UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

In the Matter of

LINCOLN UNIVERSITY,

Docket No. 13-68-SF
Federal Student Aid Proceeding

Respondent.

Appearances: Kent L. Brown, Esq., Jefferson City, Missouri, for Lincoln University.

Brian P. Siegel, Esq., 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

HISTORICAL BACKGROUND

Lincoln University (Lincoln) is a public institution of higher education located in Jefferson City, Missouri providing a variety of educational programs leading up to doctoral degrees. It is accredited by the North Central Association of Colleges and Schools, Higher Learning Commission and is eligible to participate in the various federal student financial assistance programs that are authorized under Title IV of the Higher Education Act of 1965, as amended (Title IV). 20 U.S.C. § 1071 *et seq* and 42 U.S.C. § 2751 *et seq.* The Office of Federal Student Aid (FSA), U.S. Department of Education (ED), provides oversight of these programs. Of special note, Lincoln is included in ED's approved list of Historically Black Colleges and Universities as that status is envisioned under the Higher Education Act of 1965.

As part of its overall Title IV oversight responsibility, FSA conducted a program review at Lincoln between February 23-29, 2009, and April 20-21, 2009. The focus of this review was Lincoln's compliance with the provisions of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092 (f), as implemented by ED regulations at 34 C.F.R. §§ 668.41 (e) and 668.46. On December 15, 2009, FSA issued a program review report delineating ten violations of the Clery Act -- after reviewing responsive comments submitted by Lincoln, the findings were affirmed by a Final Program Review

Determination (FPRD), dated February 14, 2011, wherein FSA notified Lincoln that the findings were closed, however, the case file was being forwarded to ED for potential further action.

Thereafter, on the basis of the determinations made in the FPRD, over two and one-half years later, on October 25, 2013, FSA issued a Notice of Intent to Fine Lincoln $275,000 for the ten delineated Clery Act violations. By letter dated November 13, 2013, Respondent's counsel filed a timely written request for a hearing, resulting in the above-captioned fine action -- this proceeding is governed by the appeal procedures set out in 34 C.F.R. Part 668, Subpart G. On November 25, 2013, I was designated as the hearing official in this matter and I issued an Order Governing Proceedings that directed the parties to submit their briefs and evidentiary matter supporting their respective positions. After uncontested requests for extensions of time, the parties made their submissions. After reviewing the parties' briefs, on May 6, 2014, I issued a Further Order in which I directed the parties to discuss two questions that I certified therein. First, do the relevant provisions of 28 U.S.C. §2462 apply to the subject fine action before me? Second, assuming *arguendo* that the provisions do apply, how much, if any, of FSA's demand before me is barred by the five-year statute of limitations provisions of that Section? Based upon my review the parties' submissions on those two questions, I determined that further proceedings were required and, therefore, I ordered and then presided at an evidentiary hearing on this matter, commencing on October 28, 2014. In lieu of oral arguments at the close of the evidentiary hearing, I ordered the parties to submit those arguments to me in writing. Those submissions and rebuttal arguments were submitted by December 23, 2014.

PROPOSED FINES

This proceeding involves FSA's demand that Lincoln pay a total fine of $275,000.00 – based on a proposed fine of $27,500.00 for each of these 10 alleged violations of the Clery Act:

- Failure to maintain documentation to support crime statistics reported by Lincoln for calendar years 2006, 2007, and 2008.
- Incorrect reporting of crimes on the crime logs for the same 2006, 2007 and 2008 calendar years.
- Failure to distribute its Annual Security Report (ASR) for calendar years 2006 and 2007.
- Failure to maintain a crime log until 2009.
- Failure to provide a victim of a sexual assault with the outcome of the campus disciplinary proceedings addressing the assault in January 2007.
- Failure to provide a victim of a sexual assault with the outcome of the campus disciplinary proceeding addressing the assault in the fall of 2008.
- Omission of a statement of possible sanctions in sex offenses in the 2009 ASR.
- Failure to define the campus geographic boundary in 2006, 2007 and 2008 ASRs.
- Failure to provide proof of request for crime statistics from local police departments in calendar years 2006 and 2007.
- Failure to include the classification for reported hate crimes in its 2009 ASR.

In support of the amount of the fine, FSA claims that each is a serious violation with only general

statements as to why it is such a serious violation. No further analysis is apparent.

STATUTE OF LIMITATIONS

> 28 U.S.C. § 2462. Time for commencing proceedings
> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . . .

