UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
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In the Matter of

Woodland Community College,

Respondent.

Docket No. 22-53-SF

Federal Student Aid Proceeding

OPE-ID: 04143800

PRCN: 201930930044

Appearances: Eileen O'Hare-Anderson, Esq., Meredith Karash, Esq., and Cindy Allen, Esq., Liebert Cassidy Whitmore, for Respondent Woodland Community College

Alexandra Sweeney, Esq., Office of the General Counsel, for U.S. Department of Education, Federal Student Aid Office

Before: Elizabeth Figueroa, Chief Administrative Law Judge

INITIAL DECISION

I. Introduction

A. Summary of this Decision

This Initial Decision upholds the fine amounts that the United States Department of Education's (Department) Federal Student Aid office (FSA) assessed Respondent Woodland Community College (WCC) in the Notice of Intent to Fine issued on September 26, 2022, which fine amounts WCC has challenged in this matter. The fines assessed in the total amount of $174,500 are for violations of the Clery Act and Drug Free Schools and Communities Act that occurred in 2017 and 2018. The fine amounts are appropriate for the gravity of the violations and WCC's size and, therefore, are upheld.

B. Procedural History of this Case

On October 11, 2022, Respondent Woodland Community College (Respondent or WCC) timely filed a request for review with the Department's Administrative Actions and Appeals Service Group (AAASG). 20 U.S.C. §1094(b)(1); 34 C.F.R. §668.113(b). The request for review challenges the fine amount of $174,500 sought by the Department in the Notice of Intent to Fine issued by the Department's Federal Student Aid (FSA) office on September 26, 2022, for purported violations of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act in Section 485(f) of the Higher Education Act (HEA), 20 U.S.C. § 1092(f) (Clery Act), as reflected in 34 C.F.R. §§ 668.41 and 668.46, and the Drug Free Schools and Communities Act Amendments of 1989 (DFSCA), as reflected in Section 1213 of the HEA, 20 U.S.C. §1145g and 34 C.F.R. Part 86.

By Order Governing Proceeding issued on October 20, 2022, the Office of Hearings and Appeals (OHA) set deadlines by which the parties' briefs, including any reply brief, and exhibits, were to be filed. An Amended Order Governing Proceeding was issued on November 1, 2022, by which a correction to the previously issued Order Governing Proceeding was made, but the deadlines set by the Order Governing Proceeding remained the same.

On December 7, 2022, FSA filed a brief in which it asserts that the proposed fines it seeks from WCC for its failures to comply with the Clery Act and DFSCA are proper and are consistent with previous Secretary of Education (Secretary) decisions. FSA filed ED Exhibits (Exhs.) 1 through 4 with its brief. On January 11, 2023, WCC responded with a brief in which it concedes that it violated provisions of the Clery Act and the DFSCA, outlines reasons that the proposed fines are disproportionate to its size as well as the gravity of its violations, asserts that the proposed fines should be reduced based on mitigating factors, and argues that it is immune from imposition of the fines. WCC filed Exhs. R-1 through R-3 with its brief. On January 31, 2023, FSA filed a reply brief, together with ED Exh. 5.

On February 3, 2023, this administrative tribunal issued an Order that, among other things, required FSA to re-file, by February 20, 2023, ED Exh. 3-013, or clarify in writing that the exhibit was intentionally blank and also allowed FSA to file, by February 20, 2023, the Program Participation Agreement in effect at the time of the violations at issue in this case. On February 8, 2023, FSA filed a response to the Order, clarifying that ED Exh. 3-103 is a blank page, and also filed ED Exh. 6, the Program Participation Agreement in effect in 2017 and 2018.

The issues having been fully briefed and the administrative record having closed on February 20, 2023, this matter is ripe for decision.

II. Jurisdiction

On September 26, 2022, FSA sent the Notice of Intent to Fine to WCC, informing WCC of its intent to impose the fine on October 17, 2022, unless a request for hearing was filed by WCC by then. By request for review dated October 6, 2022, WCC requested a hearing concerning the Notice of Intent to Fine, pursuant to 20 U.S.C. § 1094(b) and 34 C.F.R. § 668.84(b)(1)(iii). WCC's request for hearing was received by AAASG, on October 11, 2022, before the October 17, 2022,

date of fine imposition and, therefore, was timely filed as required by 34 C.F.R. § 668.84(b)(1)(iii). OHA has authority to hear this case. 34 C.F.R. § 668.84(b)(3). Jurisdiction is established.

III. Findings of Fact

A. Background and size of institution

WCC is a public institution of higher education, located in Woodland, California, and operated by the Yuba Community College District. ED Exh. 1-014.

