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

In the Matter of

Docket No. 11-30-SF

VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY,

Federal Student Aid Proceeding

Respondent

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

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

Before: Judge Ernest C. Canellos

DECISION

Virginia Polytechnic Institute and State University (Virginia Tech) is a public institution of higher education located in Blacksburg, Virginia. Virginia Tech participates in the various federal student aid programs that are authorized by Title IV of the Higher Education Act of 1965, as amended (HEA), 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* Within the U.S. Department of Education (ED), the office of Federal Student Aid (FSA) is the organization that is charged with oversight over these programs.

On March 29, 2011, FSA issued a notice of intent to fine (Fine Notice) Virginia Tech $55,000, for two violations of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (the Clery Act). The Clery Act is located at § 485(f) of the HEA, 20 U.S.C. § 1092(f) and is implemented by ED's regulations in 34 C.F.R. §§ 668.41 and 668.46. The genesis of the allegations proffered as the basis for the fines is the tragic events that occurred on the Virginia Tech campus on April 16, 2007, that resulted in the deaths of 32 individuals and

the wounding of 17 others. The alleged violations are narrowly crafted in the fine notice as follows:

1. Virginia Tech's failure on April 16, 2007, to provide a timely warning to the campus community, as required under 34 C.F.R. § 668.46(c); and

2. Virginia Tech's failure on April 16, 2007, to follow the timely warning policy contained in its Annual Security Report (ASR).

Procedural History

From October 10, 2007 to December 4, 2009, FSA conducted an off-site campus security program review of Virginia Tech's actions on April 16, 2007, relative to the institution's compliance with the timely warning provisions of the Clery Act. The review followed a complaint filed by Security on Campus, Inc. alleging that Virginia Tech violated the Clery Act by failing to provide a timely warning to the campus community. FSA reviewers did not visit the campus; rather they requested and reviewed documents from Virginia Tech. Sequentially, on January 21, 2010, FSA issued its Program Review Report (PRR); on April 20, 2010, Virginia Tech filed its response to the PRR and FSA then issued its Final Program Review Determination (FPRD) on December 9, 2010. FSA noted extensive safety improvements taken by Virginia Tech and no monetary liabilities were assessed in the FPRD.

As noted earlier, the Fine Notice was issued on March 29, 2011. According to the Fine Notice, FSA took this action based on the FPRD's findings, which concluded that Virginia Tech: (1) failed to provide a timely warning in response to the shootings that occurred on April 16, 2007; and (2) did not comply with the timely warning policy it disclosed to students and staff as part of its ASR. On April 26, 2011, Virginia Tech filed a request for hearing and on May 18, 2011, the tribunal issued an Order Governing Proceedings. After a number of extensions of time, the parties submitted their respective briefs and evidentiary matter. An evidentiary hearing was held on December 7-8, 2011, and on January 31, 2012, the parties filed post-hearing briefs.

Procedural Matters

Virginia Tech alleges procedural defects in FSA's conduct of the above referenced program review. First, Virginia Tech claims that FSA requested minimal documentation from the institution, which it provided. Also, Virginia Tech points out that it took over two years for FSA to issue its program review report and that FSA did not interview any Virginia Tech employees, but relied upon third-party recollections of statements made by the institution's administrators during meetings with family members in reaching conclusions adverse to the institution. Virginia Tech argues that such hearsay statements cannot be considered reliable or accurate especially when FSA could have spoken to the individuals whose alleged statements were recounted by others. It then took eight months for FSA to issue its Final Program Review Determination and then four months after that, it issued the Fine Notice. Finally, it objects to FSA's failure to docket its appeal of the FPRD pursuant to 34 C.F.R. § 668, Subpart H and

asserts that it has not received a response to its December 10, 2010 Freedom of Information Act (FOIA) request for documents FSA made reference to in its PPR and FPRD. In sum, Virginia Tech argues that it has not been afforded due process in the finalizing of findings of the FPRD.

FSA defends that the complaints raised by Virginia Tech are outside the scope of this proceeding and that Virginia Tech misrepresents the facts and the law. According to FSA, Virginia Tech was notified of the program review and had the opportunity to submit a response to the program review report, which the institution did. FSA maintains that Virginia Tech could have submitted statements by its officials as part of the review process, but that the institution did not. FSA also argues that the Governor Kaine's Virginia Tech Review Panel[1] interviewed numerous Virginia Tech officials and, as noted in the FPRD and the Fine Notice, ED used the Review Panel Report in its review. FSA asserts that the court decisions cited by Virginia Tech in support of its arguments apply to hearings in which property rights are at stake and that they do not apply to a government investigation. Finally, FSA argues that Virginia Tech has not and cannot point to any law or regulation that requires ED to interview a particular person or visit a particular location as part of a program review.

