THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the matter of

LINCOLN UNIVERSITY,

Respondent.

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

DECISION OF THE SECRETARY

This matter comes before me on appeal by the office of Federal Student Aid (FSA), U.S. Department of Education (Department), of the March 15, 2015, Decision by Administrative Judge (AJ) Ernest C. Canellos. The AJ considered a Notice of Intent to Fine (Notice) in the amount of $275,000 issued by FSA on October 25, 2013.[1] FSA based the Notice on a Final Program Review Determination (FPRD) issued by FSA on December 15, 2009.[2] In the FPRD, FSA found Lincoln University (Lincoln) liable for ten violations of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f).[3]

Among other things, the Clery Act requires postsecondary institutions participating in federal student aid programs to make certain disclosures about campus crime statistics.[4] These include publishing an annual security report aimed primarily at current and prospective students and employees that details the numbers and categories of crimes that took place on campus over the previous three years.[5] The Clery Act also requires a school to notify a victim of sexual assault of the outcome of any related institutional disciplinary proceeding.[6]

In this case, the violations took place substantially between 2006 and 2009, and mostly relate to failure to report and maintain documentation related to both crime statistics and specific crimes.[7] The AJ held that violations occurring more than five years prior to October 25, 2013—the date FSA issued its Notice—are barred by the statute of limitations under 28 U.S.C. § 2462 for commencing actions to assess civil penalties. The AJ reviewed the separate violations to determine which ones were barred, finding the following violations barred by § 2462:[8]

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[1] Decision, p. 2.
[2] *Id.*, p. 1.
[3] *Id.*
[4] *See* U.S. DEP'T OF EDUC., OFFICE OF POSTSECONDARY EDUC., THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING (Feb. 2011), p. 1, *available at* http://www2.ed.gov/admins/lead/safety/handbook.pdf.
[5] *See generally* 20 U.S.C. § 1092(f) (2012).
[6] *Id.* § 1092(f)(8)(B)(iv)(III).
[7] *Id.*, p. 2.
[8] Decision, p. 4.

- Failure to maintain documents to support crime statistics reported in the 2006, 2007, and 2008 Annual Security Reports (ASRs)
- Incorrect reporting in crime logs in 2006, 2007, and 2008
- Failure to distribute ASRs for 2006 and 2007
- Failure to maintain a crime log prior to 2009
- Failure to notify two victims of sexual assault of the results of campus disciplinary proceedings, because the assaults took place in 2007 and 2008 (two separate violations)
- Failure to properly define the campus geographic boundaries for the 2006, 2007, and 2008 ASR reports
- Failure to provide proof of requesting crime statistics from local law enforcement agencies during 2006 and 2007

With regard to the remaining two violations, the AJ held that FSA failed to meet its obligation to weigh the gravity of the violations and to show how each violation warranted the amount of the fine assessed.[9] Upon assessing each violation for himself, the AJ reduced each fine from $27,500 to $10,000.[10]

As the appellant, FSA bears the burden of demonstrating error in the Decision.[11] Based on the following analysis, I affirm the Decision in part, as modified, and set aside and remand the Decision in part for further proceedings.

I. Applicability of the Statute of Limitations

FSA argues alternatively that either the statute of limitations does not apply to the violations in the Notice, or that FSA's ability to impose fines for the violations has not expired under the statute of limitations. I will consider each argument in turn.

A. Whether the Statute of Limitations Applies to Clery Act Fines

Under 28 U.S.C. § 2462, a proceeding for the enforcement of any fine or civil penalty "shall not be entertained unless commenced within five years from the date when the claim first

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[9] *Id.*, pp. 6–7.
[10] *Id.*, p. 7.
[11] *See Central State University*, Dkt. No. 12-32-SA, U.S. Dep't of Educ. (Sept. 2, 2014) (Decision of the Secretary), p. 1. FSA also bore the burden of persuasion in the case before the AJ because it involved imposition of a fine related to compliance with Title IV. 34 C.F.R. § 668.88(c)(2); *In the Matter of Teachers College, Columbia University*, Dkt. No. 04-44-SF, U.S. Dep't of Educ. (Sept. 16, 2005), p. 4.

