THE SECRETARY 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.

DECISION OF THE SECRETARY AND ORDER OF REMAND

This matter comes before me on appeal by the office of Federal Student Aid (FSA) of an Initial Decision issued by Chief Judge Ernest C. Canellos (ALJ) on March 29, 2012. In that decision, the ALJ found that, as required by the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act),[1] Virginia Polytechnic Institute & State University (Respondent) issued a timely warning alerting students, faculty, and staff of the fatal wounding of two students that ultimately led to the tragic events that occurred on campus on April 16, 2007, resulting in the deaths of 32 individuals and the wounding of 17 others. The ALJ also found that Respondent had not violated the Clery Act by failing to follow its published crime reporting procedures on April 16, 2007. Pursuant to these findings, the ALJ vacated the $55,000 fine sought by FSA. On appeal, FSA argues that the findings by the ALJ should be reversed and the total fine reinstated. For the reasons set forth below, I reverse the ALJ's decision, impose a fine originally requested by FSA of $27,500 for Respondent's failure to issue

[1] *See* Pub. L. 89–329, title IV, §485(f), as added Pub. L. 101-542, title II, §204(a), Nov. 8, 1990, 104 Stat. 2385 (20 U.S.C. 1092(f)) (The Clery Act is an amendment of the Higher Education Act of 1965, as amended (HEA or Title IV)), 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* (Federal student aid programs are authorized under Title IV.) (The Clery Act has been amended several times, including on Aug. 14, 2008, where Congress amended the Clery Act by creating additional safety and security requirements for postsecondary institutions.) Among other things, the Clery Act requires all postsecondary institutions participating in Title IV student aid programs to provide a timely warning to the campus community of a threat to the safety of students and employees.

a timely notice as required by the Clery Act, and remand this matter for further proceedings on a recalculation of the fine for the remaining violation in the manner consistent with this decision.

Given the extraordinary repercussions of the events of April 16, 2007, it is appropriate to review the process by which this case comes before the Secretary of Education. Pursuant to 20 U.S.C. § 1094(c) of the Higher Education Act of 1965, as amended (HEA or Title IV), Congress has authorized the U.S. Department of Education (Department) to impose a civil penalty (generally referred to as a fine) against a postsecondary institution for each violation of the HEA. In doing so, Congress also provided postsecondary institutions with certain procedural rights, including the opportunity for a hearing to contest the basis of the Department's fine, which, in this case, was provided by the ALJ. In addition, pursuant to 34 C.F.R. § 668.91(c), any party appearing before the ALJ may appeal the ALJ's decision by filing with the Secretary a written submission that explains "why the party believes that the Secretary should reverse or modify the decision of the hearing official."[2] In reviewing the appeal, the Secretary's judgment is limited to determining whether the ALJ's decision should be modified, remanded, or reversed based on the evidence in the record and his interpretation of the Department's rules, regulations, and relevant statutory provisions.[3] Upon issuance, the Secretary's decision becomes the Department's final decision.

I

This case involves two alleged violations of the Clery Act: (1) that on April 16, 2007, Respondent failed to provide a timely warning to the campus community, as required under 34 C.F.R. § 668.46(c);[4] and (2) that on April 16, 2007, Respondent failed to follow the timely warning policy contained in its published annual security report (ASR) of campus crime. Regarding the first alleged violation, the ALJ determined that an e-mail Respondent sent on April 16, 2007 at 9:26 a.m. to the campus community -- more than two hours after the Respondent initially learned of the shootings in a dormitory -- was "issued in a timely fashion, within the guidance and training provided by ED [Department] and consistent with the practices of other institutions."[5] Thus, after finding FSA's allegation unsupported, the ALJ vacated the $27,500 fine.

Regarding the second alleged violation, as required by the Clery Act, Respondent had a published policy regarding timely warnings that stated, in the event a timely notice was required, Respondent's police department (Police Department) "will prepare a release and the information will be disseminated to all students, faculty, and staff and to the local community."[6] In this case, Respondent's actual practice followed a different path than Respondent's actual published

[2] 34 C.F.R. § 668.91(c)(2)(i).

[3] 34 C.F.R. § 668.91(c).