As a procedural matter, I find that I do not have jurisdiction over the aforementioned matters. First, only FPRD findings that have a liability attached are appealable.[2] I also do not have jurisdiction over any alleged delay or denial of Virginia Tech's FOIA request.[3] The only matter before the tribunal is the fine action and the FPRD to the degree that the Fine Notice incorporates the FPRD by reference. Since Virginia Tech was able to raise the same arguments in the Fine Action as it could in the FPRD review, the tribunal's consideration of those arguments in the fine action removes any purported defect in the process due to the institution regarding the FPRD. Moreover, the instant proceeding was brought by ED under 34 C.F.R. 668, Subpart G, and ED bears the burdens of proof and persuasion.[4]

At this juncture, it is important to state what this proceeding is about and what it is not. First, we must all recognize that the events of April 16, 2007, are tragic under any definition of that term. Also clear, out of such a horrendous situation a number of possible legal actions could result. First, the wanton slaying of 32 people is obviously punishable under the criminal laws of the jurisdiction, and would be the subject of criminal prosecution by appropriate authorities. I have no criminal jurisdiction and, even if I did, the gunman is dead and beyond the reach of such action. Also, I do not have jurisdiction over any potential law suit in tort between the victims and their families and those who are claimed to have failed in their duty to protect those victims, seeking their resulting damages. On information and belief, such cases under various theories have been filed and either settled or are in active trial. I recognize the emotional toll taken by the events of that day – the pain and anguish of the parents that testified before me at the evidentiary hearing was palpable. Having tried many cases before, I must state that this was the most emotional trial that I have ever presided over. However, despite that fact and the sympathy I feel

[1] Virginia Governor Kaine created a review panel to assess the events leading to the shooting and how the incident was handled by the university and public safety agencies.
[2] *See In the Matter of Louise's Beauty College*, Dkt. No. 95-48-SP, U.S. Dep't of Educ. (April 17, 1996)
[3] The record is unclear as to whether Virginia Tech's FOIA request is outstanding or whether the exhibits attached to ED's June 30, 2011 Brief supplied all of the information sought by the institution.
[4] *See In re Tarleton State University*, Dkt. No. 09-56-SF, U.S. Dep't of Educ. September 23, 2010).

for the victims and their parents, clearly my only jurisdiction is to determine if FSA has met its burden of proof and persuasion that Virginia Tech violated the Clery Act's timely warning provisions as alleged by FSA, and if so, what fines should I impose.

The Clery Act

The Clery Act was enacted in 1990 and originally was known as the Student Right-To-Know and Campus Security Act.[5] The stated goals of this act were "to assist students in making decisions which affect their personal safety" as well as "to make sure institutions of higher education provide students, prospective students and faculty the information they need to avoid becoming the victim of campus crime."[6] In furtherance of that goal, the Clery Act requires institutions participating in the federal student aid programs to disclose statistical information about crimes that are reported to have occurred on an institution's campus or areas adjacent to the campus. Institutions must prepare, publish and distribute an Annual Security Report (ASR) reporting crime statistics over the three most recent calendar years.[7] The ASR also must include a statement of the institution's current policy for making timely reports regarding the occurrence of certain crimes. The Clery Act also requires institutions to provide information on its policies and procedures for preventing and reporting crimes on campus.

The Clery Act mandates that institutions notify the campus community when certain enumerated crimes occur. These crimes include murder, sex offenses (forcible or non-forcible), robbery, aggravated assault, burglary, motor vehicle theft, manslaughter, and arson. The statute states that an institution "…shall make timely reports to the campus community on crimes considered to be a threat to other students and employees… that are reported to campus security or local law police agencies. Such reports shall be provided to students and employees in a manner that is timely and that will aid in the prevention of similar occurrences."[8]

The statute does not define timely reports, but the legislative history provides some insight into the purpose of a timely warning as well as how soon such a report should be issued.