With respect to the number of student enrollees, the Yuba Community College District is small compared to the majority of California Community College Districts. Exhs. R-2 and R-3. Between the school years from 2015-2016 to 2021-2022, WCC's full-time equivalent student enrollees ranged in number from 1,995 to 2,063. WCC's Responsive Brief (WCC Brief) at 3. The number of WCC's full-time equivalent student enrollees is generally about thirty percent of the total of Yuba Community College District's student enrollees. WCC Brief at 2; Exhs. R-2 and R-3. The number of WCC's full-time equivalent student enrollees is less than that of the majority of California community colleges. *Id*.

WCC entered into a Program Participation Agreement with the Department to participate in federal student financial aid programs under Title IV of the Higher Education Act (HEA). ED Exh. 6. Upon signing the Program Participation Agreement in March 2017, WCC certified that it would comply with Clery Act and DFSCA requirements. ED Exhs. 6-001, 008, 013.

For the school award year 2020-2021, WCC received Title IV funds in the following amounts: Federal Pell Grants in the amount of either $2,709,976, according to FSA, or $2,692,986.40, according to WCC; Federal Direct Loans in the amount of $48,034; and, Campus-Based Funds in the amount of $291,139. Notice of Intent to Fine at 5; WCC Brief at 3.

B. The undisputed facts concerning the violations

The facts underlying WCC's violations of the Clery Act and DFSCA are undisputed and as follows:

The Department conducted a program review at WCC from June 17 – 20, 2019. ED Exhs. 1-014 and 2-001. During the program review, the reviewers requested evidence that WCC had produced, published and distributed Annual Security Reports (ASRs) in 2017 and 2018. ED Exhs. 1-020 and 2-017. The reviewers found that although WCC had created the ASRs and posted them on its website in both calendar years, it had not distributed notices to students and employees that included statements of the reports' availability, the exact electronic address at which the report was posted, a brief description of the reports' contents, and statements that the institution would provide a paper copy upon request, in accordance with 34 C.F.R. §§ 668.41(c)(2), 668.41(e)(2), and 668.41(e)(3). *Id*. When the reviewers interviewed WCC's Chief of Police and the Immediate Supervisor Vice Chancellor on site, both the Chief of Police and Vice Chancellor confirmed that WCC had not distributed an email to the campus community alerting them of the existence of the

ASRs posted on WCC's website. *Id*.

Also during the program review, the reviewers tested WCC's compliance with the DFSCA and found that WCC failed to produce any drug and alcohol abuse prevention program (DAAPP) materials in 2017 and 2018. ED Exhs. 1-021 through 1-025 and 2-018 through 2-021. During the program review, WCC's Financial Aid Director stated that the school had never produced any DAAPP materials. ED Exhs. 1-022 and 2-019. On July 3, 2019, after the program review was completed, upon FSA's request for more information, WCC's Dean of Students stated that WCC had not distributed a DAAPP in 2017 and 2018. ED Exh. 4. The reviewers also found that WCC failed to comply with the requirement of a biennial review of the DAAPP because the school did not have a program in place to review. ED Exhs. 1-022 and 2-019.

C. The Program Review Report

On October 1, 2019, the program reviewers issued a Program Review Report (PRR), based upon the on-site program review it had conducted in June 2019 . ED Exh. 2. In the PRR, FSA found that WCC had failed to properly distribute the 2017 and 2017 ASRs, had failed to produce and distribute a DAAPP in calendar years 2017 and 2018, and had failed to conduct a biennial review of its DAAPP in accordance with federal regulations. *Id*.

WCC responded to the PRR on December 6, 2019. ED Exh. 3. In its response, WDD did not dispute the findings but provided information regarding actions it had taken in response to the findings. ED Exhs. 3-011 and 3-014.

D. Actions taken by WCC following issuance of the Program Review Report

The facts concerning actions taken by WCC after FSA issued the PRR are also undisputed and as follows:

Sometime between June 2019, when FSA reviewers conducted the on-site review at WCC and December 6, 2019, WCC notified students, faculty, and staff that it had updated how WCC shares safety incidents that occur on campus. WCC Brief at 5; ED Exh. 3-011; Exh. R 1 at 106-160. Additionally, WCC developed an automatic notification system by which students and employees would automatically be distributed notices to students and employees. The notices would include statements of the reports' availability, the exact electronic address at which the report was posted, a brief description of the reports' contents, and statements that the institution would provide a paper copy upon request. *Id*.

Additionally, sometime between June 2019, when Department reviewers conducted an on-site review at WCC, and December 6, 2019, WCC adopted a DAAPP. Exh. R 3-012, R-1 at 161-191. WCC emailed the DAAPP to all students, faculty, and staff and also posted it to its website. *Id*.

On December 6, 2019, WCC wrote to FSA regarding the actions it had taken. WCC Brief at 2; ED Exh. 3. WCC informed FSA about the notifications it had sent to students, faculty and

staff concerning updates on how WCC would share safety incidents that occur on campus. *Id*. WCC also informed FSA about the automatic notification system it had put into place to inform students and employees about the availability of ASR reports, the exact electronic address at which reports are posted, a brief description of the reports' contents, and statements that the institution would provide a paper copy upon request. *Id*.