Not to belabor my consideration of the issues in this proceeding, I find that the statute of limitations enumerated above is clear and unequivocal. It applies to fine actions by agencies of the federal government -- since Subpart G proceedings are fine actions statutorily authorized and initiated by FSA under the provisions of Title IV, I find that § 2462 applies to this action against Lincoln. *See*, 34 C.F.R. § 668.89 (d). On its face, the statute of limitations is clearly raised as to many of the offenses -- those violations that are barred by the statutes of limitations may not be punished regardless of how well they may be established by the evidence. Consequently, in furtherance of judicial economy, I will first discuss the defense of statute of limitations. To be clear, although I find that the five-year statute of limitation provision in 28 U.S.C. § 2462 applies to this fine procedure; FSA argues that the statute of limitations should not bar enforcement of the fines because Lincoln was reminded in the program review report to retain all relevant records. As a basis for such assertion, FSA argues that statutes of limitations are meant to protect against a situation where time has elapsed and defendants lose the availability of exculpatory evidence for its defense. However, I note that the law recognizes broader protections in statutes of limitation -- a balance has been struck in American law that after a set number of years has passed with respect to a particular violation, all parties can consider themselves safe from litigation -- the price to be paid for such protection is that some known wrongdoers will never be brought to justice. Promotion of justice and provision of security and stability to human affairs have also been recognized. *See, Gabelli v. SEC,* 568 U.S. 133, 133 S.Ct. 1216 (2013) and the cases cited therein. *See also, In the Matter of San Francisco College of Mortuary Science, Docket No.* 92-8-S, U. S. Dep't of Educ. (Dec. of the Sec., March 26, 1993).

FSA argues further in effect that, even though it has the ultimate burden of proof in this proceeding, Lincoln is the party with the burden of proof when asserting the statute of limitations defense -- and it has failed to meet that burden. Further it criticizes me for raising the 28 U.S.C. § 2462 statute of limitation issue, *sua sponte*. I do note, however, that the time periods for the offenses as they are specifically alleged in the fine notice clearly raises the statute of limitations as an issue. In addition, I have broad discretion in this adjudicative process and am directed to conduct a fair and impartial hearing and that Lincoln has alluded to a statute of limitations issue in its original brief. *See*, 34 C.F.R. § 668.88 *et seq.* Finally, case law has also held that the issue of the applicability of the statute of limitations is jurisdictional and a presiding judge has the professional obligation to raise it and correctly apply it to the facts as he or she finds them, when

applicable, even though the parties, themselves, and for whatever reason, choose not to raise the issue. *See, S.E.C. v. Graham, Et al.*, 21 F.Supp.3d 1300 (S.D. Fla., 2014).

To properly apply the statute of limitations, I must establish a cut-off date for actions to be considered timely under the statute. Consequently, I find that since FSA's proposal to fine is dated October 25, 2013, and this action is the earliest possible date for the initiation of the formal fine procedure, any complained of action that occurred earlier than five years prior to that date is clearly barred by the 28 U.S.C. §2462 statute of limitations. Since the date of accrual, as provided in the statute has been defined by the U. S. Supreme Court as the date when the cause of action comes into existence as a claim and not when discovered, any argument that some other date should be applied here, is summarily rejected by me as not relevant to that determination. *Gabelli v. SEC, supra.* I note that a number of the allegations by FSA reflect claims of error or inadequacies in the reporting of Lincoln's ASRs -- FSA informs me that the ASRs are filed as of October 1 of the reporting year. Therefore, I find that any allegation as to violations relating to the 2008 and earlier ASRs are barred by the § 2462 statute of limitations. A cursory review of the proposed fines in this case indicates that with the exception of the two fines related to the 2009 ASR violations, all the fines are time-barred. As to the proposed fines related to the alleged failings in the 2009 ASR, I find that the statute of limitations does not bar assessment of a fine, therefor. I will discuss those fines after I resolve the statute of limitation issue.

As a starting point, I note that FSA has decided to fine separately allegations that are clearly identified and separated by dates of violation. Since those dates are included in the allegations themselves, I must utilize those specified times in my decision on the applicability of the statute of limitations. The first three $27,500.00 fines proposed by FSA are, by their very terms, time-barred. These include: first, failure to maintain documents to support crime statistics reporting in 2006, 2007 and 2008 ASRs; second, incorrect reporting in crime logs in 2006, 2007 and 2008; and third, failure to distribute ASRs for 2006 and 2007. The fourth proposed fine also seems time-barred since it alleges failures to maintain a crime log prior to 2009. The fifth and sixth fine proposals allege failures to notify two victims of sexual assault with the results of campus disciplinary proceedings -- these resulted from assaults in 2007 and 2008 and, therefore, are time-barred, as well. The eighth proposed fine alleges failure to properly define the campus geographic boundaries for the 2006, 2007 and 2008 ASR reports, clearly outside the allowable period for adverse action. In the ninth proposed fine, FSA alleges failure to provide proof of requesting crime statistics from local law enforcement agencies during 2006 and 2007 -- these are clearly time-barred. As indicated above, the seventh proposed fine, failure to include possible sanctions for disciplinary actions involving sex offenses, and the tenth, failure to include the classification for reported hate crimes, both relate to the 2009 ASR, and are not time-barred and are actionable in this proceeding. I will discuss each below.

