

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

CHICAGO TRIBUNE COMPANY,)	
)	
Plaintiff,)	Case No. 10 C 568
v.)	
)	Judge Joan B. Gottschall
UNIVERSITY OF ILLINOIS)	Magistrate Judge Michael T. Mason
BOARD OF TRUSTEES,)	
Defendant.)	

DEFENDANT'S MOTION TO STAY JUDGMENT PENDING APPEAL

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Pursuant to Fed. R. Civ. P. 62 and Fed. R. App. P. 8(a)(1), Defendant, the Board of Trustees of the University of Illinois (the “University”), by its undersigned counsel, hereby respectfully moves this Court to stay its Judgment in a Civil Action dated March 7, 2011 (the “Judgment”), which the Court entered in the above-captioned case on March 9, 2011, or any amended or corrected version of the Judgment that the Court may subsequently enter herein,¹ until the conclusion of the University’s appeal. In support of its motion, the University states:

INTRODUCTION

1. This Court’s Order and Judgment (Dkt. Nos. 31-32) declare that educational records within the scope of the Family Educational Rights and Privacy Act of 1974 (“FERPA”), 20 U.S.C. § 1232g, are not exempt from disclosure under Section 7(1)(a) of the Illinois Freedom of Information Act (“FOIA”), 5 ILCS 140/1 *et seq.*, which provides an exemption for “[i]nformation specifically prohibited from disclosure by federal or State law or rules[.]” 5 ILCS 140/7(1)(a). The Court concluded that FERPA does not “specifically prohibit[.]” the University “from doing anything,” because the University “could choose to reject federal education money, and the conditions of FERPA along with it[.]” (Dkt. No. 31, pp. 4-5).

2. Respectfully, even though the Court describes its decision in this case as “narrow” (Dkt. No. 31, p. 6), the Court’s ruling places the University in a very difficult position. The University receives hundreds of FOIA requests every year, many of which call for the disclosure of records and information covered by FERPA. In some instances, particularly since the amendment of FOIA to remove the *per se* privacy exemption, FERPA provides the only basis for the University to withhold FERPA-exempt records and information from public disclosure. Thus, the effect of this Court’s Judgment is to place the University in a situation where, in order

¹ The University has filed a Motion to Amend or Correct Judgment (Dkt. No. 33), and this Motion to Stay is intended to cover both the original Judgment and any amended or corrected version of the Judgment that this Court may subsequently enter.

to comply with FOIA, it may well be forced to reject education funding or violate FERPA. Such disclosures violate the University's privacy policies and breach its trust with students who have been promised that the University will protect their private records in compliance with FERPA. Moreover, the "federal education money" at risk consists of more than \$400 million in student loans and more than \$140 million in direct financial assistance and grants, much of which is relied upon by the University's more than 77,000 students to pay their tuition and fees.

3. In light of these concerns, after careful consideration of this Court's ruling and the substantial risk of injury that the University now faces, the University has decided that it must appeal this Court's Judgment. While that appeal is pending and the Seventh Circuit reviews the questions of first impression raised by this Court's decision, the University respectfully requests that this Court grant a stay of its Judgment pending appeal. A stay pending appeal is appropriate and necessary. This Court's reasoning that FERPA does not "specifically prohibit" the disclosure of student educational records is a subject on which reasonable jurists can and do differ, as evidenced by a number of decisions reaching the opposite conclusion, most notably the Sixth Circuit's holding in *United States v. Miami University*, 294 F.3d 797, 809 (6th Cir. 2002). That split of authority establishes that the University has a likelihood of success on appeal. At the same time, the harm to the University from the violation of student privacy rights during the pendency of this appeal and the potential loss of federal funding is serious and irreparable, whereas little if any harm to Plaintiff Chicago Tribune Company (the "Tribune") would occur if a stay is granted. The public interest also supports a stay, as the public has an interest in protecting students' reasonable expectations of privacy and in ensuring that the tens of thousands of students at the University who rely on federal loans and financial assistance to pay their tuition get to attend college. For these reasons, the Court should grant a stay pending appeal.