Also on December 6, 2019, WCC informed FSA in writing that it had both adopted a DAAPP and that it had informed all its students, faculty, and staff of the DAAPP. *Id*. at 011. Additionally, WCC informed FSA that it would provide a copy of the DAAPP to new students upon their enrollment and to new employees upon their onboarding. *Id*.

E. The Final Program Review Determination

On March 9, 2021, after reviewing WCC's response, FSA issued a Final Program Review Determination (FPRD). ED Exh. 1-012 through 1-037. The FPRD restated the findings of the PRR and notified WCC that the results of the review would be referred to another office in the Department for consideration of possible administrative action pursuant to 34 C.F.R. Part 668, Subpart G. ED Exh. 1-009.

IV. The Notice of Intent to Fine

On September 26, 2022, FSA issued the Notice of Intent to Fine to WCC, informing WCC of its intention to impose fines in the total amount of $174,500, for violations of the Clery Act and DFSCA. In the Notice of Intent to Fine, FSA specified the proposed fine amount for each violation: $40,000 for failure to properly distribute the 2017 Annual Security Report (ASR) to students and employees by October 17, 2017; $40,000 for failure to properly distribute the 2018 ASR to students and employees by October 17, 2018; $45,000 for failure to prepare and properly distribute to students and employees a comprehensive DAAPP in 2017; $45,000 for failure to prepare and properly distribute to students and employees a DAAPP in 2018; and, $4,500 for failure to conduct a subsequent biennial review to evaluate the effectiveness of its DAAPP.

V. The Parties' Arguments

FSA argues that it has demonstrated that WCC failed to comply with requirements of the Clery Act and the DFSCA by failing to properly distribute the 2017 ASR to students and employees by October 17, 2017; failing to properly distribute the 2018 ASR to students and employees by October 17, 2018; failing to prepare and properly distribute to students and employees a comprehensive DAAPP in 2017; failing to prepare and properly distribute to students and employees a DAAPP in 2018; and, failing to conduct a subsequent biennial review to evaluate the effectiveness of its DAAPP. FSA also argues that the fine amounts it seeks to impose, which total $174,500, are consistent with those imposed against large institutions because they are well below the $62,689 maximum fine amounts allowable for each violation and are based on the size of WCC and the gravity of the violations.

WCC acknowledges that it violated provisions of the Clery Act and DFSCA. WCC Brief

at 1 – 2. Rather, WCC requests that the proposed fine amounts be reduced. In support of its request for reduction of the proposed fine amounts, WCC contends that it is immune from fines, that its violations were unintentional, that it abated the violations on its own volition before FSA completed its review or sought the proposed fines, that it is a small institution, and also that the proposed fine amounts are disproportionate to the gravity of the violations.

VI. Issues Presented

Based on the challenges to the Notice of Intent to Fine that WCC advanced in its hearing request as well as the arguments made by the parties in their briefs, the issues presented are as follows:

1. Is WCC immune from fines imposed under the Clery Act and DFSCA because it is a public entity under California Code § 818 and therefore cannot be held liable for damages imposed primarily for the sake of example and punishment?

2. Are the fines proposed by FSA for WCC's violations of the Clery Act and DFSCA appropriate to the size of WCC under 20 U.S.C. § 1094(c)(3)(B)(i) and 34 C.F.R. §§ 668.93(a)(1)(i) and (a)(2)?

3. Are the fines proposed by FSA for WCC's violations of the Clery Act and DFSCA appropriate for the gravity of the violations under 20 U.S.C. § 1094(c)(3)(B)(i) and 34 C.F.R. §§ 668.93(a)(1)(i) and (a)(2)?

4. Have any mitigating factors, including corrective actions taken by WCC, concerning WCC's violations of the Clery Act and DFSCA been properly considered in assessing fines and the gravity of the violations under 20 U.S.C. § 1094(c)(3)(B)(i) and 34 C.F.R. §§ 668.93(a)(1)(i) and (a)(2)?

VII. Discussion and Conclusions of Law

The four issues raised by the parties concerning WCC's immunity from the proposed fines, whether the proposed fines are appropriate to the size of WCC and the gravity of the violations, and whether any mitigating factors have been properly considered in determining the fine amounts are addressed, in turn, below.

A. Immunity from fines

Because immunity deprives a court of subject matter jurisdiction, the first of the four issues raised in this case, whether WCC is immune from imposition of the fines FSA seeks to impose, must be addressed as a threshold matter. *See*, *e.g.*, *Gonzalez v. United States*, 814 F.3d 1022 (9th Cir. 2016).