accrued." The AJ found that this provision unequivocally applies to this matter, because "Subpart G proceedings are fine actions."[12]

In *3M Company v. Browner*, the D.C. Circuit Court of Appeals specifically considered whether § 2462 "applies to civil penalty cases brought before agencies."[13] In that case, the EPA argued that § 2462 is inapplicable to administrative proceedings before a federal agency and only applies to "judicial" suits.[14] The court disagreed, finding that distinction unsupported by precedent or the purpose of statutes of limitations.[15] Therefore, the court found that § 2462 applies to an agency's administrative proceeding to impose a penalty, noting also that the initial imposition of a penalty constitutes "enforcement" under the statute.[16] Finally, the court determined that the statute of limitations clock begins to run on the date when the violation occurred.[17]

FSA argues that § 2462 only applies to actions brought in federal court because it appears in Title 28 of the United States Code, which is subtitled "Judiciary and Judicial Procedure."[18] Because Title 28 "does not mention or specifically address actions before federal administrative agencies," FSA asserts that it does not apply here.[19] I reject this argument as contrary to the holding in *3M Company*, which specifically applies § 2462 to administrative proceedings for civil penalties within federal agencies.

Next, FSA argues that the purpose of statutes of limitations is to protect defendants so they are not subject to claims concerning evidence and witnesses which are unavailable due to the passage of time.[20] In this and other Clery Act cases, the argument goes, FSA puts institutions on notice in FPRDs that they may be subject to adverse administrative action and that they should retain their records.[21] Furthermore, FSA asserts that the Department has rejected the application of general statutes of limitations to departmental enforcement actions in past decisions.[22] Therefore, FSA asserts that the AJ erred by applying § 2462 in the present matter.

I reject these arguments in light of the court's holding in *3M Company*. None of FSA's assertions refute the reasoning used by the court, including its interpretation of the language in § 2462, nor does FSA point to any authority that would trump the court's decision.[23] I find the holding in *3M Company* clear and controlling in this case.

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[12] Decision, p. 3.
[13] 17 F.3d 1453, 1455 (D.C. Cir. 1994).
[14] *Id.* at 1456.
[15] *Id.* at 1455–57.
[16] *Id.* at 1457–59.
[17] *Id.* at 1462–63.
[18] FSA Brief, p. 8.
[19] *Id.*
[20] *Id.*, p. 9.
[21] *Id.*, pp. 9–11.
[22] *Id.*, p. 11.
[23] All of the cases FSA cites involve actions to recover funds, which are purely remedial and not punitive (and therefore not subject to § 2462). Further, none of these cases discuss § 2462 or the interpreting cases that make clear that the statute of limitations applies to proceedings for civil penalties and fines.

Based on this analysis, I hold that § 2462 applies to FSA's Clery Act fine proceeding in this matter.

B. Whether the Statute of Limitations Bars Imposition of Fines Against Lincoln

I now turn to the question whether § 2462 actually bars enforcement of certain fines against Lincoln. Based on § 2462 and the holding in *3M Company*, the deadline to commence a fine proceeding is five years from the date when the violation occurred that forms the basis of the fine.

An institution violating a federal statute by making misrepresentations in an annual filing to a federal agency would, for the purposes of § 2462, renew its violation by repeating those misrepresentations in a later annual filing.[24] In *SEC v. e-Smart*, a company made fraudulent misrepresentations in its 2005 and 2006 annual SEC filings.[25] The company asserted that the SEC's complaint related to the misrepresentations was time barred. The company asserted that it had made the same misrepresentations in earlier filings, thus starting the clock on the statute of limitations more than five years before the SEC filed its complaint.[26] In rejecting this defense, the court stated that it was "obviously not the case" that the company could "renew the misrepresentations year after year and quarter after quarter, into perpetuity" because "the SEC did not catch the falsehoods the first time they were filed."[27] Instead, the court held that each time the company made its yearly filing, it renewed its misrepresentations and "violated the statute anew."[28]