FACTUAL BACKGROUND

I. The FOIA/FERPA Litigation and This Court's March 9, 2011 Order and Judgment

4. The Tribune owns and operates the *Chicago Tribune*, a daily newspaper of general circulation in the Chicago metropolitan area. (Exh. 1: Compl. ¶ 1; Exh. 2: Answer ¶ 1).

5. The University is a state authority that exercises final authority over and is the governing body of the University of Illinois. (Exh. 1: Compl. ¶ 2; Exh. 2: Answer ¶ 2).

6. The Tribune has published a series of articles in the *Chicago Tribune* relating to the University's admissions process, stating that the University maintained a list, known as "Category I," of certain applicants to the University of Illinois who were closely tied to clout-heavy patrons. (Exh. 1: Compl. ¶¶ 5-6; Exh. 2: Answer ¶¶ 5-6).

7. In a letter dated December 10, 2009 (the "Request"), the Tribune submitted a request under the Illinois Freedom of Information Act ("FOIA") to the University, seeking:

the following public records with regard to each applicant in Category I (and/or the equivalent designation in the professional schools) who was admitted to the University of Illinois and subsequently attended the University of Illinois: the names of the applicants' parents and the parents' addresses, and the identity of the individuals who made a request or otherwise became involved in the such applicants' applications. Further, please provide any records about the identity of the University official to whom the request was made, any other university officials to whom the request was forwarded, and any documents which reflect any changes in the status of the application as a result of that request.

(Exh. 1: Compl., ¶¶ 7-8, Exh. A; Exh. 2: Answer ¶¶ 7-8).

8. In a letter dated December 21, 2009, the University denied the Tribune's request, on the grounds that the requested information is protected by FERPA, and therefore exempt from disclosure under Section 7(1)(a) of FOIA. (Exh. 1: Compl., ¶ 9, Exh. B; Exh. 2: Answer ¶ 9).

9. In a letter dated December 24, 2009, the Tribune appealed the University's denial of its request, and the University denied the Tribune's appeal on December 30, 2009. (Exh. 1: Compl., ¶¶ 10-11, Exh. C-D; Exh. 2: Answer ¶¶ 10-11).

10. The Tribune commenced this action on January 27, 2010 with the filing of its Complaint seeking a declaration that FERPA does not apply to the Request so as to exempt the Request from disclosure under FOIA. (Dkt. No. 1).

11. The University answered the Complaint on March 5, 2010, and the Tribune and the University filed cross-motions for summary judgment. (Dkt. Nos. 12, 14-17, 20, 23-24, 27).

12. On March 9, 2011, the Court entered its Order and Judgment granting the Tribune's motion for summary judgment, and denying the University's cross-motion for summary judgment. (Dkt. Nos. 31-32).

13. In its Order, the Court found that FERPA does not "specifically prohibit[]" the University "from doing anything," because the University "could choose to reject federal education money, and the conditions of FERPA along with it[.]" (Dkt. No. 31, pp. 4-5).

II. While the Appeal of this Court's Judgment Is Pending, The University Will Continue to Be Required to Respond to Numerous FOIA Requests Seeking Educational Records and Personally Identifiable Information Covered by FERPA

14. The University received 505 FOIA requests in 2009, 605 requests in 2010, and 153 requests through March 18, 2011. (Exh. 3: T. Hardy Aff., ¶¶ 6-8). These requests frequently call for records or information that is covered by FERPA. (*Id.*, ¶ 10).

15. The University responds to FOIA requests that call for records or information covered by FERPA by (a) producing in unredacted form all responsive records that are not covered by FERPA, (b) producing in redacted form all responsive records that are covered by FERPA, but which can be produced in redacted form consistent with FERPA, (c) withholding all responsive records that are covered by FERPA, and which cannot be produced in redacted form consistent with FERPA, and (d) informing the requesting party of the University's response, including whether the University has redacted or withheld records. (*Id.*, ¶ 11).