WCC argues that it is immune from FSA's fine action under California Government Code

§ 818 based on its designation as a "public entity" under California Government Code § 818, which extends immunity from certain damages to public entities. In opposition, FSA asserts that WCC agreed to comply with the terms of the Program Participation Agreement, which requires compliance with requirements of the Clery Act and DFSCA, and WCC's status as a public entity does not extend to this context.

California Government Code § 818 provides as follows:

> Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant.

On this record, it is not clear whether WCC is a public entity within the meaning of CA Gov Code § 818. "Public entity" includes the state, the Regents of the University of California, the Trustees of the California State University and the California State University, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State. CA Gov Code § 811.2. WCC states that it is a "small public community college in northern California operated by the Yuba Community College District," WCC Brief at 1, but that alone, without more, does not bring WCC within the scope of the public entities specified in § 811.2.

Further, WCC's reliance on § 818 to confer immunity on it from fines for its violations of the Clery Act and DFSCA is not otherwise supported. Section 818 was enacted to eliminate public entity liability based upon common law tort claims. *Simonian v. Fowler Unified School Dist*., 473 F. Supp. 2d 1065 (E.D. Cal. 2007). In other words, the immunity provided in § 818 to public entities covers liability for injuries that would have arisen from common law tort claims. CA Gov Code § 815. Injuries from which public entities are immunized are death, injury to a person, damage to or loss of property, or any other injury that a person might suffer to his person, reputation, character, feelings or estate. CA Gov Code § 810.8. Section 818's applicability to tort-based claims is illustrated in the case cited by WCC, *United Nat. Maintenance, Inc. v. San Diego Convention Center, Inc.*, 766 F.3d 1002 (9th Cir. 2014). There, the Ninth Circuit found the city's convention center commission was a public entity and decided that it could not be held liable for intentional interference with a contractual relationship, a tort-based action. FSA's action here involves fines for WCC's having run afoul of its promise in the Program Participation Agreement to comply with requirements of the Clery Act and DFSCA and their implementing regulations, neither of which are tort-based injuries or those identified in §§ 810.8 and 815 for which public entities are conferred with immunity under § 818.

For these reasons, WCC is not immune under § 818 from any fines assessed in this action, and, therefore, this has the authority to exercise jurisdiction over this proceeding.

B. The Violations

1. Clery Act Violations

Congress's intent in enacting the Clery Act included the goal of providing campus communities with sufficient information to avoid becoming future victims of campus crime. 20 U.S.C. § 1092(f). The Clery Act mandates that all colleges and universities that accept federal funding must notify the constituent campus communities – students, faculty, and employees – when certain crimes are brought to their attention. *Id*. The goal of the notification is to protect members of the constituent communities by "aid(ing) in the prevention of similar occurrences." *Id*. § 1092(f)(3).

To that end, institutions that participate in Title IV, HEA Programs must prepare, publish, and distribute an Annual Security Report (ASR) by October 1 of each year. 34 C.F.R. § 668.41. The ASR must include, among other things, a description of the institution's campus security policies in specific areas. 34 C.F.R. § 668.46(b). Crimes that must be reported include criminal homicide (murder and manslaughter), sex offenses (rape, fondling, incest, statutory rape), robbery, aggravated assault, burglary, motor vehicle theft, arson, arrests for liquor law violations, drug law violations, illegal weapons possession. 34 C.F.R. § 668.46(c)(1). Additionally, the ASR must report statistics for the three most recent calendar years concerning the occurrence of certain crimes on campus, in or on certain non-campus buildings or property, and on public property. 34 C.F.R. § 668.46(c).

The Clery Act requires that institutions distribute, by October 1 of each year, to all enrolled students and current employees its annual security report through appropriate publications and mailings, including—

(i) Direct mailing to each individual through the U.S. Postal Service, campus mail, or electronic mail;

(ii) A publication or publications provided directly to each individual; or

(iii) Posting on an Internet Web site or an Intranet Web site, subject to paragraph (e)(2) and (3) of this section.

34 C.F.R. § 668.41(e).

As relevant to the Clery Act violations in this case, an institution that chooses to distribute its annual security report to enrolled students and current employees by posting the disclosure or disclosures on an Internet Web site or an Intranet Web site must distribute to all enrolled students and current employees a notice of the availability of the information required to be disclosed. 34 C.F.R. § 668.41(c)(1). The notice must list and briefly describe the information and tell the student or employee how to obtain the information and must include the exact electronic address at which the information is posted and statement that the institution will provide a paper copy of the information on request. 34 C.F.R. §§ 668.41(c)(1) and (c)(2); 668.41(e)(2) and (e)(3).

With respect to prospective students and prospective employees, the institution must provide a notice to prospective students and prospective employees that includes a statement of the ASR's availability, a description of its contents, and an opportunity to request a copy; must

provide its annual security report, upon request, to a prospective student or prospective employee. If the institution chooses to provide either its annual security report to prospective students and prospective employees by posting the disclosure on an Internet Web site, the notice must include the exact electronic address at which the report is posted, a brief description of the report, and a statement that the institution will provide a paper copy of the report upon request. 34 C.F.R. § 668.41(c)(4).