DISCUSSION

The procedures for fining an eligible educational 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 $27,500.00 for each violation of a statutory or regulatory provision applicable to Title IV. In any such proceeding, 34 C.F.R. § 668.88 (c) (2) provides that FSA has the burden of proof -- this includes the burden of production as well as the burden of persuasion. Further, when considering an appropriate fine, 34 C.F.R. § 668.92 (a) instructs that the designated department official, hearing official and the Secretary, determine the amount of a fine by taking into account both the gravity of the violations as well as the size of the institution. Inherent in such instructions and clearly consistent with the well-settled legal principles regarding punishments, including fines, that the principles of mitigation clearly must be considered. In addition, since a fine is a punishment that results in the deprivation of a protected property interest, the concept of due process of law must be adhered to or else the action would violate the United States Constitution.

The proposed fines that are not barred by the § 2462 statute of limitations include $27,500.00 for failure to include a statement of possible sanctions in disciplinary actions involving sex offenses in Lincoln's 2009 ASR, and $27,500.00 for Lincoln's failure to include the classification for reported hate crimes in the 2009 ASR. Lincoln defends against both claims by first arguing that both failures were promptly remedied after the program review, that 2009 was the first year that hate crimes classification was required, and there were no hate crimes at Lincoln in 2009.[1] Also, Lincoln argues that the maximum fine is not supported as to those violations, claiming that "[T]here must be some relationship between the conduct and the fine and merely imposing the maximum penalty in every case is not permissible under the statute." This is clearly a reference to the fact that all ten of the proposed fines are for the maximum allowable amount, without any attempt by FSA to distinguish their seriousness.

Without doubt, the governmental authority imposing a fine has discretion in determining the amount of the fine so long as it is within the authorized maximum permissible punishment. However, just as clear, to be considered an appropriate action upon review, fines like any other pecuniary action can be affirmed only after giving due consideration to the seriousness of the violation as well as the degree of culpability of the violator. That analysis must take into consideration the injurious effect of the violation on others; the intent or lack thereof of the perpetrator; and the possible deterrent effect punishment might have. Surely, no one would seriously argue that the fines for two violations that are indistinguishable from one another should be exactly the same despite the fact that one perpetrator committed the act intentionally while the other did it negligently. As a corollary, the law has always abhorred the multiplication of charges in order to enhance punishment, regularly finding such action to violate due process. Also a standard sentencing instruction that trial judges provide to jurors for their consideration in their assessment of punishment is that the maximum permissible punishment should be reserved

[1] FSA asserts that there was a 2008 robbery that constituted a hate crime. Assuming this is true; it does not materially alter my reasoning or change the outcome of this case.

only for those most aggravating examples of the violations being sanctioned. My review of the record in this proceeding reveals no such analysis. In fact, the only indication of any consideration of the amount of a fine is a reference to the maximum permissible fine, $27,500 per violation, and a generalized statement to the effect that each violation is serious because, without correct information, students, parents and employees are unable to make informed decisions relative to the safety of the campus community. Although no dispute of such determination is apparent, no specific example of such possibility is even tangentially mentioned.

As I have indicated above, specific mandatory factors must be considered in deciding the range of penalties. If FSA does not utilize this range and make that decision a matter of record, but instead seeks to impose a maximum fine in all fine proceedings, it is clearly not in compliance with the express requirements of the regulation and borders on being arbitrary. This assertion is even supported by FSA's Clery Act expert, Mr. James Moore, when he testified before me at the evidentiary hearing alluded to above. In its defense, Lincoln has argued, in effect, that surely not every violation of Title IV can be classified as the most serious; therefore the automatic imposition of the maximum permissible fine in every case is surely inappropriate. In furtherance of its plea for a lower fine, Lincoln assures me and the Secretary that any of its violations of the Clery Act should not recur given the new procedures that it has instituted to prevent such recurrence -- and that such procedures have received positive review by its peers.

FINDINGS

First, consistent with my determinations above, I find that all fines except the two fines imposed for violations related solely to the 2009 ASR are time-barred under 28 U.S.C. §2462. As a consequence, those fines are disapproved and are, hereby, DISMISSED.