Further, during a proceeding, an agency may invoke annual filings in addition to those ones originally cited as justification for a penalty, so long as the additional annual filings contain "essentially the same misrepresentations" as what was originally cited.[29] In *e-Smart*, the SEC's initial complaint only identified the 2006 annual filing as the source of the company's violations.[30] Therefore, the company argued that further violations identified by the SEC in its amended complaint, derived from the 2005 annual filing, were time barred.[31] The court disagreed, holding that the 2005 and 2006 annual filings contained essentially the same misrepresentations, so the original complaint was sufficient notice to the company of the basis of its liability with regard to misrepresentations in both the 2005 and 2006 annual filings.[32]

In the case before me, FSA argues briefly that its FPRD is similar to a complaint filed to commence a penalty proceeding and, therefore, its Notice is merely an amended complaint.[33] Thus, the AJ should have used the date five years prior to issuance of the FPRD to calculate the statute of limitations deadline. However, FSA admits earlier in its brief that "[s]ince the FPRD

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[24] *SEC v. e-Smart*, 31 F. Supp. 3d 69, 88–89 (2014).
[25] *Id.* at 75.
[26] *Id.* at 88.
[27] *Id.*
[28] *Id.*
[29] *Id.* at 89.
[30] *Id.* at 88–89.
[31] *Id.* at 89.
[32] *Id.*
[33] FSA Brief, p. 13.

did not impose any financial liabilities, *Lincoln could not appeal the FPRD.*"[34] The FPRD did not commence a civil penalty proceeding, as envisioned in § 2462, and could not toll the statute of limitations. I reject FSA's assertion that the AJ should have based his calculation on the date of the FPRD.

Alternatively, FSA argues that the AJ should not have considered the violations time barred because they constituted "continuing violations."[35] FSA notes that the Clery Act requires institutions to provide crime statistics annually, but it must provide accurate information in its annual reports regarding each of the most recent three years.[36] Because Lincoln's ASR issued on October 1, 2009, contained information regarding crime in 2006 through 2008, FSA argues that each of Lincoln's violations occurring in those years was renewed for the purposes of § 2462.[37]

Lincoln responds that FSA's Notice purported to impose fines for violations in the years they actually occurred, not based on erroneous reporting in the 2009 ASR.[38] Lincoln asserts that FSA's present argument is a tacit admission that its actual cited violations are time barred, and "whether [FSA] could have charged the 2009 violation is irrelevant because it did not do so."[39] However, if Lincoln made "essentially the same misrepresentations" in multiple ASRs, FSA's citations in the Notice do not resolve the matter in light of the *e-Smart* decision.

The relevant questions are: 1) whether any misrepresentations or omissions in the 2006, 2007, and 2008 ASRs themselves constituted violations of the Clery Act; and 2) whether Lincoln made essentially the same misrepresentations or omissions in the 2009 ASR. Any violation that satisfies both of the above elements would be renewed under the holding in *e-Smart* for the purposes of § 2462. Unfortunately, I am unable to perform this analysis because the 2006, 2007, and 2009 ASRs do not appear in the record before me. Therefore, I must set aside the decision with regard to the violations the AJ dismissed as time barred and remand the case to the AJ for further proceedings.

The AJ can obtain the ASRs in question and any other evidence he deems necessary, then perform an analysis conforming to the holding in *e-Smart* to determine whether Lincoln renewed any of these violations. For any violation so renewed, the AJ should evaluate whether FSA properly supported the amount of the fine with a rational explanation, or in the absence of such an explanation, undertake his own analysis to determine the correct amount.

II. Appropriateness of FSA Fine Amounts

The remaining issue is whether the AJ erred by reducing the fine amount for each of the last two violations from $27,500 to $10,000. FSA has "wide discretion" to set an amount for a fine derived from a Clery Act violation, but FSA must consider, among other things, the gravity

[34] *Id.*, p. 5 (emphasis added).
[35] *Id.*, p. 12.
[36] *Id.* pp. 12–13.
[37] *Id.*, p. 13; Transcript, p. 38.
[38] Lincoln Brief, p. 4.
[39] *Id.*

of the violation and size of the institution.[40] Thus, FSA must consider the "relative degree of the seriousness of the violation compared to other violations, as well as the relative nature and extent of the violation itself."[41] FSA must provide a rational explanation for the amount of a fine.[42] To avoid acting in an arbitrary and capricious manner, FSA must set similar fines in very similar cases, or must demonstrate a material difference between the circumstances of the different cases.[43]