WCC concedes that it violated the Clery Act in calendar years 2017 and 2018, by failing to properly distribute ASRs to students and employees. During both of those calendar years, WCC posted the 2017 and 2018 ASRs on its website. However, WCC failed to provide a notice to students and employees, including a statement of the reports' availability, the exact electronic address at which the report was posted, a brief description of the report's contents, and a statement that the institution would provide a paper copy of the reports upon request as required by 34 C.F.R. §§ 668.41(c)(2), (e)(2) and (e)(3).

2. DFSCA Violations

The Drug-Free Schools and Communities Act Amendments of 1989 (DFSCA), the requirements of which were later placed in the Department's regulations, requires institutions to adopt and implement a drug and alcohol prevention program (DAAPP) for students and employees. 20 U.S.C. 1145g; 34 C.F.R. § 86.100.

The institution's DAAPP must, at a minimum, include the following:

> (a) The annual distribution in writing to each employee, and to each student who is taking one or more classes for any type of academic credit except for continuing education units, regardless of the length of the student's program of study, of—
> (1) Standards of conduct that clearly prohibit, at a minimum, the unlawful possession, use, or distribution of illicit drugs and alcohol by students and employees on its property or as part of any of its activities;
> (2) A description of the applicable legal sanctions under local, State, or Federal law for the unlawful possession or distribution of illicit drugs and alcohol;
> (3) A description of the health risks associated with the use of illicit drugs and the abuse of alcohol;
> (4) A description of any drug or alcohol counseling, treatment, or rehabilitation or re-entry programs that are available to employees or students; and
> (5) A clear statement that the IHE will impose disciplinary sanctions on students and employees (consistent with local, State, and Federal law), and a description of those sanctions, up to and including expulsion or termination of employment and referral for prosecution, for violations of the standards of conduct required by paragraph (a)(1) of this section. For the purpose of this section, a disciplinary sanction may include the completion of an appropriate rehabilitation program.

34 C.F.R. § 86.100.

Additionally, the institution must conduct a biennial review of its DAAPP to determine its effectiveness and implement changes to the program if they are needed and to ensure that the disciplinary sanctions described in paragraph (a)(5) of this section are consistently enforced. 34 C.F.R. §§ 86.100(b)(1) and (2).

WCC concedes that it violated the DFSCA in calendar years 2017 and 2018, by failing to adopt and implement a DAAPP for students and employees as required by 34 C.F.R. § 86.100. failed to produce any DAAPP materials in 2017 and 2018. ED Exhs. 1-021 through 1-025 and 2-018 through 2-021. During the program review, WCC's Financial Aid Director stated that the school had never produced any DAAPP materials. ED Exhs. 1-022 and 2-019. On July 3, 2019, after the program review was completed, upon FSA's request for more information, WCC's Dean of Students stated that WCC had not distributed a DAAPP in 2017 and 2018. ED Exh. 4. During both of those calendar years, WCC neither had nor distributed a DAAPP. WCC also failed to conduct a biennial review of its DAAPP, as required by 34 C.F.R. §§ 86.100(b)(1) and (2), because it did not have a program in place to review in the first instance.

C. Fines for the violations

FSA must set similar fines in very similar cases, or must demonstrate a material difference between the circumstances of the different cases. *In re Lincoln University*, Dkt. No. 13-68-SF, U.S. Dep't of Educ. (Decision of the Secretary) (Apr. 25, 2016).

Here, FSA has proposed a total fine amount of $174,500, comprised of the following fines for each violation:

Failure to properly distribute the 2017 ASR:	$40,000
Failure to properly distribute the 2018 ASR:	$40,000
Failure to prepare and properly distribute a DAAPP in 2017:	$40,000
Failure to prepare and properly distribute a DAAPP in 2018:	$40,000
Failure to conduct a biennial review of the DAAPP	$4,500

The proposed fine amounts are less than the maximum fine amount of $62,689 allowed for each violation, 34 C.F.R. § 668.84(a)(1), and, based on a review of cases contained in OHA's electronic case management system, are similar to the fine amounts FSA assessed in similar cases

filed with OHA during the past two years.[1]

The maximum allowable penalty for an institution's violation of Title IV of the Higher Education Act or its implementing regulations for penalties assessed after April 20, 2022, whose violations occurred after November 2, 2015 is $62,689. 87 Fed. Reg. 23450 (Apr. 20, 2022).[2]

Each violation of the Clery Act and DFSCA warrants imposition of a fine. *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. In determining the amount of a fine to be assessed to an institution, FSA has wide discretion, but must consider, among other things, (1) the appropriateness of the penalty to the size of the institution, and (2) the gravity of the violation. 20 U.S.C. § 1094(c)(3)(B)(i); 34 C.F.R. §§ 668.93(a)(1)(i) and (a)(2); *In re Virginia Polytechnic Institute and State University*, Dkt. 11-30-SF, U.S. Dep't of Educ. (Decision of the Secretary) (Jan. 3, 2014) at 6. Further, FSA has an affirmative obligation to consider the gravity of a violation and the size of the institution before setting the fine amount. *In re Lincoln University*, Dkt. No. 13-68-SF at 7. In its determination, FSA must provide a rational explanation, based on these factors, for the fine amount. *Id*.