16. In some instances, particularly since the amendment of FOIA to remove the *per se*

privacy exemption, FERPA has provided the University's sole basis to redact or withhold FERPA-exempt information in response to a FOIA request. (*Id.*, ¶ 12).

17. Based on the University's recent history responding to FOIA requests since 2009, there is a strong likelihood that the University will continue to receive FOIA requests that call for records or information that is covered by FERPA during the next twelve months. (*Id.*, ¶ 13).

III. The Disclosure of Educational Records and Personally Identifiable Information Covered by FERPA Violates the University's Privacy Policies and Students' Expectations of Personal Privacy

18. The University collects and maintains a broad range of records and information regarding current and former students and their parents, including, but not limited to: (a) student and parent names, addresses, dates of birth, hometowns, phone numbers, genders, and Social Security numbers; (b) application and admission materials; (c) personal essays submitted in support of admission or residency applications, (d) high school transcripts and other post-secondary academic records; (e) ACT, SAT, placement, and proficiency scores; (f) letters of recommendation; (g) comments from high school administrators or counselors; (h) student financial information; (i) parent financial information; (j) applications for financial aid, scholarships, or other financial assistance; (k) payment records and histories; (l) grades and academic transcripts; (m) enrollments, registrations, and schedules; (n) graduation records; and (o) disciplinary records. (Exh. 4: C. Malmgren Aff., ¶ 6).

19. It is University policy to comply fully with FERPA, and the policies adopted by the University with respect to privacy, record access, and record release of educational records and information are based upon FERPA. All information maintained by the University, and directly related to a student "in attendance" is considered part of the student's educational record and may not be released to or accessed by anyone without the express written consent of the student, unless the information falls within one of FERPA's limited exceptions, such as the

exception for “directory information.” All other educational record information is considered “non-directory” and is classified as “high risk” under the University’s data classification standard, and therefore may not be released or accessed without either the student’s express written consent or under the prescribed limited exceptions. (*Id.*, ¶¶ 7-8, Exh. A).

20. The University’s policies with respect to the privacy of student records and information, including the University’s policy to comply fully with FERPA, are set forth in the Student Code, on the University’s campus web sites, in annual notifications to students, and in various other publications and notifications to students and parents. (*Id.*, ¶¶ 9-12, Exh. B-E).

21. The University does not have a policy, nor has it advised students or parents of a policy, that student records and information that are otherwise protected from disclosure under FERPA may be subject to disclosure in response to a FOIA request. (*Id.*, ¶ 13).

22. The University regards the unauthorized access, disclosure, or release of any “non-directory” educational record information to be harmful and invasive of student privacy. The potential harm or invasion varies based on the student’s individual circumstances. Foreseeable harms to the University, its students, and parents include, but are not limited to: the stigma or prejudice to the academic process from releasing a student’s grades or test scores; the stigma, personal violation, or injury to the financial aid process from releasing a student’s or parents’ financial information; the personal violation of having a student’s residency application disclosed to public scrutiny; the threat of identity theft; and the stigma and personal violation from releasing a student’s disciplinary records. (*Id.*, ¶¶ 14-15).

IV. Federal Funding from the U.S. Department of Education, Which Is Contingent on FERPA Compliance, Constitutes a Substantial Majority of the Funds Used to Pay Student Tuition and Fees to Attend the University, and a Significant Percentage of the University’s Total Annual Operating Revenues

23. Total enrollment at the University for the current academic year is approximately

77,000 undergraduate, graduate, and professional students. (Exh. 3: T. Hardy Aff., ¶ 9). Well over half of all the funds used to pay these students' tuitions and fees comes from applicable U.S. Department of Education ("DOE") loan and financial aid programs covered by FERPA, constituting a significant portion of the University's annual operating revenues. (See Exh. 5: S. Moulton Aff., ¶¶ 8-16, Exh. A-C).

24. In Fiscal Year 2010, the University received \$448,883,775.00 in student loans and capital contributions disbursed from or through the DOE.² (*Id.*, ¶¶ 8-9, Exh. A).