> The Committee believes that members of the campus community need to be made aware of a crime committed on campus as soon as reasonably possible after the occurrence of the crime. The timely notification of students, faculty and employees will alert individuals to the potential that subsequent similar crimes could occur and will permit them to better protect themselves.[9]

ED's implementing regulation captions the statutory provision as "timely warning" and states that an institution must, in a manner that is timely and will aid in the prevention of similar crimes, report to the community on the aforementioned enumerated crimes that are reported to

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[5] *See* Pub.L.No. 101-542, 104 Stat 2381 (1990); *see also* § 485(f) (1) (F) of the HEA, 20 U.S.C. § 1092(f). The law was amended in 1992, 1998, 2000 and 2008.
[6] *See* Conference Report on S. 580, Student Right-To-Know and Campus Security Act, 136 Cong. Rec. H11499-01, 1990 WL 285340 (October 22, 1990).
[7] *See* § 485(f) (1) (F) of the HEA, 20 U.S.C. § 1092(f) (1) (F); 34 C.F.R. § 668.46(b) and (c).
[8] *See* § 485(f) (1) (F) of the HEA, 20 U.S.C. § 1092(f) (1) (F).
[9] *See* H.R. Rep. No. 101-518 (1990).

campus security authorities, and considered by the institution to represent a threat to students and employees.[10] ED specifically determined that it would not define timely reports in the regulation:

> The Secretary does not believe a definition of timely reports is necessary or warranted. It 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.[11]

ED's guidance on the purpose of the timely warning requirement may be found in its 2005 Handbook for Campus Crime Reporting (Handbook).[12] There, the intent of a timely warning is to alert the campus community of continuing threats especially concerning safety, thereby enabling community members to better protect themselves. The Handbook states that "[t]he warning should be issued as soon as the pertinent information is available." It further provides that the warning should include "all information that would promote safety."

The Facts

The facts are well known and documented. The parties stipulated to the timing of some events and Virginia Tech has not specifically disputed the timing of the events relied upon by ED in its Fine Notice. The timeline of what specifically occurred at what time is pertinent to the current proceeding. ED relies upon the State Review Panel Report and its amended timeline. The tribunal accepts the timeline established in the Review Panel Report that was published in August 2007. An addendum to the Review Panel Report including a revised timeline of events was issued in November 2009 and the report was revised in December 2009. The Review Panel Report and its addenda were the result of an exhaustive investigation commissioned by Governor Tom Kaine of Virginia and reviewed the events of April 16, 2007. The scope of the review included "…a review of the timeline of events from the time that the culprit entered the West Ambler Johnston Dormitory until his death in Norris Hall." Consequently, the tribunal finds that FSA has sufficiently established the timing of the inclusive events pertinent to this case.

About 7:15 a.m., Virginia Tech students Emily H. and Ryan C. were shot in Ms. H's dorm room in the West Ambler Johnston residence hall (WAJ). The shooter was not identified at that time.[13] At 7:24 a.m., a Virginia Tech Police Department (VTPD) officer arrived at the room and discovered that two people had been shot, and requested additional resources. Sequentially, at: 7:40 a.m., the VTPD Chief was notified of the shooting; at 7:57 a.m., the VTPD notified Virginia Tech's Office of the Executive Vice President of the shootings; at 7:51 a.m., VTPD Chief contacted the Blacksburg Police Department to request their assistance. At 8:11 a.m., VTPD Police Chief Flinchum informed Virginia Tech President Steger that one

[10] *See* 34 C.F.R. § 668.46(e).
[11] *See* 59 Fed. Reg. 22314, 22316 (April 29, 1994).
[12] *See* ED Ex. 4.
[13] *See id*. (The identity of the WAJ shooter was not learned until after the subsequent shootings occurred later that morning.)

student was killed, another critically wounded, and that the incident appeared to be domestic in nature. Chief Flinchum also reported that no weapon was found and there were bloody footprints at the scene. At 8:11 a.m., President Steger decided to convene the Policy Group no later than 8:30 a.m. Between 8:16 a.m. - 8:40 a.m., Ms. H's roommate returned and informed the VTPD that Ms. H's boyfriend usually dropped her off on Monday morning and that he owned and has an interest in guns. At 8:25 a.m., the Policy Group convened to discuss the shootings and how to notify the campus community. At 9:26 a.m., the Policy Group issued an email to the campus community stating:

> A shooting incident occurred at West Ambler Johnston earlier this morning. Police are on the scene and 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.

Between 9:40 a.m. and 9:51 a.m., the culprit shot 47 additional victims at Norris Hall, killing 30 victims and then himself. The Policy Group was notified of the Norris Hall shootings at approximately 9:45 a.m. A second message was sent to the campus community at 9:50 a.m. in response to the shootings at Norris Hall. The 9:50 a.m. email message stated that "[a] gunman is loose on campus. Stay in buildings until further notice. Stay away from all windows." At 10:17 a.m., a third message was sent canceling classes and advising everyone to remain in place.

