UNITED STATES DEPARTMENT OF EDUCATION

WASHINGTON, DC 20202

In the Matter of

VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY,

Docket No. 11-30-SF

Federal Student Aid Proceeding

Respondent.

Appearances: Peter R. Messitt, Esq., Senior Assistant Attorney General, Office of the Attorney General of Virginia, and E. Duncan Getchell, Jr., Esq., State Solicitor General, Commonwealth of Virginia, Richmond, VA for Virginia Polytechnic Institute and State University.

Brian P. Siegel, Esq., Office of the General Counsel, U.S. Department of Education, and Julie Miceli, Esq., Deputy General Counsel, Office of the General Counsel, U.S. Department of Education, Washington, D.C. for the Office of Federal Student Aid.

Before: Judge Ernest C. Canellos

DECISION UPON REMAND

On August 30, 2012, the Secretary found that the Virginia Polytechnic Institute and State University (Virginia Tech) violated the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) and 34 C.F.R. § 668.46(b) (2) (i), which required it to disclose its timely warning policy to students and employees as part of its Annual Security Report (ASR). In the Secretary's decision, he determined that Virginia Tech failed to comply by having inconsistent timely warning policies and failing to disclose one of them; and remanded the matter to me for recalculation of the appropriate fine for this violation.

In the remand, the Secretary stated that "[p]ostsecondary institutions should not have multiple timely warning policies – only some of which are disclosed to the campus community – that are inconsistent with each other. University policies and procedures provide vital assurance of informing students, faculty, and staff of the specific procedures followed by the institution in the event of criminal activity on campus that may threaten the safety of members of the campus community. Accordingly, the Respondent should be fined for having inconsistent policies and failing to disclose one of them." The Secretary stated that "[t]he precise questions for the remaining violation are: what should the fine be and why." The Secretary also stated that he "…cannot say it warrants the maximum possible fine." [1]

As of April 16, 2007, the timely warning policy in Virginia Tech's ASR provided:

> At times it may be necessary for 'timely warnings' to be issued to the university community. If a crime (s) occur and notification is necessary to warn the university of a potentially dangerous situation then the Virginia Tech Police Department should be notified. The police department will then prepare a release and the information will be disseminated to all students, faculty, and staff and to the local community.

At the same time, Virginia Tech also had an internal policy, Virginia Tech Policy #5615, which was not disclosed to its students, faculty and staff, and which provided:

> University Relations and the University Police will make the campus community aware of crimes, which have occurred and necessitate caution on the part of students and employees, in a timely fashion and in such a way as to aid in the prevention of similar occurrences.

Neither policy was followed on April 16, 2007. Instead, it was Virginia Tech's Policy Group which considered whether to issue a notice to the campus community and what the notice would say. The Secretary concluded that the timely warning policy in Virginia Tech's ASR was not consistent with Policy #5615 nor with the procedures Virginia Tech followed on that day.

In its brief, the Office of Federal Student Aid (FSA) argues that Virginia Tech's failure to have a consistent and transparent timely warning policy is a significant violation of the Clery Act. FSA states that timely warning policies address the most serious crimes, including criminal homicide, sex offenses, robbery, aggravated assault, burglary, motor vehicle theft, and arson. Given that most of these crimes involve physical harm to the victim, Virginia Tech's failure to have a consistent timely warning policy, which has been disclosed to its students and employees, warrants a significant penalty.

FSA points out that in recent decisions, the Secretary addressed the criteria that should be used for the imposition of fines in Clery Act cases. In one such decision, the Secretary addressed

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[1] *See In re Virginia Polytechnic Institute and State University*, Dkt. No. 11-30-SF, U. S. Dep't of Educ. (August 30, 2012) (Decision of the Secretary and Order of Remand) (Sec. Dec.) Sec. Dec. at p. 10-11.

a case in which the institution failed to include specific criminal offenses in the crime statistics included in its ASR. The Secretary concluded that the fine should be calculated based on each missing criminal offense, and that the maximum fine should be imposed because the crimes not reported were violent crimes.[2] In another case, the Secretary also restated his conclusion that the fine for failing to include specific criminal offenses in its ASR should be calculated based on each missing criminal offense and the maximum fine amount should be imposed.[3] Although this case doesn't involve the inclusion of violent crimes in crime statistics, FSA maintains that the relationship of the timely warning policy to violent crimes, which represent a threat to the campus community, supports the imposition of the maximum fine of $27,500. FSA argues that having inconsistent and undisclosed timely warning policies can be as dangerous as having no policy at all and Virginia Tech did not have a clear policy or process for making decisions on whether to issue a warning. Thus, FSA asserts that the safety of the campus community is not improved merely by the fact that an institution has a policy, if that policy is not followed.