[4] FSA argues that Respondent failed to issue a timely warning to the campus community after two shootings occurred at the West Ambler Johnston campus residence hall (WAJ) on April 16, 2007, at about 7:15 a.m. The University Relations office issued an e-mail to the campus community notifying it of the shootings at 9:26 a.m.

[5] This ruling follows the ALJ's conclusion that "the shootings at WAJ should have prompted a timely warning." *Virginia Polytechnic Institute & State University*, U.S. Dep't of Educ., Dkt. No. 11-30-SF (March 29, 2012).

[6] *Virginia Polytechnic Institute & State University*, U.S. Dep't of Educ., Dkt. No. 11-30-SF (March 29, 2012) at 18.

policy. On April 16, 2007, Respondent's Policy Group, which included senior university officials, and not the Police Department, issued a warning to the campus about the shootings. According to the record, the Police Department did not think it was necessary to issue a warning. In his judgment, the ALJ ruled that Respondent had committed a mere "technical deviation" from its timely warning policy, and that doing so "does not mean that the spirit and intent of Virginia Tech's timely warning policy was violated."[7] The ALJ concluded that it would not be "in keeping with the purpose of a fine action to penalize the institution for a technical deviation from its stated policy."[8] On these grounds, the ALJ vacated FSA's $27,500 fine.

On appeal, FSA argues that the ALJ's decision should be reversed. On the first issue, FSA argues that Respondent's 9:26 a.m. e-mail was "neither 'timely' nor did it provide a 'warning'" because the e-mail failed to put the campus community "on guard at an opportune time."[9] Regarding the second issue, FSA argues that "when an institution misrepresents its policies to its students and employees, and then fails to follow any of them," it has exceeded a mere "technical violation."[10] FSA requests that I either reinstate the total fine of $55,000 or remand this case "for further consideration of the proceedings and verdict in a Virginia State court proceeding related to the same events as this case."[11]

Opposing FSA's appeal, Respondent argues that it was not required to issue a timely warning after it had learned of the shooting because it had reasonably determined that the crime did not represent a continuing threat to students and employees. In the alternative, if it were required to issue a timely notice under the Clery Act, Respondent argues that the e-mail the University Relations office sent on April 16, 2007 at 9:26 a.m. may be construed to meet the Clery Act's requirements. As for the second alleged violation, Respondent argues that the evidence in the record does not support FSA's contention that Respondent failed to follow the timely warning policy contained in its annual report of campus crime.

II

Respondent's position raises a threshold question; namely, whether a timely warning was required in this case. The Clery Act requires that postsecondary institutions must issue timely warnings to the campus community on crimes considered to be a threat to other students and employees if the crime is one to be included in the institution's annual security report (ASR).

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[7] *Id. at 19.*

[8] *Id.*

[9] Government Br. at 19.

[10] *Id.* at 30.

[11] *Id.* at 32. FSA requests that I either remand this case for consideration of a state court verdict finding Respondent negligent in its actions on April 16, 2007, or that I take judicial notice of the verdict. For several reasons, I decline to do either. First, I am mindful of the ALJ's judgment not to allow the state court verdict to infect the distinct matters in the case before him. I am persuaded that this was a prudent determination. Though some similarities between the cases are apparent, the issues are different and the parties are different. In addition, I am aware of no case precedent or principle -- and FSA does not point to any -- that would support FSA's effort to meet its burden of proof by submitting the state court judgment. Moreover, FSA makes no argument that it was forestalled from presenting evidence to the ALJ that was presented in the state case, which would have had relevance on the application of the *timely warning* standard in the Clery Act. Finally, FSA makes no direct assertion that doctrines of *res judicata*, issue preclusion, or claim preclusion are relevant here.

