not subject to FERPA. Regulations issued to implement FERPA are to the same effect:

> "Except as otherwise noted in [34 C.F.R.] Sec. 99.10, this part applies to an educational agency or institution to which funds have been made available under any program administered by the Secretary, if - (1) The educational institution provides educational services or instruction, or both, to students; or (2) The educational agency provides administrative control of or direction of, or performs service functions for, public elementary or secondary schools or postsecondary institutions." 34 C.F.R. § 99.1(a), captioned, "To which educational agencies or institutions do these regulations apply?".

Thus, even if the University does accept federal funds, it is necessary to know under what

federal laws and programs it might do so, to determine whether and to what extent FERPA's provisions govern the Applicant's acceptance of such funds. The stay motion does not offer such information, even though it is relevant to whether and how much the Applicant might be affected, if at all, by FERPA's provisions.

Thirdly, FERPA prohibits providing federal funds to "any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein * * *)." What the University might do to provide information to D. C. authorities in order to comply with a local D. C. zoning order, or other local legal requirements, especially requirements which it did not seek and to which it objected, does not mean that the University itself "has a policy or practice" of providing or releasing such information within the meaning of FERPA. This is not to suggest that the Board can or should interpret FERPA itself and decide whether its order as modified does not give the University a FERPA compliance problem which it might have no reasonable way of resolving. However, it does serve to show that the alleged conflict has not been proven by competent record evidence, and that the Applicant has not substantiated its surprising claim that FERPA conflicts with Conditions 7, 10, and 14 of the Board's order.

C. The Stay Motion's Speculation, That There is a Conflict, Between FERPA and Condition 10 of the Board's Order, Is Also Contradicted by Condition 10.

The stay motion's claim of a conflict between FERPA and Condition 10 is also contradicted by the express terms of Condition 10. That condition states: "10. 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.*" (Emphasis added.) Thus, if FERPA did actually prohibit the reports to which Applicant objects, Condition 10 by its own terms would not require such reports to be made, because Condition 10 requires the reports to be made only "to the extent permitted by law." Condition 10 by its own terms is self-coordinating with any requirements that FERPA or any other law would impose. Applicant's request for a stay, even of Condition 10, implies that Applicant has some other reason, than the FERPA compliance problem it alleges, for seeking a stay and judicial relief from the requirements of Condition 10.

III. The Stay Motion Fails to Meet its Burden of Proving That the Applicant Has Satisfied the Requirements for an Injunction.

It follows that the stay motion has not met any of the four requirements it acknowledges it has to meet in order for the Board to have discretion to consider granting a stay of any part of its Order.

First, the stay motion has not provided, or shown that the record already contains, substantial evidence meeting the Applicant's burden of proving that Applicant would be irreparably injured if the stay is denied. No evidence is in the record to show even that there is an unavoidable conflict between FERPA and the Board's order. Nor is there anything in the record that even alleges how much federal money might be affected by the alleged but unproven conflict, or that alleges any significance to the unspecified federal funding that might be lost, or that alleges that such funding could not be privately replaced if the federal government withheld it.

Secondly, opposing parties will indeed be harmed if the stay is granted. The conditions which the motion seeks to stay are intended to help make the Applicant into a better neighbor, and protect the Applicant's neighbors from continuing injuries inflicted by Applicant's students, the evidence of which is well documented in the record. Those conditions are also manifestly intended to improve local law enforcement in other areas such as housing, sanitation, and motor vehicle requirements. All those persons protected by these local requirements would be injured

by deferring, even temporarily,
the effective date of the Order's conditions whose effective date the Applicant asks the Board to stay.

Thirdly, the public interest does not favor a stay. The public interest favors the protection of the Applicant's neighbors from injuries inflicted by its students, and in the enforcement of local zoning, housing, sanitation, and motor vehicle requirements. The stay motion merely argues, "Indeed, compliance with federal law is by definition in the public interest." Stay Motion, page 11. As already shown above, the stay motion fails to provides evidence that staying the Board's order is in any way necessary to advance compliance with federal law. On the contrary, Applicant has failed to meet its burden of proving that it cannot comply both with federal law and local law.