Further, as to the fines related to the 2009 ASR, FSA has assessed the maximum fine for each of those two violations for a total of $55,000. I note that FSA has considered that Lincoln is a large institution in its fine determination; however, FSA also has the burden of proving the appropriateness of a fine, based on the gravity of the violations. This thereby, requires FSA to produce evidence justifying the fine and the amount of the fine. FSA has been given numerous opportunities to satisfy this burden, including a live hearing and extensive briefing opportunities. By its terms, fine procedures require consideration of the "gravity" of an institution's violation, misrepresentation, or failure to carry out its responsibilities under a statute, regulation, or agreement. 34 C.F.R. § 668.92(a) (1). Rather than provide evidence that the gravity of the fine was considered when FSA imposed the maximum fine of $27,500 each or that the gravity of the violations warranted the maximum fine, FSA, through its counsel, repeatedly argued that mitigation does not apply and that all ten assessed violations, including the two remaining, always warrant the maximum fine. In support, FSA's counsel cites two prior cases, *In re Tarleton State University*, Docket No. 09-56-SF, U.S. Dep't of Educ. (Dec. of the Sec, June 1, 2012) (Tarleton) and *In re Washington State University*, Docket No. 11-56-SF, U.S. Dep't. of Educ. (Dec. of the Sec., August 29, 2012) (WSU) for the argument that these violations warrant the maximum penalty. However, I note that the Secretary rejected FSA's efforts to make this

argument in *In re Virginia Polytechnic Institute and State University*, Docket No. 11-30-SF, U.S. Dep't of Educ. (Dec. of the Sec., January 3, 2014).

The Higher Education Act requires a comparison of the seriousness of a violation against other violations of the Clery Act. The Secretary noted that the determinations in *Tarleton* and *WSU* extend only to the violations that "strike at the very heart of the Clery Act's protections" and to violations that are "precisely the kinds of acts that Congress intended to prohibit -- namely, colleges failing to inform their communities of violent crimes on their campuses." Here, the remaining violations are for an omission of a statement of possible sanctions in sexual offenses in the 2009 ASR[2] and a failure to include a classification for hate crimes in the 2009 ASR. Neither of these fines was assessed for failing to **report** a violent crime, or even the failure to **report** any crime. It is for this type of violation – failure to report a violent crime that the Secretary has explicitly stated is serious enough to warrant the maximum fine amount. *See, In re Washington State Univ., supra*. Rather, Lincoln's violations are a failure to articulate the possible punishment for one category of crimes and a failure to include a distinct classification for hate crimes for crimes that were already reported.[3]

In summary, FSA has provided no evidence tailored to establishment of the gravity of the violations beyond an attempt to equate them with a failure to report violent crimes and a general statement that compliance is necessary to keep students, parents, and employees informed about campus safety. As a result of the insufficiency of any evidence from FSA about the gravity of the two remaining violations, I, as the hearing official, am forced to assess the gravity of the violations myself. 34 C.F.R. § 668.92(a) (1).

In assessing an appropriate fine in this proceeding, I have taken into consideration the following factors: both of the fines relate to violations which were quickly remedied by Lincoln after the program review was issued; the hate crime reporting requirement was a new requirement when violated; and there is no evidence presented that any physical harm resulted from either violation. Although FSA is correct that failure to adequately provide required information can impede students, parents, and employees from making informed decisions, I conclude, on the facts before me, that the maximum fine is unwarranted. I find, instead, that a

[2] Specifically, the fine letter indicates that Lincoln's violation giving rise to the fine was that its 2009 ASR failed to "contain[] a statement that includes the sanctions the institution may impose following a final determination of an institutional disciplinary proceeding regarding rape, acquaintance rape, or other forcible or non-forcible sex offenses."

[3] The fine letter indicates that Lincoln failed to "provide data relating to reported hate crimes in its ASR for the calendar year 2009." This could mean either that Lincoln failed to report a hate crime or that Lincoln failed to categorize a reported crime as a hate crime. In its notice, however, FSA indicates that the $27,500 fine is for "Lincoln's failure to include the classification for reported hate crimes in its calendar year 2009 ASR." This does not appear on its face to mean that Lincoln was fined for failure to report a crime, but for failure to adequately characterize a reported crime.

$10,000.00 fine for each violation, for a total fine of $20,000.00, is more appropriate. In that vein, one is left to ponder how truly serious FSA deems the violations for which it seeks to assess a maximum fine. After receiving full notice of the dates of and extent of the violations in the program review issued in late 2009, it took no fine or other pecuniary action until October 25, 2013. Under these circumstances, any claim by FSA that this maximum fine action would act as either a deterrent or in furtherance of rehabilitation, both well-recognized aims of punishment, seems tenuous, at best.

ORDER

On the basis of the foregoing, it is ORDERED that Lincoln University pay to the United States Department of Education a fine of $20,000.00 for the approved findings of its actionable failures to comply with the reporting requirements of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act.

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Ernest C. Canellos
Chief Judge

Dated: March 16, 2015

SERVICE

A copy of the attached document was sent by certified U.S. mail, return receipt requested, to the following:

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