The two violations in question are: 1) "failure to include a statement of possible sanctions in disciplinary actions involving sex offenses in Lincoln's 2009 ASR" and 2) "failure to include the classification for reported hate crimes in the 2009 ASR."[44] The maximum fine per violation of the Clery Act is $27,500.[45] The AJ held that, although FSA has discretion to determine the amount of the fine for each violation, FSA must demonstrate that it considered the gravity of each violation and Lincoln's level of culpability when determining the amount of the fine.[46] Finding that FSA failed to undertake such consideration, the AJ considered these matters himself. The AJ found that the nature of the violations was far below the seriousness of what would justify the maximum fine amount.[47]

FSA argues that the AJ erred in how he approached the question of how to calculate Lincoln's fines. FSA asserts that the correct approach is to assume that all parts of the Clery Act serve important objectives and all violations presumptively justify the maximum fine amount.[48] Then, FSA "looks at the facts and determines if there is a reason to fine less than the maximum established by Congress."[49] FSA argues that the record in this case does not contain any evidence that would mitigate Lincoln's fine amounts.[50]

Lincoln argues that FSA cannot justify the maximum fine because the fine will be enforced many years after the violations occurred.[51] Because Lincoln's violations caused "no obvious, immediate harm" and "no actual harms have surfaced for...years," imposition of the maximum fine cannot serve a legitimate interest.[52] Lincoln also argues that the total fine amount is too severe in light of Lincoln's budget.[53] Finally, Lincoln suggests that a maximum fine should only be levied when an institution is "guilty of the worst possible conduct," which is not

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[40] 34 C.F.R. § 668.92; *In the Matter of Virginia Polytechnic Institute and State University*, Dkt. No. 11-30-SF, U.S. Dep't of Educ. (Jan. 3, 2014) (Decision of the Secretary), p. 6 (hereinafter, "*Virginia Tech*").
[41] *Virginia Tech*, p. 6.
[42] *Id.* ("the Clery Act allows for wide discretion in the imposition of a fine . . . . However, whatever fine is proposed, to be supportable upon review, must be determined to be reasonable under the circumstances and supported by a rational explanation for the basis of the amount of the fine").
[43] *Id.*
[44] Decision, p. 5.
[45] 34 C.F.R. § 668.84(a)(1). The regulation applies to any fine imposed for a violation of a statutory provision applicable to Title IV of the Higher Education Act.
[46] Decision, pp. 5–6.
[47] *Id.*, p. 7.
[48] FSA Brief, p. 31.
[49] *Id.*
[50] *Id.*
[51] Lincoln Brief, p. 9.
[52] *Id.*
[53] *Id.*, pp. 9–10.

the case here.[54] Rather, Lincoln asserts that FSA believes the maximum fine allowed under the Clery Act is too low, so FSA frequently assesses the maximum fine with the tacit conviction that it is only a small percentage of the punishment deserved by violating institutions.[55]

FSA's theory of how to calculate a Clery Act violation fine amount is contrary to the regulations and past decisions. FSA has an affirmative obligation to consider the gravity of a violation and size of the institution *before* setting the amount of the fine, not merely to mitigate a fine down from the $27,500 per-violation maximum.[56] FSA may not simply assert that every violation warrants the maximum fine without evaluating the relevant factors. At the same time, I disagree with Lincoln's assertions that FSA cannot assess the statutory maximum fine unless it finds obvious harm stemming from a violation or "the worst possible conduct." Rather, FSA simply must provide a rational explanation for the amount of each fine. I agree with the AJ's decision to undertake an analysis of the circumstances to determine the appropriate amount of the fine.