Moreover, the implication of Applicant's argument, that compliance with federal law is "by definition in the public interest," even when compliance with local law would be thereby undermined, is false. We live under a constitutional government in which the federal government has limited and delegated powers, and the states and local governments retain many areas of authority and responsibility, where the federal government either does not, or cannot, protect the public interest. Nothing in the stay motion suggests that there is anything that the federal government can or will do to protect the Applicant's neighbors form the Applicant if the Board stays any part of its order designed to provide such protection. In the absence of an irreconcilable conflict between local law and a federal law or requirement which the federal government is authorized to adopt – a conflict which the stay motion implies, but has totally failed to allege or prove – Applicant's job, as a good citizen, is to comply wholeheartedly with both the local as well as the local legal requirements that apply to it.

Fourthly, Applicant is not likely to succeed on the merits. It has not substantiated its claim of a conflict with federal law, and its motion is not supported by any evidence of the facts it asks the Board to assume.

CONCLUSION

Applicant's motion should be denied because it is untimely and unsubstantiated. A draft order denying the motion is set forth below for the Board's consideration and convenience.

DRAFT ORDER DENYING STAY AND ORDER TO SHOW CAUSE

The Board issued a final Decision and Order on this application on March 29, 2001 ("Order"). On April 11, 2001, Cloisters in Georgetown Homeowner's Association ("Cloisters"), a party to the proceeding, filed a letter seeking clarification of the Order, which the Board on April 20, 2001, elected to serve on the parties and process as a timely motion for rehearing or reconsideration. No other party filed a timely motion for reconsideration or hearing on or before the April 11 deadline set by the Board's rules. On May 10, 2001, Applicant filed a purported "Response" to the Cloisters letter. Part of that purported "Response" sought reconsideration of several conditions in the Order on which the Order had conditionally approved Applicant's campus plan, without seeking the Board's leave, as required, to file such an untimely motion for reconsideration. Applicant's May 10 reconsideration arguments, in sum, suggested that the Board should "clarify" that the Order did not require the University to take action that would be inconsistent with its alleged obligations to maintain the confidentiality of student records under federal law. No evidence was offered by the purported "Response" of any such conflict.

On August 6, 2001, the Board issued a reconsideration order substantially granting the Cloisters' reconsideration motion, and also clarifying, on its own motion, other conditions of its initial March 29 order. The Board's reconsideration order, however, declined to address the requests for reconsideration in the Applicant's untimely purported "Response," on the grounds that Applicant had failed either to show "good cause" for doing so, or that such a pleading would not be prejudicial to other parties, considering that the Board's rules do not allow other parties to reply to such a "Response."

On August 16, 2001, Applicant filed a "Motion for Stay" under the Board's reconsideration or rehearing motion rule, asking that the Board stay enforcement of Conditions 7, 10, and 14 of the Order pending judicial review of the Order.

Upon consideration of the motion, and the opposition thereto, the Board has determined that Applicant has not met its burden of proving that such a stay would be warranted. The motion, moreover, is untimely under the Board's rules, and the Applicant has not even attempted to show "good cause" for allowing such a late filing. The Applicant's motion neither offers, nor shows that the exclusive record contains, evidentiary support for the facts it alleges or implies, and the motion also appears to contain mischaracterizations concerning what federal law actually says. There is insufficient record evidence to support Applicant's assertions that it would be irreparably injured if the stay is denied, that opposing parties will not be harmed if the stay is denied, that the public interest favors a stay, and that the Applicant is likely to succeed on the merits.

IT IS THEREFORE ORDERED AS FOLLOWS:

That Applicant's motion for stay is hereby DENIED as untimely and without merit.

CERTIFICATE OF SERVICE

This is to certify that on August 23, 2001, I placed in ordinary first-class mail of the U. S. Postal Service a copy of this submission to the following parties:

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Barbara Zartman

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true copy of the foregoing Opposition to Petitioner's Motion for Stay to be mailed, first-class, postage-prepaid, on this 11th day of June, 2002, to:

Deborah B. Baum
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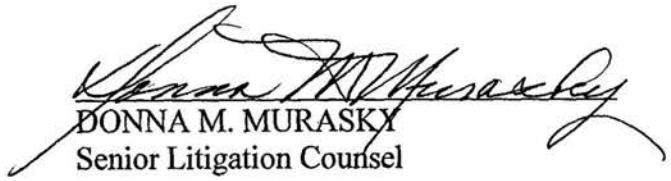
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