25. Moreover, in Fiscal Year 2010, the University received \$145,552,087.00 in student financial assistance and other federal funding from the DOE, of which \$71,628,791.00 consists of student financial assistance and the remaining \$73,923,296.00 consists of grants and other federal funding.³ (*Id.*, ¶¶ 10-11, Exh. B).

26. The combined student loans, capital contributions, and student financial assistance received by the University from or through the DOE in Fiscal Year 2010, totaling \$520,512,566.00, comprised approximately 63.2% of the University's total operating revenues from student tuition and fees of \$823,488,000.00. (*Id.*, ¶¶ 12-14, Exh. A-C).

27. Grants and other funding received by the University from or through the DOE in Fiscal Year 2010, totaling \$73,923,296.00, comprised approximately 8.5% of the University's total operating revenues from grants and contracts of \$873,737,000.00. (*Id.*, ¶ 15, Exh. B-C).

28. The total of all student loans, capital contributions, student financial assistance, and other federal funding received by the University from or through the DOE in Fiscal Year 2010, totaling \$594,435,862.00, comprised approximately 19.1% of the University's total

² The University does not retain the full amount of student loan funds. When the University receives funds on a loan made to a student, the University first applies the funds to any outstanding tuition and fees, and then forwards the remainder to the student.

³ A portion of the grant money consists of non-recurring stimulus funds for programs that will terminate in 2011 or 2012.

operating revenues from all sources of \$3,111,169,000.00. (*Id.*, ¶ 16, Exh. A-C).

V. The Tribune Has Already Received Thousands of Documents and Written Dozens of Articles Based on Its FOIA Requests to the University

29. Among past FOIA requests, the University received at least 15 requests between April 2009 and December 2009 from Jodi S. Cohen, Stacy St. Clair, and/or Tara Malone of the *Chicago Tribune*, and all but one of them sought documents, records, or other information relating to the admissions issues at the University and/or “Category I” applicants to the University (collectively, the “Tribune Admissions Requests”). (Exh. 3: T. Hardy Aff., ¶ 14).

30. The University produced more than 5,200 pages of documents in response to the Tribune Admissions Requests, some of which were produced in unredacted form and some of which were redacted to remove FERPA-exempt information. (*Id.*, ¶ 15).

31. Since May 2009, the *Chicago Tribune* has published dozens of articles and editorials relating to admissions at the University and/or “Category I” applicants to the University. Many of these articles contain information that appears to have been obtained as a result of the University’s responses to the Tribune Admissions Requests. (*Id.*, ¶ 16).

ARGUMENT

I. Legal Standard for a Stay Pending Appeal

32. A party seeking a stay pending appeal must satisfy a standard similar to that applied to a party seeking preliminary injunctive relief; it “must show that it has a significant probability of success on the merits; that it will face irreparable harm absent a stay; and that a stay will not injure the opposing party and will be in the public interest.” *Hinrichs v. Bosma*, 440 F.3d 393, 396 (7th Cir. 2006) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The moving party has a “threshold burden[.]” to establish the first two factors; it “must that [it] has some likelihood of success on the merits and that [it] will suffer irreparable harm if the requested relief

is denied.” *Matter of Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300 (7th Cir. 1997) (citing *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386-87 (7th Cir. 1984)). “If the movant can make these threshold showings, the court then moves on to balance the relative harms considering all four factors using a ‘sliding scale’ approach.” *Id.* at 1300-01.

33. The “sliding scale” approach “amounts simply to weighting harm to a party by the merit of his case.” *Cavel Intern., Inc. v. Madigan*, 500 F.3d 544, 547 (7th Cir. 2007). In other words, the greater the level of irreparable harm to the movant, the less substantial the showing of probability of success required to grant a stay. *See id.* “If an appeal has no merit at all,” a stay “should of course be denied.” *Id.* “But if the appeal has some though not necessarily great merit,” then the showing of “serious irreparable harm ... would justify the granting of [a stay] pending appeal provided, as is also true in this case, that the [opponent] would not suffer substantial harm from the granting of the [stay].” *Id.* at 546-47 (collecting cases).