The warnings should be "provided to students and employees in a manner that is timely and will aid in the prevention of similar occurrences."[12]

Under Section 485(f)(3) of the HEA, a timely warning is required if: (1) one of the crimes listed in the HEA occurs; (2) the crime is reported to a campus security authority; and (3) the crime is considered by the institution to represent a threat to students and employees. In this case, there is no dispute among the parties that criteria (1) and (2) were met. The only issue is whether Respondent considered the crime to represent a threat to its students and employees.[13]

In *Havlik v. Johnson & Wales University*, the First Circuit Court of Appeals held that the Clery Act requires "every covered entity to make timely reports to the campus community on [certain] crimes considered to be a threat to other students and employees that are reported to campus security or local law enforcement agencies."[14] The court noted that the goal of the timely warning notice requirement is to protect members of the constituent campus communities by "aid[ing] in the prevention of similar occurrences."[15] When determining whether a crime represents a threat to students and employees, the court instructed that "[r]easonableness is the beacon by which institutions must steer," and counseled that doubts regarding issuing notice should be resolved in favor of assuring safety and security for campus communities.[16]

Here, after considering the arguments of the parties, the ALJ concluded that Respondent had a duty to issue a timely warning under the Clery Act. The ALJ cited multiple factors in support of his conclusion, including: (1) that the "crime represented the most heinous crime listed in the offenses for which a Clery Act warning comes into play," (2) that "[i]t was a violent crime involving the use of a firearm," (3) that "Virginia Tech also did not know the identity or location of the shooter," (4) that "there was no suspect in custody, [and] Virginia Tech did not know whether or not the gunman was loose on campus," and (5) that "Virginia Tech did not know the identity of the weapon or its location."[17] In addition, the ALJ noted that his finding was bolstered by "the fact that when people learned that the shootings had occurred, they took action to protect themselves or otherwise alter their behavior."[18]

The ALJ's conclusion is clearly the correct one. In fact, it is alarming that Respondent argues that it had no duty to warn the campus community after the Police Department discovered the bodies of two students shot in a dormitory, and did not know the identity or location of the shooter. Indeed, if there were ever a time when a warning was required under the Clery Act, this would be it. Moreover, even if the Respondent had doubts about whether the shootings represented a threat to students and employees, as noted in *Havlik*, any doubts regarding issuing the notice should have been resolved in favor of providing a warning in order to assure safety and security for the campus community.

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[12] 20 U.S.C. § 1092(f)(3).

[13] *Id.*

[14] *Havlik v. Johnson & Wales University,* 509 F.3d 25, 28 (1st. Cir. 2007); *see also* 34 C.F.R. § 668.46(e).

[15] *Id.* at 31.

[16] *Id.*

[17] *Virginia Polytechnic Institute & State University*, U.S. Dep't of Educ., Dkt. No. 11-30-SF (March 29, 2012) at 13.

[18] *Id.*

And clearly doubt existed. Even if the Police Department believed the shooting was "domestic" in nature, the series of actions taken by University officials demonstrates that Respondent had concerns that the crime might represent a continuing threat to the campus. As FSA points out in its brief, the Respondent locked down its Center for Professional and Continuing Education at 8:00 a.m., cancelled bank deposit pickups at 8:25 a.m., locked down its Veterinary College shortly after 9:00 a.m., and also cancelled trash pickups due to the shootings. Finally, in the 9:26 a.m. e-mail the University Relations office sent to the campus community, it urged recipients "to be cautious and ... to contact Virginia Tech Police if [they] observe[d] anything suspicious or with information on the case."[19]

Despite Respondent's arguments that it was not aware of any danger to the campus, these actions speak for themselves. In light of my agreement with *Havlik's* guidance and the ALJ's factual assessment, I find that the Clery Act required a timely warning notice to the campus community on April 16, 2007, after the Police Department discovered two students had been shot in an on-campus dormitory. I affirm the ALJ's ruling on this issue.

Having found that Respondent had a duty to provide a timely warning, I must now decide whether the e-mail that the University Relations office sent to the campus community on April 16, 2007 at 9:26 a.m. met the Clery Act's timely warning requirements. Although the Clery Act does not define the term "timely warnings," the First Circuit has held that the Act "stipulates no hard-and-fast rules [regarding timely warning notices], but, instead, gives institutions of higher learning substantial leeway to decide how notices should be phrased and disseminated so as most effectively to prevent future incidents."[20] Still, the exercise of the institution's judgment is never unfettered and must be exercised on a reasonable basis.[21]

Further, the Department's guidance provides that timeliness should be "decided on a case-by-case basis":

> The Secretary does not believe that a definition of "timely reports" is necessary or warranted. Rather, the Secretary believes that timely reporting to the campus community for this purpose must be decided on a case-by-case basis in light of all the facts surrounding a crime, including factors such as the nature of the crime, the continuing danger to the campus community, and the possible risk of compromising law enforcement efforts.[22]

In this case, the Respondent issued a notice to the campus community at 9:26 a.m., more than two hours after the Respondent learned of the shootings in one of its dormitories. The 9:26 a.m. e-mail contained the following message:

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[19] Government Br. at 8.