I will now consider the AJ's reasoning based on the facts in the record to determine whether to modify the amount of the fine. First, I will consider the violation based on Lincoln's failure to include a statement of possible sanctions in disciplinary actions involving sex offenses in the 2009 ASR. FSA assessed the maximum fine for this violation based on its conclusion that it is "a serious violation because current students/employees and prospective students/employees cannot be expected to know the institution's sanctions associated with sex offense when that information has not been provided to them."[57]

I agree with FSA's assessment. On-campus sexual assault is a serious problem – women at our nation's colleges and universities are at particular risk of being sexually assaulted.[58] Past failure to condemn sexual assault as loudly as is warranted has had a chilling effect on reporting of crimes.[59] This "culture of silence" in part arose from victims seeking justice, but seeing little-to-no punishment assessed to perpetrators in closed, school-run proceedings.[60]

Lack of prosecution for these crimes is especially harmful. A January 2014 report found that "[t]o reduce rape and sexual assault, offenders must be held accountable. ...perpetrators of sexual assault are commonly repeat offenders.... The strongest predictor of sexual assault is a previous sexual assault, which makes rape a particularly crucial crime to prosecute."[61] The current administration has aggressively targeted on-campus sexual assault with the intent of

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[54] *Id.*, p. 10.
[55] *Id.*
[56] *See* 34 C.F.R. § 668.92(a).
[57] Notice, p. 11.
[58] THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 2, 33, *available at* https://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf.
[59] Tanya Somanader, *President Obama Launches the "It's On Us" Campaign to End Sexual Assault on Campus*, THE WHITE HOUSE (Sept. 19, 2014 2:40 PM), https://www.whitehouse.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus.
[60] *How College Campuses Handle Sexual Assaults*, NPR.ORG (Dec. 3, 2009 4:12 PM), http://www.npr.org/templates/story/story.php?storyId=121057891.
[61] THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, supra note 58, p. 22.

making our campuses safer.[62] Since 2011, the administration has promoted better enforcement of the existing law, and "student activists are increasingly holding schools more accountable."[63]

Lincoln's failure to provide a statement of possible sanctions for sex offenses in the 2009 ASR was a violation of the Clery Act. More than that, it contributed to the culture of silence that dissuades victims of sexual assault from reporting crimes. The failure to publish a statement of possible sanctions, a provision intended to encourage the reporting of crimes, is on par with failing to report a crime itself. I find this violation serious enough to warrant the maximum fine and reinstate the fine amount of $27,500 for this violation.

Next, I will consider the violation based on Lincoln's failure to include a classification for hate crimes in its 2009 ASR. The Clery Act requires institutions to report in their ASRs a variety of serious crimes by category of prejudice.[64] Lincoln initially failed to provide any hate crime data in its 2009 ASR.[65] Lincoln informed the Department that its 2009 ASR would be revised to address hate crimes, stating that no hate crimes were reported in 2006 through 2008.[66] Lincoln subsequently issued its revised 2009 ASR in which it categorized one robbery in 2008 as a hate crime.[67] In his analysis, the AJ found this failure to properly categorize an already-reported crime to be insufficiently serious to warrant the maximum fine.[68]

However, I find FSA's justification convincing with regard to this violation. The failure to even address hate crimes in an ASR, as specifically mandated by the Clery Act, is a serious violation.[69] Lincoln's subsequent omission of the fact that a hate crime occurred in a communication with the Department is an aggravating circumstance. Based on these facts, I will restore FSA's assessment of the maximum fine of $27,500 for this violation.

III. Conclusion

Based on the foregoing analysis, I will set aside and remand the case with regard to the violations found to be time barred by the AJ. On remand, the AJ shall obtain the 2006, 2007, and 2009 ASRs, and any other evidence he deems relevant, then undertake an analysis under *e-Smart* to determine whether Lincoln renewed any violations for the purposes of § 2462. I will affirm as modified the AJ's ruling on the other two violations, assessing a total fine of $55,000.

ORDER

ACCORDINGLY, the Decision by Administrative Judge Ernest Canellos is HEREBY AFFIRMED AS MODIFIED IN PART, as described above, and SET ASIDE AND REMANDED IN PART for further proceedings.

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[62] *Id.*, pp. 3–5.
[63] *Id.*, p. 25.
[64] Notice, pp. 9–10
[65] *Id.*
[66] *Id.* p. 10.
[67] *Id.*
[68] Decision, p. 7.
[69] *See* 20 U.S.C. § 1092(f)(7).

So ordered this 25th day of April 2016.

John B. King, Jr.

Washington, D.C.

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