II. The University Has a Significant Probability of Success on the Merits

34. To meet its threshold burden on probability of success, the University is not required to undertake the onerous task of persuading this Court that it erred in the entry of its Judgment or that the University is certain to prevail on appeal. The sliding-scale approach “does not require a ‘strong showing’ that the applicant will win his appeal.” *Cavel Int’l*, 500 F.3d at 549. Particularly where serious irreparable harm may arise in the absence of a stay, the movant need not have “a winning case or even a good case[.]” *Id.* (reversing district court’s denial of an injunction pending appeal, where the movant showed serious irreparable injury and a likelihood of success that “is not negligible”). *See also In re Doctors Hosp. of Hyde Park, Inc.*, 376 B.R. 242, 246 (Bankr. N.D. Ill. 2007) (citing *Matter of Forty-Eight Insulations*, 115 F.3d at 1301) (“Likelihood of success is not certainty of success; neither is it a mere possibility.”).

35. Here, although this Court granted the Tribune’s motion for summary judgment

and denied the University's cross-motion for summary judgment, and therefore is unlikely to find that the University has a "winning case" on appeal, the University clearly does have "a good case." The Court's ruling is on a question of first impression in the Seventh Circuit, and there is conflicting authority reflecting that reasonable jurists can differ on whether FERPA specifically prohibits the disclosure of educational records and personally identifiable information, so as to be exempt from disclosure under Section 7(1)(a) of FOIA, 5 ILCS 140/7(1)(a). In ruling on the parties' cross-motions, this Court recognized that its ruling disagrees with the decision of the Sixth Circuit in *United States v. Miami University*, 294 F.3d 797, 809 (6th Cir. 2002), which held that FERPA imposes a binding obligation on schools that accept federal funds, such that records covered by FERPA are exempt from disclosure under a similar exemption in the Ohio FOIA for information "the release of which is prohibited by state or federal law." (Dkt. No. 31, p. 5).

36. Although this Court disagreed with the Sixth Circuit's analysis in *Miami University*, that decision presents a reasonable and colorable alternative to this Court's conclusions. The Sixth Circuit based its ruling on the principle that, once a state has "knowingly accepted" federal funds subject to statutory conditions, the statute "imposes enforceable, affirmative obligations," which may be enforced through the exercise of a court's equitable powers. *Miami University*, 294 F.3d at 808-09 (citing *Wheeler v. Barrera*, 417 U.S. 402, 427 (1974), *modified on another ground*, 422 U.S. 1004 (1975)). Accordingly, the Sixth Circuit concluded that FERPA "unambiguously conditions the grant of federal education funds on the educational institutions' obligation to respect the privacy of students and their parents," and that "[o]nce the conditions and the funds are accepted, the school *is indeed prohibited* from systematically releasing education records without consent." 294 F.3d at 809 (citing 20 U.S.C. § 1232g(b)(2)) (emphasis added). A majority of courts to consider this issue have held, as the Sixth

Circuit did, that FERPA prohibits the disclosure of education records and personally identifiable information. *See, e.g., Unincorporated Operating Div. of Indiana Newspapers, Inc. v. Trustees of Indiana University*, 787 N.E.2d 893, 903-04 (Ind. App. 2003); *DTH Publishing Corp. v. University of N. Carolina*, 496 S.E.2d 8, 12 (N.C. 1998).⁴ That includes one of the authorities relied upon by the Tribune in its summary judgment motion. *See, Board of Education of Colonial School Dist. v. Colonial Educ. Ass'n*, No. 14383, 1996 WL 104231, *5 (Del. Ch. Feb. 28, 1996) (holding that FERPA “does impose a binding obligation on the government unit that accepts designated federal funds,” and that its language “reveals a congressional intent to impose obligations directly on educational agencies or institutions”) (*quoting Belanger v. Nasua, New Hampshire School Dist.*, 856 F. Supp. 40, 46 (D.N.H. 1994)).