Other events are detailed in the Fine Notice and the Review Panel Report upon which FSA relied. These events concern the actions taken by individuals and/or Virginia Tech upon hearing of the first shooting incident. The parties have not stipulated to these events. At about 8:00 a.m., the Virginia Tech Office of Continuing and Professional Education "locked down" after an employee was notified of the WAJ shootings. At about 8:15 a.m., two senior officials had conversations with family members regarding the shootings. At 8:25 a.m., VTPD cancelled bank deposit pickups. At 8:40 a.m., a Policy Group member notified the Governor's office of the double shooting. Also at about 8:40 a.m., Chief Flinchum informed President Steger that there was a person of interest identified who may have left the campus. At 8:52 a.m., Blacksburg public schools locked down. Also at 8:52 a.m., the Executive Director of Government Relations directed that the doors to his office be locked. Sometime between 9:00 a.m. and 9:15 a.m., the Virginia Tech Veterinary College locked down. At 9:05 a.m., trash pickup on campus was cancelled.

The parties stipulated that at 8 a.m. classes began at Virginia Tech and that at 9:05 a.m., classes for the second period began. The parties also stipulated that as of April 2007, Virginia Tech's annual security report included a timely warning policy which stated the following:

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

students, faculty, and staff and to the local community.

The parties stipulated that as of April 2007, Virginia Tech policy 5615 stated following regarding timely warnings of crimes on campus:

> REQUIRED REPORTS: 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.

Finding # 1: Failure to Provide a Timely Warning

The Fine Notice alleges that Virginia Tech failed to issue a timely warning on April 16, 2007, in response to the shootings that occurred in WAJ and seeks to impose a fine of $27,500 for this alleged violation. My review of this finding will be conducted in three parts. First, I will examine the import of the 2008 emergency notification requirement implemented after the events of April 16, 2007. Second, I will examine whether a timely warning was required under the circumstances. Third, I will review the sufficiency of the 9:26 a.m. email sent by Virginia Tech regarding the shooting at WAJ.

Emergency Notification Requirement

In 2008, Congress added an emergency notification requirement to the Clery Act. That implemented a requirement that an institution's current campus policies regarding immediate emergency response and evacuation procedures should include procedures to "immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff occurring on the campus…"[14]

FSA contends that the 2008 amendment implementing the emergency notification requirement is irrelevant to this case, arguing that the emergency notification requirement is broader than and not directly related to the timely warning requirement. Further, FSA maintains that neither the Conference Committee Report, H. Rpt. 110-803, nor the House of Representatives Committee Report, H. Rpt. 110-500, refer to or suggest that the new requirement was intended to address the events of April 16, 2007 at Virginia Tech.

Contrariwise, Virginia Tech argues that the emergency notification requirement was added by Congress because it believed the existing timely warning requirements did not address the type of situation faced by the institution on April 16, 2007. It further argues that ED comingled and interchanged the definition of timely warning with the emergency notification requirement implemented in 2008. According to Virginia Tech, attempting to apply the timely warning requirement as an emergency notification procedure is inconsistent with the intent, meaning and purpose of the timely warning regulation as it existed on April 16, 2007. Thus,

[14] *See* § 485(f) of the HEA of 1965, as amended, 20 U.S.C. § 1092(f) (1) (J).

Virginia Tech argues that ED is attempting to unlawfully retroactively impose the 2008 emergency notification requirement in the guise of a timely warning.

As an initial matter, I must examine the import of the 2008 emergency notification requirement on the existing timely warning requirement. Specifically, an analysis needs to be done regarding whether ED is seeking to retroactively enforce the emergency notification requirement. It seems uncontroverted that the emergency notification provision added a new requirement to the Clery Act. Congress recognized that this requirement would apply to a broad range of emergencies including man-made and natural disasters.[15] Clearly, the Virginia Tech incident also was on Congress' mind. In speaking about the emergency notification requirement, it was noted that "[t]he tragic events of April 16, 2007, on the campus of Virginia Tech, reminded us that horrific incidents can happen anywhere and that we must be prepared."[16] Further, it was added that, " [t]he addition of an emergency notification provision to the Jeanne Clery Act will help ensure that students and employees are empowered with information about potential significant threats to their safety such as an unknown shooting suspect at large or an impending natural disaster. Because emergencies can escalate or spread quickly it is vital that emergency notifications occur without any delay and these provisions appropriately provide that warnings must occur "immediately . . . upon confirmation" of a threat. Minutes can mean the difference between life and death."