FSA does note that the Secretary suggested that a lower fine could be considered. FSA states that if the tribunal determines that the fine should be reduced to acknowledge that Virginia Tech partially complied with the requirement in 34 C.F.R. § 668.46(b)(2)(i) in that it had a timely warning policy in place, the proposed fine could be reduced by 25 percent to $20,625. According to FSA, this reduction would acknowledge Virginia Tech's partial compliance with the regulations while still imposing an appropriately significant sanction for Virginia Tech's violation of that same regulation.

Virginia Tech argues that the inconsistency between the policy statement in the ASR and the institutional policy (Policy # 5615) does not involve an essential Clery Act disclosure and, the differences between the two policies did not diminish the efficacy of the timely warning policy contained in the ASR. The institutional policy relies upon University Relations to physically send the timely warning out by campus-wide email. Virginia Tech maintains that when the Virginia Tech Police Department (VTPD) decides when a timely warning is necessary, they contact University Relations and informs them what it wants to say and asks them to send it. In support, Virginia Tech cites the testimony of ED's Deputy Assistant Secretary for Policy Planning and Innovation in the Office of Postsecondary Education for the premise that the omission of University Relations from the ASR policy was not the Department's primary concern. Instead, the Department's concern stemmed from whose judgment was relied upon to make this determination.[4]

Virginia Tech also points out that the Secretary addressed whether disclosure of the office that mechanically sends a timely warning is required by the Clery Act. Virginia Tech maintains that the Secretary merely recommended that an institution do so as a best practice.[5]

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[2] *See In re Tarleton State University*, Dkt. No. 09-56-SF, U.S. Dep't of Educ. (Decision of the Secretary and Order of Remand) (June 1, 2012) at 5.
[3] *See In re Washington State University*, Dkt. No. 11-56-SF, U.S. Dep't of Educ. (Decision of the Secretary and Order of Remand) (August 29, 2012) (Washington State University).
[4] *See id*.
[5] *See Sec Dec.* at 10, ftnt. 51.

Were it an essential feature of the timely warning policy, Virginia Tech argues that the Department's model timely warning policy[6] would have contained such a detail and the Secretary would have stated that it was required by the Clery Act. According to Virginia Tech, the Secretary found that it is not appropriate to impose a fine on Virginia Tech for not following its disclosed policy on April 16, 2007, because "had the Respondent strictly complied with its published policy, the Respondent may not have issued any warning at all. Accordingly, FSA should only fine Respondent for having inconsistent policies and failing to disclose one of them."[7]

Virginia Tech next argues that the fine imposed should be *de minimus* to be consistent with similar cases in which no fine was imposed. Virginia Tech points to two cases involving inadequate timely warning policies. First, Virginia Tech notes that in a proceeding against University of Vermont, the Final Program Review Determination found that that University's timely warning disclosure was insufficient because "it does not describe the mode of communication in which those warnings will be made in the case of an imminent threat."[8] Virginia Tech states that when FSA brought a fine action for the various violations cited in the FPRD, it did not impose a fine for the finding that the University's timely warning policy was insufficient.[9] Thus, according to Virginia Tech, FSA declined to impose a fine related to the insufficient disclosure of a timely warning policy. In another case involving the University of Utah, Virginia Tech states that FSA similarly declined to impose a fine for a deficiency involving the University's timely warning policy. Virginia Tech argues that these aforementioned cases demonstrate that the fine FSA now seeks to impose is far out of line with its handling of cases involving similar violations.