In determining the fine amount, the gravity of the violation must first be considered. *In re Bnai Arugath Habosem*, Dkt. No. 92-131-ST, U.S. Dep't of Educ. (Decision of the Secretary) (Aug. 24, 1993) at 2. The gravity of an institution's violation reflects the relative degree of the seriousness of the violation, as well as the relative nature and extent of the violation. *In re Tarleton State University*, Dkt. No. 09-56-SF. Corrective action taken and cooperation by an institution can be taken into account and considered a mitigating factor when determining the gravity of the violation. *In re Bnai Arugath Habosem*, Dkt. No. 92-131-ST at 2.

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[1] In *In re Bacone College*, Dkt. No. 21-42-SF, FSA assessed a small institution $15, 000 for failing to distribute its ASR properly, $15,000 for not having a DAAPP, and $3,000 for failing to conduct a biennial review. In *In re Southern Utah University*, Docket No. 21-43-SF, FSA assessed a large institution $59,017 for failing to distribute its ASR properly, $33,000 for failing to distribute its DAAPP, and $3,000 for failing to conduct a biennial review. In *In re Baptist Bible College,* Dkt. No. 22-52-SF, FSA assessed a small institution $20,000 for failing to prepare, publish and distribute a proper ASR, $15,000 for failing to have a DAAPP, and $1,000 for failing to conduct a biennial review. In *In re Samford University*, Dkt. No. 22-56-SF, FSA assessed a large institution $45,000 for failing to properly and timely distribute its ASR. In *In re Northern Oklahoma College*, Dkt., 22-57-SF, FSA assessed a large institution $40,000 for failing to properly distribute its ASR by October 1, $30,000 for failing to prepare and distribute a complete DAAPP to students and employees, and $4,500 for failing to conduct a biennial review. In *In re Coker University*, Dkt. No. 23-03-SF, FSA assessed a large institution $144,500 for multiple omissions in its ASR, $25,000 failing to properly distribute a complete DAAPP to students and employees, and $4,500 for failing to conduct a biennial review.

[2] The maximum allowable penalty of $25,000 set by Congress in 1986, 20 U.S.C. §1094(c)(3)(B), for penalties assessed after April 20, 2022, whose violations occurred after November 2, 2015, has been increased to the current amount of $62,689 through a series of adjustments, including the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note; the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, Sec. 701, 129 Stat. 599; and, annual inflation adjustments, 77 Fed. Reg. 60047 (Oct. 2, 2012), 81 Fed. 50321 (Aug. 1, 2016), 82 Fed. Reg. 18559 (Apr. 20, 2017), 83 Fed. Reg. 2062 (Jan. 15, 2018), 84 Fed. Reg. 971 (Feb. 1, 2019), 85 Fed. Reg. 2033 (Jan. 14, 2020), 86 Fed. Reg. 7974 (Feb. 3, 2021), and 87 Fed. Reg. 23450 (Apr. 20, 2022).

Here, in the Notice of Intent to Fine, FSA explained how it determined the gravity of the violations in assessing fine amounts. FSA determined that WCC's violations were serious because its failure to comply with the Clery Act resulted in students and employees not being properly provided policy statements and crime statistics that would have helped them make important personal safety decisions. Notice of Intent to Fine at 5 and 6. FSA also considered WCC's failure to properly distribute a DAAPP serious because that violation resulted in students and employees being denied drug and alcohol awareness information and not being made aware of the seriousness of violations of WCC's drug and alcohol standards of conduct. *Id.*

I agree with FSA's determinations concerning the seriousness of these violations. The gravity of WCC's failures to distribute a notice to students and employees, including providing statements of the ASRs' availability, the exact electronic address at which the reports were posted, a brief description of the reports' contents, and statements that the institution would provide a paper copy of the reports upon request as required by 34 C.F.R. §§ 668.41(c)(2), (e)(2) and (e)(3) are serious enough violations to come within the fine range proposed by FSA. Equally, the gravity of WCC's failure to adopt and implement a DAAPP and to later conduct a biennial review of the DAAPP are serious enough violations to warrant the fines proposed by FSA.