In the Conference Report[17] on the bill implementing the Higher Education Opportunity Act, which contained the emergency notification requirement, Congress described situations similar to but occurring after the events at Virginia Tech, in which a shooting led to institutions implementing their own immediate notifications:

> The Conferees believe it is important that the Department be informed by past demonstrated ability of institutions to take immediate action in the face of campus emergencies in developing any regulations related to this provision. Recent examples include:
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> Florida Atlantic University on April 30, 2008 - A shooting incident was reported at 1:16 AM, 26 minutes later alerts were sent out to the campus community, sirens, public address systems and Reverse 911 systems were activated. A follow-up e-mail was sent to the campus community at 2 AM.
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> Ferrum College (VA) on February 26, 2008 - A sighting of a man with a gun was reported at 7:29 AM, 11 minutes later sirens were activated, and by 7:54 a text alert went out to the campus community with additional details concerning the emergency.
>
> Northern Illinois University on February 14, 2008 - A multiple shooting incident was reported at 3 PM, and 20 minutes later an alert was posted to the institution's web site.

[15] *See* H.R. Rep. No. 110-803 (2008).
[16] *See* 110 Cong. Rec. H7664 (July 31, 2008) (Remarks of Representative McCarthy of New York).
[17] *See* H.R. Rep. No. 110-803 (2008).

The Conference Report also stated that

> [t]he Conferees recognize that emergencies are volatile, fast-moving and unpredictable events that can encompass a range of natural and man-made situations, from campus fires to the presence of shooting suspects on campus. As such, the Conferees intend that institutions may rely upon the initial known facts of a situation in crafting and disseminating notifications that are timely, accurate and useful to appropriate segments of the campus community. The Conferees also do not intend to hold institutions responsible for the failure of local law enforcement or other emergency response personnel to provide them with information, or other circumstances beyond their control that may delay the delivery of emergency notifications.[18]

Thus, Congress, not unexpectedly explicitly recognized there would be some instances in which a shooting would prompt an emergency notification.

ED noted the distinction between incidents triggering an emergency notification and crimes triggering a timely warning. The final regulations clarified the difference between the existing timely warning requirement and the new requirement for an emergency notification policy.

> While a timely warning must be issued in response to specific crimes, an emergency notification is required in the case of an immediate threat to the health or safety of students or employees occurring on campus."[19]

However, ED also recognized there may be overlap between the two provisions and its final regulation provides that

> an institution that follows its emergency notification procedures is not required to issue a timely warning based on the same circumstances; however, the institution must provide adequate follow-up information to the community as needed.[20]

The legislative history regarding the enactment of the emergency notification is not clear as to whether Congress believed that this requirement would have been applicable to the shootings that occurred at WAJ. It is conceivable from the examples cited by Congress that the emergency notification procedures contemplated events like those at WAJ. However, for this proceeding, I can only judge the actions surrounding the shootings at WAJ against the timely warning requirement. As such, what is pertinent is that a completed Clery Act listed crime occurred and was reported to Virginia Tech's campus security authority. Against that backdrop, and in that vein, what is clear is that the emergency notification provisions specifically contemplate that immediate threats should prompt immediate warnings while the timely warning

[18] *See id*. at p. 553.
[19] *See* 74 Fed. Reg. 42380-01 (August 21, 2009).
[20] *See id*.

provision does not dictate such an immediate response. Moreover, Congress' statement that timely warnings should be issued as soon as reasonably possible and ED's guidance that warnings should be issued as soon as pertinent information is available, both clearly suggest that the timely warning requirement allows for some reasonable period of time before an institution is required to issue a timely warning.

Was a Timely Warning Required?

It appears clear that determining whether a crime represents a threat to the campus community requires the exercise of judgment by the institution and must be decided on a case-by-case basis. Just as clear, however, this judgment is not unrestrained and a reasonable belief test should be applied in assessing whether an institution exercised appropriate discretion in determining that a crime posed no threat to the campus community, and, therefore, did not require a timely warning regarding the occurrence of the crime. *See generally, Havlik v. Johnson & Wales University*, 509 F.3d 25 (1st Cir. 2007).