The procedures for fining an eligible institution are enumerated in 34 C.F.R. Subpart G. In accordance with 34 C.F.R. § 668.84 (a) (1), the Secretary is authorized to impose a fine of up to $27,500 for each violation of a statutory or regulatory provision applicable to Title IV. In any such fine proceeding, 34 C.F.R. § 668.88 (c) (2) provides that FSA has the burden of proof and persuasion. When considering the appropriate fine, 34 C.F.R. § 668.92 instructs that the gravity of the violation must be considered as well as the institution's size. Under ED's standards, Virginia Tech is considered a large institution based on its funding levels.

In considering the amount of the fine, I note that the law allows for wide discretion in the imposition of a fine, and the only absolute limitation is that it cannot exceed the authorized maximum. However, whatever fine is proposed, to be supportable upon review, it must be determined to be reasonable under the circumstances. As a corollary, although proposed fines are not necessarily required to be always exactly the same for the same violation because of potentially unique circumstances, treatment for very similar violations with no discernible distinction cannot be so different as to be considered arbitrary.

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[6] *See* ED Ex. 4 at 9. (Campus Crime Handbook).
[7] *See id.* at 11.
[8] *See* Exhibit R-2 at 7.
[9] *See* Exhibit R-3 at 2, ftnt. 1.

With that as a background, I have considered the following factors in my determination as to the appropriate fine in this case. Virginia Tech's failure to have a consistent and fully disclosed timely warning policy prevented the campus community from having a true picture of who would make the determination to issue a timely warning. Virginia Tech made no attempt to tailor its announced policy to the actual circumstances as they existed on April 16, 2007 in that the VTPD could not issue timely warnings. I reject Virginia Tech's argument that the inconsistency between the two policies does not involve an essential Clery Act disclosure -- the Secretary ruled that the inconsistencies between the policies did involve an essential Clery Act disclosure. The Secretary stated "[t]hat Congress included specific guidelines governing what types of crime policies institutions must identify and explain, reinforces rather than mitigates, the importance of the accurate disclosure of such policies."[10] It is not therefore, as Virginia Tech states, a *de minimus* violation. Further, although I note that in other cases FSA has declined to seek a fine for inadequate timely warning policies, FSA's determinations in these other matters is not necessarily dispositive of whether a substantial fine should be imposed in this case.

However, the Secretary noted that had Virginia Tech strictly complied with the published policy in this case, it may not have issued any warning at all. I also acknowledge that Virginia Tech did have a policy in place in its ASR and as indicated by FSA, Virginia Tech partially complied with the requirement that it have a published timely warning policy as opposed to having no policy at all. As suggested by FSA, I could find that this partial compliance may merit the reduction of the fine by 25%, resulting in a fine of $20,625.

Of more import here however, although FSA has the burden of proof and persuasion in any Title IV fine proceeding, it offers no support for, or explanation of, why Virginia Tech should be substantially fined in this proceeding while it apparently took no such fine action against two other large universities for, what appears to be, very similar violations. I note that the information relative to the inaction taken against the Universities of Utah and Vermont, referenced above, was provided by Respondent's counsel in his brief, dated October 29, 2012. The service page of such brief indicates it was served on FSA's counsel both by FAX and U.S. Mail on that same date. As of the date of this decision, FSA has neither provided a responsive pleading addressing this issue, nor requested an opportunity to do so.

As a consequence of the above, especially the obvious disparate treatment, unexplained in its extreme differences in penalties, vitiates against a substantial fine in this case. Therefore, I find that FSA has failed to meet its burden of persuasion that this violation, at most, warrants any more than a substantially reduced fine of $5,000.

ORDER

On the basis of the foregoing, it is ORDERED that Virginia Tech pay to the U.S.

[10] *See* Sec. Dec. at 9.

Department of Education a fine of $5,000 for its failure to comply with the timely warning policy statement requirement of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act.

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Ernest C. Canellos
Chief Judge

Dated: December 10, 2012

SERVICE

A copy of the attached decision was sent Certified U.S. Mail, return receipt requested to the following:

Peter R. Messitt, Esq.
Senior Assistant Attorney General
Office of the Attorney General of Virginia
900 East Main Street
Richmond, VA 23219

E. Duncan Getchell, Jr., Esq.
State Solicitor General
Commonwealth of Virginia
900 East Main Street
Richmond, VA 23219

Brian P. Siegel, Esq.
Julie Miceli, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC 20202-2244