WCC's argument that the gravity of its Clery Act violations was not serious as compared to other violations such as inaccurate reporting of crime statistics and because it merely failed to distribute notices to students, faculty, and staff is not persuasive. Posting the ASRs to the website without notifying students and employees of their availability and location rendered them inaccessible or, at the very least, not readily accessible. WCC's corrective action of later developing an automated system to distribute notice to students and employees, in 2019, did not, by the very nature of the violations, cure WCC's failures to properly distribute notice for the 2017 and 2018 calendar years. For those two years, students and employees went without notice intended to help them make important personal safety decisions.

Similarly, failure to distribute DAAPPs and conduct a biennial review resulted in students and employees being denied drug and alcohol awareness information and not being made aware of the seriousness of violations of WCC's drug and alcohol standards of conduct. Additionally, failure to distribute DAAPPS and conduct a biennial review may have contributed to any increased drug and alcohol abuse as well as any increase in drug and alcohol-related violent crime.

WCC's arguments for reduced fines because the violations were unintentional and because it took prompt corrective measures also are not persuasive. The Secretary has previously rejected reductions in fines for violations of the Clery Act based on prompt actions to adopt corrective measures and lack of intent. *In re Washington State University*, Dkt. No. 11-56-SF, U.S. Dep't of Educ. (Decision of the Secretary and Order of Remand) (Aug. 29, 2012) at 4. In so ruling, the Secretary noted that mitigation should not be applied in a manner inconsistent with the Clery Act's goal of encouraging institutions to provide reports to students and employees who, as a result, may use the crime reports to avoid becoming victims of campus crime. *Id*.

Under the Program Participation Agreement it executed, WCC promised to comply with requirements of the Clery Act and DFSCA and thus implicitly agreed that it understood and would

knowingly abide by those requirements. The program participation agreement executed by the parties when an institution becomes eligible to receive Title IV funds incorporates these regulations and requirements, creating an additional contractual obligation for the institution to comply with the regulations. 34 C.F.R. § 668.14; *In re Institute of Medical Education*, Dkt. Nos. 12-59-SA and 13-58-SP, U.S. Dep't of Educ. (Decision of the Secretary) (Aug. 18, 2014). WCC's failure to abide by requirements of the Clery Act and DFSCA cannot be construed as unintentional as it had an obligation to understand and follow the requirements of both Acts.

The steps WCC took in 2019 to bring itself into compliance with the Clery Act and DFSCA following the on-site review but before FSA completed its review are commendable. But, as FSA explained in its Notice of Intent to Fine, WCC was required to properly provide the ASR by October 1 of each year. Any action WCC took in 2019 to correct its inactions in 2017 and 2018 was untimely and did not cure its failures in 2017 and 2018. Properly providing ASRs in a timely manner is intended to ensure that all students and employees have the necessary crime and safety information on a timely basis so that they can make informed decisions about their personal safety. Untimely provision of ASRs meant that students and employees went without that information during 2017 and 2018, and, consequently, could not use the reports to avoid becoming victims of crime. For the very reasons that the Clery Act was enacted --- providing campus communities with sufficient information to avoid becoming future victims of campus crime--- providing information contained in the ASR some two years late could not, for all practical purposes, correct the failures to properly and timely distribute the ASRs. In short, for calendar years 2017 and 2018, students and employees were not provided sufficient information to avoid becoming victims of campus crime and WCC's belatedly providing this information in 2019 could not and did not correct the violations of 2017 and 2018.

The proposed fine amounts, which approximate sixty-four percent of the maximum allowable fine amount for each violation, except the lower fine amount for failing to conduct a biennial review of the DAAPP, are reasonable in view of the serious nature of the violations, consistent with fine amounts FSA has sought in similar cases and will both punish the institution and deter similarly situated institutions from committing similar violations.

Once the gravity of a violation has been considered, the size of an institution must be considered to establish the fine amount. *In re Bnai Arugath Habosem*, Dkt. No. 92-131-ST at 2. The size of an institution is based on whether it is above or below the median funding levels for Title IV, HEA programs in which it participates. *Id.* at 2 – 3. In *Bnai Arugath Habosem*, the Secretary rejected the Administrative Law Judge's decision with respect to the size of the institution. In his decision, the ALJ had rejected FSA's determination that Bnai was a small institution. The ALJ then went on to determine the institution's size based on Title IV funding amounts in a limited number of cases within his experience. On review, the Secretary found the record insufficient to determine whether the institution was above or below the median funding levels for the Title IV programs in which it participated. The Secretary also determined that it was necessary to obtain FSA records for the award years in contention to decide the issue of the institution's size based on whether it was above or below median funding levels. Upon obtaining those records, the Secretary determined Bnai exceeded the median funding levels for Title IV funding and, therefore, was not a small institution.