[20] *Havlik v. Johnson & Wales University, supra.*

[21] *See, e.g., In the Matter of Saint Louis University*, Dec. of the Secretary, Dkt. No. 99-29-SA (Decision of the Secretary, Nov. 12, 2010).

[22] 59 Fed. Reg. 22314, 22316 (Apr. 29, 1994).

> A shooting incident occurred at West Ambler Johnston earlier this morning. Police are on the scene and are investigating. The university community is urged to be cautious and asked to contact Virginia Tech Police if you observe anything suspicious or with information on the case. Contact Virginia Tech Police at 231-6411. Stay tuned to the www.vt.edu. We will post as soon as we have more information.[23]

According to the ALJ, the heart of the analysis of the timely warning requirement does not focus on whether Respondent's e-mail could have been sent earlier or could have been more explicit; instead, the appropriate focus is on (1) whether the notice was disseminated within a reasonable amount of time after Respondent discovered the crime; (2) whether the content of the notice was accurate; and (3) whether the content was informative of what crime had occurred. Further, the ALJ noted that "the type and nature of the crime as well as the potential for further occurrences are all factors which must be considered in determining when to issue a timely warning."[24] In other words, although "the more potentially dangerous the situation, the more quickly an institution should act to issue a timely warning...in effect, there may be a sliding scale as to determining what is timely based on the totality of the circumstances" according to the ALJ.[25]

In adopting this formulation, the ALJ noted that his task was to balance several factors including the following: (1) that the "crime was violent and involved a firearm," (2) that the "identity and location of the shooter and the weapon were unknown," (3) that the campus police concluded that "the crime was an isolated domestic incident," and (4) "the violent nature of the crime scene, [and] the fact that the shooter was armed and still at large."[26] In light of the foregoing, the ALJ held that the issuance of the 9:26 a.m. e-mail in "a little over two hours after the crime was discovered [is not] an unreasonable amount of time in which to issue a warning."[27]

In terms of accuracy and content of the notice, the ALJ concluded that the e-mail contained informative content regarding the location and occurrence of the shootings and also advised recipients to notify campus police of any known event related to the shootings. The ALJ also noted that the e-mail implied that "a gunman had yet to be apprehended."[28]

On appeal, FSA argues that the ALJ's decision must be overturned because the 9:26 a.m. e-mail does not meet the Clery Act's timely warning requirement. Based upon a reading of the statute's plain language, FSA takes a two-pronged approach to the analysis of the Clery Act's timely warning requirement: (1) the notice must be sent to the campus community within a time frame that ensures that the campus has sufficient time to react to protect individual safety; and

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[23] *Virginia Polytechnic Institute & State University*, U.S. Dep't of Educ., Dkt. No. 11-30-SF (March 29, 2012) at 6.

[24] *Id.* at 16.

[25] *Id.*

[26] *Id. at 17.*

[27] *Id.*

[28] *Id.*

(2) the notice must convey sufficient information to allow individuals in the campus community to act in their best interest to protect their safety.[29]

According to FSA, the timing of the 9:26 a.m. e-mail was inadequate because under the circumstances of the case, it was unreasonable to wait "two hours and fifteen minutes to issue a notice of any kind to the campus community," when "Virginia Tech police and administrators knew that two students had been shot and fatally wounded and that the perpetrator had not been identified or located."[30] In terms of content, FSA argues that the message: (1) was vague; (2) did not direct the community to take any safety measures; (3) failed to notify the campus community that there had been a shooting on campus; (4) did not mention that there had been a murder or that the killer had not been identified; and (5) failed to provide sufficient information to aid recipients to make decisions about their own safety.