37. The fact that there is disagreement among the courts with respect to whether FERPA imposes binding legal obligations that specifically prohibit the disclosure of educational records, and reasoned arguments going the other way from this Court’s decision, satisfies the University’s burden on probability of success. A “split in authority” or “difference of opinion” among courts, demonstrating that “reasonable jurists can disagree” on the question at issue, is sufficient to establish a “likelihood of success on the merits.” *Aslam v. Chertoff*, No. 1:07cv331, 2008 WL 341434, *1 (E.D. Va. Feb. 4, 2008). *See also In re Hunt*, 93 B.R. 484, 494 (Bankr. N.D. Tex. 1988) (finding that, in light of the existence of “conflicting authority” on the disputed legal question, “there exists some likelihood of success” on the merits).

III. The University Faces Serious Irreparable Harm Absent a Stay

38. The University has also met its threshold burden on threat of irreparable harm, as

⁴ *See also Disability Law Center of Alaska, Inc. v. Anchorage School Dist.*, 581 F.3d 936, 939 (9th Cir. 2009); *A.B. v. Clarke County School Dist.* No. 3:08-CV-041, 2009 WL 902038, *9 & *12 (M.D. Ga. March 30, 2009); *Interscope Records v. Does 1-14*, 558 F.Supp.2d 1176, 1180 (D. Kan. 2008); *MacKenzie v. Ochsner Clinic Foundation*, No. Civ. A. 02-3217, 2003 WL 21999339, *3-5 (E.D. La. Aug. 20, 2003).

it is clear that the University faces significant peril of serious irreparable harm if the Judgment is not stayed pending appeal. The University receives hundreds of FOIA requests every year, many of which call for records or information covered by FERPA, and expects to continue receiving such FOIA requests during the next twelve months while this appeal is pending. (Exh. 3: T. Hardy Aff., ¶¶ 6-8, 10, 13). In the past, the University has responded to these requests by producing responsive records that are not covered by FERPA, producing redacted records that are covered by FERPA, withholding records that are covered by FERPA and cannot be redacted, and informing the requesting party of the University's response. (*Id.*, ¶ 11). In some instances, particularly since the amendment of FOIA to remove the *per se* privacy exemption, FERPA has provided the University's sole basis to redact or withhold FERPA-exempt information in response to a FOIA request. (*Id.*, ¶ 12).

39. This Court's Judgment and Opinion, however, declare that the University is not entitled to withhold records covered by FERPA from disclosure under FOIA pursuant to the exemption for disclosures "specifically prohibited" by federal or state law, 5 ILCS 140/7(1)(a), because the University "has the option to choose whether or not to accept FERPA's conditions." (Dkt. No. 31, p. 6). Thus, unless the Court's Judgment is stayed pending appeal, the University is now in a position where it is very likely to be required to respond to FOIA requests that seek records and information covered by FERPA but not subject to any other FOIA exemption, and it will not be able to withhold such records and information under Section 7(1)(a) of FOIA in light of this Court's ruling. In short, to comply with FOIA during the pendency of this appeal, in the absence of a stay, the University will be compelled to violate its own policies on privacy, record access, and record release, contrary to the University's repeated promises to students in the Student Code, on its web sites, in annual notifications to students, and in various other

publications and notifications to students and parents that “non-directory” educational records will not be released by the University to anyone without prior written consent. (Exh. 4: C. Malmgren Aff., ¶¶ 6-13, Exh. A-E). The violation of student privacy is a harm in itself, and may well give rise to many added harms, including, *inter alia*, the stigma, prejudice, and personal violation resulting from the release of a student’s grades or test scores, a student’s or parents’ financial information, or a student’s disciplinary records, and the threat of identity theft. (*Id.*, ¶¶ 14-15). These intrusions into student privacy, once committed, cannot be undone.

40. The University may further be compelled to choose, as this Court said, “not to accept FERPA’s conditions,” thereby turning down federal funding from the DOE. (Dkt. No. 31, p. 6). Alternatively, even if the University attempts to keep its federal funding, when compliance with FOIA forces the University to violate FERPA, the DOE may be compelled under FERPA’s enforcement mandate to “take appropriate actions to enforce this section and to deal with violations of this section,” which may include “action to terminate assistance” if the Secretary “finds that 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(g).⁵ Thus, the University faces a real risk of forfeiting or losing its federal funding if the Judgment is not stayed.