Here, in the Notice of Intent, FSA explained that it determined that WCC is a large

institution because its funding levels for Title IV funding exceed the median funding levels. WCC received approximately $2,709,976 in Federal Pell Grant funds, $48,034 in Federal Direct Loan funds, and $291,139 in Campus-Based funds for the 2020-2021 award year. FSA determined that the latest information available indicates the median funding level for institutions participating in the Federal Pell Grant program is $1,582,746; in the Federal Direct Program is $2,294,028; and, in the Campus-Based program is $255,810. Comparing WCC's funding levels to median funding levels for other institutions, FSA concluded that WCC is a large institution because its funding levels for Federal Pell Grant and Campus-Based funds exceed the median funding levels for those programs. Notice of Intent at 5.

WCC does not dispute the amounts of the Title IV funds it received. Nor does WCC dispute that the latest information available as provided by FSA shows that the median funding level for institutions participating in the Federal Pell Grant program is $1,582,746; in the Federal Direct Program is $2,294,028; and, in the Campus-Based program is $255,810. Rather, WCC counters FSA's assertion that it is a large institution by asserting that it is a small institution based on the number of full-time equivalent students enrolled at WCC as compared to other institutions and as supported by data on student enrollments at other institutions. WCC's argument is not persuasive. The "size" of an institution is determined by whether it is above or below the median funding levels for Title IV, HEA programs in which it participates, not the number of students enrolled. *In re Bnai Arugath Habosem*, Dkt. No. 92-131-ST at 2 – 3.

Based on this record, I agree with FSA's conclusion that WCC is a large institution. In the last year for which complete figures were available, the median participation rates in the Federal Pell Grant and Campus-Based funds programs were $1,582,746 and $255,810, respectively. Fully fifty percent of the schools participating in the Pell Grant program received less than $1,582,746 and fifty percent received less than $255,810 for Campus-Based programs. Therefore, WCC's funding levels exceeded the median funding levels for both programs and WCC is considered a large institution for purposes for determining its size with respect to Title IV, HEA programs.

VIII. Conclusion and Order

For the reasons explained above, FSA has established that the proposed fine amounts it assessed Respondent WCC in the total amount of $174,500, for violations of the Clery Act and Drug Free Schools and Communities Act in 2017 and 2018, are appropriate to the gravity of the violations, including mitigating factors pointed out by WCC, and WCC's size. Accordingly, the fine amounts are **UPHELD**. WCC is hereby **ORDERED** to pay fines in the total amount of $174,500 to the United States Department of Education.

This Initial Decision automatically becomes the Secretary's Final Decision 30 days after it is issued and received by both parties unless, within that 30-day period, either party appeals the decision to the Secretary. 34 C.F.R. § 668.91(c)(1). Information on how to appeal this decision to the Secretary is contained on the next page of this decision.

Dated: March 13, 2023

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Elizabeth Figueroa
Chief Administrative Law Judge

NOTICE OF DECISION AND APPEAL RIGHTS-
SUBPART G PROCEEDING

This is the initial decision of the hearing official pursuant to 34 C.F.R. § 668.91. The regulation does not authorize motions for reconsideration. The following language summarizes a party's right to appeal this decision as set forth in 34 C.F.R. § 668.91(c)(2).

An appeal to the Secretary shall be in writing and explain why this decision should be overturned or modified. A party appealing the decision may submit proposed findings of fact or conclusions of law to the Secretary. If a party submits proposed findings of fact, then the findings must be supported by admissible evidence that is already in the record, matters that may be given official notice, or stipulations of the parties. Neither party may introduce new evidence on appeal. An appeal must be filed within 30 days from receipt of this notice and decision.

If an appeal is not timely filed, by operation of regulation, this Initial Decision will automatically become the Final Decision of the Department. 34 C.F.R. § 668.91(c)(1).

An appeal to the Secretary shall be filed in the Office of Hearings and Appeals (OHA). The appeal shall clearly indicate the case name and docket number. The appealing party shall provide a copy of the appeal to the opposing party, simultaneously with its filing of the appeal. The opposing party will then have 30 days to file its response to the appeal to the Secretary and shall provide a copy of its response to the party who appealed the decision, simultaneously with its filing of the response.

A registered e-filer may file the appeal via OES, the OHA's electronic filing system. Otherwise, appeals must be timely filed with OHA by U.S. Mail, hand delivery, or other delivery service. Appeals filed by mail, hand delivery, or other delivery service shall be in writing and include the original submission and one unbound copy addressed to:

Hand Delivery or Overnight Mail*	U.S. Postal Service*
Secretary of Education c/o Docket Clerk Office of Hearings and Appeals U.S. Department of Education 550 12th Street, S.W., 10th Floor Washington, D.C. 20024	Secretary of Education c/o Docket Clerk Office of Hearings and Appeals U.S. Department of Education 400 Maryland Avenue, S.W. Washington D.C. 20202

These instructions are not intended to alter or interpret the applicable regulations or provide legal advice. The parties shall follow the regulatory requirements for appealing to the Secretary at 34 C.F.R. § 668.91. Questions about the information in this notice may be directed to the OHA Docket Clerk at 202-245-8300.