Respondent argues at length that its decision to issue the e-mail at 9:26 a.m. is consistent with the Department's guidance and was made after making a "case-by-case analysis, considering all of the facts available."[31] Respondent argues that FSA's position is "contrary to the guidance that has been provided by the Department of Education for years."[32] Respondent argues that "FSA has pointed to nothing in the regulations of the Department of Education, guidance materials provided by the Department of Education, training materials provided to institutions" or in other fine actions against other universities "that would suggest that an institution has only two hours to determine the facts surrounding a crime."[33] Respondent also states that "nothing in the [Department's] handbook requires an institution to walk into a crime scene and immediately determine whether a warning should [be] issue[d]," and refers to "guidelines" stating that "timely" means that warnings should be issued 24 to 48 hours after the crime has been discovered.[34]

The Department's guidelines are not intended to address every possible scenario; rather, they are intended to cover a wide variety of circumstances and guide university officials to make prudent decisions in potentially life-threatening situations. As pointed out by both parties, the Clery Act provides for postsecondary institutions' exercising of sound judgment based on particular circumstances. Accordingly, Respondent's argument that FSA has failed to identify a specific provision in the Department's handbook that would require institutions to "walk into a crime scene and immediately determine" whether to issue a warning or to "determine the facts

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[29] Citing its handbook on campus crime, FSA notes that a timely warning "should be issued as soon as the pertinent information is available because the intent of a timely warning is to alert the campus community of continuing threats . . . thereby enabling community members to protect themselves." *See The Handbook for Campus Safety and Security Reporting*, which is made available to institutions on the Department's website: www.ed.gov/admins/lead/safety/handbook.pdf.

[30] Government Br. at 20.

[31] Resp. Br. at 10.

[32] *Id.*

[33] *Id. at 15.*

[34] Respondent also engages in a lengthy and irrelevant discussion regarding the 2008 Amendments to the Clery Act that require postsecondary institutions to "immediately notify the campus community of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff occurring on campus." 20 U.S.C. § 1092(f)(1)(J). For the reasons pointed out in FSA's brief, these Amendments are irrelevant to this case.

surrounding a crime" in "only ... two hours" is without merit. Guidelines, by definition, do not go into that level of specificity.

In this case, the evidence in the record is sufficient to meet FSA's burden of proof showing that Respondent's 9:26 a.m. e-mail was not disseminated within an appropriate time frame. Although the Police Department hypothesized that the crime was "domestic in nature," the record is clear that the Respondent had not located the suspect, had not found the weapon, and was confronted with the distinct possibility that the gunman was armed and still at large. Faced with this possibility, the Respondent should have resolved any doubts it had regarding the timing of the warning by issuing the warning before 9:26 a.m. Therefore, I reverse the ALJ's finding that the 9:26 a.m. e-mail constituted an appropriate timely warning notice. Furthermore, finding that the Respondent's 9:26 a.m. e-mail was not issued in a timely manner, I see no reason to decide the remaining issue -- whether the content of the e-mail contained sufficient information to allow recipients to protect themselves from the occurrence of similar crimes.

III

Finally, I must decide whether the Respondent failed to follow the timely warning policy contained in its annual security report (ASR) of campus crime.[35] The Clery Act requires postsecondary institutions to disclose their crime reporting policy in an ASR,[36] which is sent to the Department and distributed throughout an institution's campus community.[37] Although the Act restricts the Department from requiring "particular policies, procedures, or practices by institutions of higher education with respect to campus crimes or campus security," the Act does impose requirements and enumerates the type of policy statements that must be included in the

[35] The Department's regulations require that all institutions participating in the Title IV, HEA programs must prepare an ASR that contains the information listed in 34 C.F.R. § 668.46. One of the requirements is that the ASR must include a statement of current campus policies regarding procedures for students and others to report criminal actions or other emergencies occurring on campus. The ASR also must include the institution's policies concerning the institution's response to reports of criminal activity on campus. In particular, the ASR should set out the institution's policies for sending timely warnings to members of the campus community, including indicating the circumstances that will lead to issuance of a notice and who will issue the notice, and describing the mode of communication used to disseminate the notices. 34 C.F.R. § 668.46.

[36] 20 U.S.C. § 1092(f).