41. The harm to the University from losing its federal funding would be immediate and irreparable. In the University’s most recently completed fiscal year, Fiscal Year 2010, the University received \$448,883,775.00 in student loans and capital contributions disbursed from or through the DOE, \$71,628,791.00 of student financial assistance from the DOE, and

⁵ The DOE has never previously had to revoke federal funding based on FERPA violations, and the University does not believe that the DOE would precipitously commence an action to terminate the University’s funding based on the first or even the first several FERPA violations. But if this Court’s ruling places the University in a posture where it is required on a consistent basis to disclose records that are covered by FERPA, the statute’s enforcement provision is non-discretionary once the Secretary determines that compliance cannot be secured by voluntary means. *See* 20 U.S.C. § 1232g(g).

\$73,923,296.00 of grants and other federal funding from the DOE. (Exh. 5: S. Moulton Aff., 8-11, Exh. A-B). These amounts comprised 63.2% of the University's total operating revenues from student tuition and fees, 8.5% of the University's total operating revenues from grants and contracts, and 19.1% of the University's total operating revenues from all sources. (*Id.*, ¶¶ 12-16, Exh. A-C). Thus, if the University loses its federal funding, a substantial portion of its annual operating revenue, including approximately two-thirds of its funding for student tuition and fees, disappears. (*Id.*). Once these funds are lost, they cannot be retrieved.

42. “Irreparable harm is harm ‘which cannot be repaired, retrieved, put down again, atoned for.... [T]he injury must be of a particular nature, so that compensation in money cannot atone for it.’” *Graham v. Medical Mut. of Ohio*, 130 F.3d 293, 296 (7th Cir. 1997) (*quoting Gause v. Perkins*, 56 N.C. (3 Jones Eq.) 177 (1857)). Here, the injuries to the University from the violation of trust from compulsory breach of its own privacy policies and assurances of privacy to students and parents and the loss of hundreds of millions of dollars in federal funding is incalculable, and by definition cannot be repaired, retrieved, or atoned for.

IV. A Stay Will Not Injure the Tribune

43. By contrast, the Tribune will suffer little or no injury if a stay is granted pending appeal. The Tribune Admissions Requests were made two years ago, between April 2009 and December 2009. (Exh. 3: T. Hardy Aff., ¶ 14). Although the University redacted FERPA-exempt information, it still produced more than 5,200 pages of documents to the Tribune, and the Tribune has been able to publish dozens of articles and editorials relating to admissions at the University and/or “Category I” applicants to the University since May 2009. (*Id.*, ¶¶ 14-16). At worst, the Tribune will incur only some modest delay in writing additional follow-up articles on a topic it has already covered quite thoroughly.

V. **A Stay Is in the Public Interest**

44. A stay pending appeal is also clearly in the public interest. There are more than 77,000 students enrolled at the University for the current academic year. (Exh. 3: T. Hardy Aff., ¶ 9). The public has an interest in protecting these students' privacy rights. Moreover, the students rely on student loans, capital contributions, and financial assistance disbursed from or through the DOE to cover 63.2% of their tuition and fees. (Exh. 5: S. Moulton Aff., 8-16, Exh. A-C). Thus, the public cost of denying a stay is the risk of depriving tens of thousands of Illinois students of their privacy and/or the means to attend college. Whatever marginal additional information the public would gain through the disclosure of information covered by FERPA during the pendency of appeal, over and above the more than 5,200 pages of documents the University has already produced and the dozens of articles and editorials the Tribune has already written, is marginal at best and cannot compare to the public harm of depriving tens of thousands of students of an invaluable educational opportunity.

WHEREFORE, the University respectfully requests that this Court: (1) stay its Judgment pending the conclusion of the University's appeal thereof; and (2) grant such other and further relief as the Court finds necessary and appropriate.

Dated: Chicago, Illinois
April 12, 2011

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