[37] There is a subtle distinction in FSA's position. FSA does not contend that the dissemination of a timely warning notice by Respondent's University Relations office violates the Clery Act. In fact, FSA opines that it is quite likely that Respondent vested the authority and the technical capacity to issue such notices in the University Relations office. Nonetheless, FSA argues, the policy identified in Respondent's ASR and disseminated to the campus community and submitted to the Department indicated that the Police Department maintained the responsibility to prepare and distribute the timely warning notice. Despite the seemingly plain language of the policy statements included in the ASR -- set out fully in the ALJ's decision -- the parties dispute the policy's interpretation and seem to intensely disagree as to which university office maintained responsibility for preparing and disseminating timely warning notices. The ALJ concluded that the "logical" interpretation of Respondent's policy is that responsibilities for preparing and distributing timely warning notices are shared between the "Policy Group" and the campus police. Regardless of what view is correct, it is clear to me that the policy disseminated in the ASR to the campus community -- as required by the Clery Act -- was not followed. This is borne out by the mandate of the policy in the ASR that the "police department...prepare a release" for the timely warning and by the undisputed fact in this case that the police did not prepare any such release; as Respondent indicates, the decision by the Police Department that a release was not required was based on the view of the Police Department that there was no ongoing threat to the campus community.

ASR.[38] That 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.

As of April 16, 2007, the timely warning policy in the Respondent's ASR, and provided to students and employees as required by the Clery Act, stated:

> At times it may be necessary for 'timely warnings' to be issued to the university community. If a crime(s) occur[s] 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.[39]

The Respondent also had an internal policy, Virginia Tech Policy #5615, dated May 17, 2002, which was not disclosed to students and employees, and which provided that "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."[40] Finally, the Respondent had an emergency management plan "which also contained formal emergency alert procedures and assigned the authority for releasing a warning to the Policy Group only."[41] On April 16, 2007, the Policy Group drafted a warning which the University Relations office issued to the campus community by the e-mail at 9:26 a.m.

As noted *supra*, the ALJ ruled that Respondent had committed a mere technical violation of its timely warning policy, and that doing so "does not mean that the spirit and intent of Virginia Tech's timely warning policy was violated." The "technical deviation" resulted from the Police Department's inability to distribute the 9:26 a.m. e-mail because the Department lacked "the requisite computer code to mechanically issue the warning."[42] On this basis, the ALJ vacated FSA's fine.

On appeal, FSA argues that I should reverse the ALJ's decision because it "inappropriately denigrates statutory and regulatory requirements and undercuts the purpose of the Clery Act."[43] Because "students and employees reasonably expect institutions to follow the procedures they announce," it is "not a 'technical deviation' when an institution misrepresents its policies to its students and employees and then fails to follow any of them."[44] This "failure to properly explain its timely warning policy gave the campus community a false sense of the

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[38] 20 U.S.C. § 1092(f).

[39] *Virginia Polytechnic Institute & State University*, U.S. Dep't of Educ., Dkt. No. 11-30-SF (March 29, 2012) at 6.

[40] Government Br. at 27.

[41] *Id.* at 28.

[42] *Virginia Polytechnic Institute & State University*, U.S. Dep't of Educ., Dkt. No. 11-30-SF (March 29, 2012) at 19.

[43] Government Br. at 29.

[44] *Id.* at 30.

officials who would be responsible for providing them vital safety information."[45] Further, FSA argues that on April 16, 2007, the Respondent actually "did not comply with either the policy it had provided to its students or with Policy #5615," and instead followed an emergency management plan which contained "formal emergency alert procedures and assigned the authority for releasing a warning to the Policy Group only."[46] Pursuant to this emergency management plan, the "Policy Group, not the Police Department, worked on a notice of the shootings to the campus community" and the "Police Department [was] not consulted or advised about the Policy Group's planned notice."[47]

In response, Respondent argues that it did comply with its published policy regarding timely warnings because the Police Department "did not consider there to be a threat on campus, and the police informed the Policy Group of this. There is no evidence that the police deferred to the Policy Group or that they made a collaborative decision. The police made that judgment."[48]

In the alternative, if the Clery Act had required a timely warning, Respondent implies that the Police Department would have complied with its published policy because the police would have "distribute[d] the warning by contacting the University Relations office and telling them to send it. There is nothing more involved than picking up a phone."[49] Accordingly, Respondent argues that FSA fails "to prove that the police and the Policy Group made a joint decision about the necessity for a timely warning, or that Va Tech violated the requirement that it disclose its timely warning requirement."[50] Notably, Respondent makes no argument that FSA's proposed fine on this issue should be reduced.

I agree that having consistent and transparent timely warning policies are important for the reasons identified by FSA.[51] Postsecondary 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

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[45] *Id.* at 30.
[46] *Id.* at 28.
[47] *Id.*
[48] Resp. Br. at 18.
[49] *Id.* at 19.
[50] *Id.*
[51] The parties make references to the possibility that Respondent either maintained timely warning notice policies or maintained multiple means of implementing its policy. FSA argues that Respondent maintained a published policy and an undisclosed policy containing important differences. Respondent argues that its only policy is the one in the annual report, but the policy may be implemented through multiple means and is not intended to be comprehensive. Hence, in Respondent's view, it is consistent with the disclosed policy to require the Police Department to determine whether a timely warning notice should be disseminated, but allow the University Relations office to conduct the actual distribution. The ALJ opines that there are at least two policies, but that they should be fused together to adopt an interpretation that avoids an illogical outcome. I think this issue is beside the point. The issue at hand concerns the policy in the annual report, which is what the Clery Act requires. Although I think that in light of the purposes of the Clery Act, timely warning notice policies should routinely disclose who or what office prepares the notice as well as who or what office distributes the notice as a best practice, the issue before me renders the status of undisclosed policies entirely irrelevant. Simply stated, the issue is whether Respondent failed to follow the policy disclosed in the annual report.

community. Accordingly, the Respondent should be fined for having inconsistent policies and failing to disclose one of them.[52]

That said, it is important to note that had the Respondent strictly complied with its published policy in this case, the Respondent may not have issued any warning at all. The published policy provides the Policy Group with no role in the preparation and dissemination of timely warning notices; however, after learning of the shootings, the Policy Group clearly saw a need to warn the campus even though the Police Department did not. Accordingly, FSA should only fine Respondent for having inconsistent policies and failing to disclose one of them.

IV

Fines under the HEA are measured based on the gravity of the offense and the size of the institution. The size of an institution is based on whether it is above or below the median funding levels for the Title IV, HEA programs in which it participates. The latest year for which complete funding data is available for Respondent is the 2008-09 award year. According to FSA, Respondent received approximately $8,993,612 in Federal Pell Grant funds; approximately $108,064,732 in Federal Family Education Loan (FFEL) and Federal Direct Loan (FDL) funds; and approximately $2,971,036 in Campus-Based funds. These funding levels exceed the median level of funding. As such, FSA considers Respondent a large institution.

In FSA's view, Respondent's violation of the Clery Act warrants "a fine far in excess of what is currently permissible under the statute."[53] Under the statute, however, a maximum fine of $27,500 may be imposed for Respondent's failure to issue a timely warning. FSA proposed a fine of $27,500 due to the serious nature of this violation, and Respondent's size. I agree. In light of FSA's assessment, I find that the maximum fine of $27,500 is warranted.

As for the Respondent having inconsistent and undisclosed timely warning policies, I agree with FSA that this violates the Clery Act; however, I cannot say that it warrants the maximum possible fine. On the basis of the foregoing, I remand this matter for recalculation of the appropriate fine for this violation. FSA shall be permitted an opportunity to submit to the ALJ a recalculation of the proposed fine for this violation along with a rational explanation for the basis thereof. The precise questions for the remaining violation are: what should the fine be and why.

ORDER

ACCORDINGLY, the Initial Decision of Chief Judge Ernest C. Canellos is HEREBY MODIFIED. IT IS HEREBY ORDERED that Respondent shall pay the U.S. Department of Education $27,500.

IT IS FURTHER ORDERED that this matter be REMANDED for further proceedings consistent with this decision.

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[52] 34 C.F.R. § 668.84(a).

[53] Government Br. at 31.

So ordered this 30th day of August 2012.

Arne Duncan

Washington, D.C.

SERVICE LIST

Office of Hearings and Appeals
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Peter R. Messitt
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

Julie Miceli, Esq.
Deputy General Counsel
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-2110
Julie.Miceli@ed.gov

Brian P. Siegel, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202-2110
brian.siegel@ed.gov