FSA argues that the actions of Virginia Tech fail that reasonable belief test. FSA asserts that Virginia Tech's failure to provide a timely warning was unreasonable in light of the facts available to the institution at the time of the first two shootings. According to FSA, between the time the police arrived on scene at 7:24 a.m. until 8:14 a.m., Virginia Tech did not know who the victims were and whether a person of interest even existed. FSA states that the information regarding the identity of the victim and the subsequent identification of a person of interest was not communicated to the Policy Group until 8:40 a.m. so there was no basis for the assessment that the crime was an isolated incident that no longer represented an ongoing threat. According to FSA, all that Virginia Tech knew was that two victims had been shot and seriously wounded, that bloody footprints led away from the scene, no suspect had been identified and no gun was found on the scene. Even after the identity of the victims was known, FSA contends there was no basis for the decision not to issue a timely warning.

FSA claims that Virginia Tech changed its position for believing the shooting at WAJ was an isolated event. In its request for a hearing, Virginia Tech first claimed that the police investigation immediately revealed the existence of a person of interest who had left the campus; however, a person of interest was not identified until at least 8:14 a.m. At the hearing, Virginia Tech added additional factors for its claim that the shooting was likely targeted namely, that the dorm room was in a relatively isolated area, the position and dress of the victims, no evidence of forced entry and that there was an alleged report that someone had seen a person run from the room. FSA argues that Virginia Tech has not presented any police reports or other records to support these additional factors. Further, contrary to Chief Flinchum's testimony,[21] the police continued to search for the person of interest on campus and had not concluded he was not on campus.[22] FSA also argues that this testimony is inconsistent with testimony provided to the State Review Panel by Chief Flinchum in which Virginia Tech did not cite any of these factors for its determination that it was an isolated domestic incident. Consequently, FSA argues that this testimony should not be given any weight.

[21] *See* Tr. p. 263, line 14 to p. 265, line 6.
[22] *See* Hearing Ex. 2 at 11-12.

Finally, FSA asserts that the judgment of police officials as to whether a warning is appropriate may be questioned by ED. To wit, the Clery Act places the requirements for issuing a timely warning policy on the institution, not its police force. Merely assigning responsibility for making that decision to the VTPD does not allow the institution to avoid its responsibility. Regardless of who makes the decision, FSA maintains that it is the institution that is held to account and the fact that the police made the decision as opposed to another institutional official does not make that decision any more reasonable.

According to Virginia Tech, it made a determination that no timely warning was required because the shootings that occurred at WAJ did not represent an ongoing threat. It concluded that the shooting incident was likely domestic in nature and/or an isolated and targeted act of violence. Virginia Tech asserts that its determination is based on a number of factors. Specifically, the VTPD pointed to how the victims were clothed, noting that the male victim was wearing boxers and the female victim was dressed in pajamas. Also, because the room where the crime took place was in an isolated part of the building, away from the main elevator and that based on that location, it was likely that the room was deliberately sought out by the perpetrator. Additionally, Virginia Tech noted that there was no sign of forced entry or robbery as a motive for the crime and that the identification of the victims and subsequent identification of a person of interest who had a relationship with the victim, had an interest in firearms, and owned firearms added to their belief that the crime was domestic in nature. Virginia Tech argues that there were no reported sightings of suspicious activity on campus, that the person of interest's vehicle was not on campus, and he was believed to be off campus. Finally, it was the concurred-in opinion of the police officials of the VTPD, the Virginia State Police and the Blacksburg Police, all certified police departments, that this shooting incident likely was domestic in nature and not likely to expand any further.

Virginia Tech argues that FSA applied an improper standard by using the phrase "could" represent a threat at the hearing.[23] Virginia Tech says the standard that should be applied is "considered" to be a threat and because the institution did not consider it a threat, it was not required to issue a timely warning. Alternatively, if the institution's decision regarding the existence of a threat is discretionary, Virginia Tech argues that the decision should be reviewed for an abuse of discretion and should be upheld if reasonable. Virginia Tech maintains that its decision that there was no ongoing threat was not an abuse of discretion based on its review of all of the appropriate factors.

To determine whether Virginia Tech's assessment that the murders of two students at WAJ triggered a legal duty to issue a timely warning was reasonable requires the tribunal's analysis of three factors. The first two factors are the occurrence of a Clery Act crime and whether the crime was reported to the campus security authorities or the local police. The third factor is whether the institution considered the underlying event indicated a threat to the campus community. The parties do not dispute that a Clery Act crime occurred and was reported to the campus security authorities. The regulation leaves it to the institution's discretion as to whether it considered the crime to represent a threat. The question becomes how to assess the institution's exercise of its discretion. The Court's opinion in *Havlik* is instructive. It provides

[23] Tr. p. 114, lines 3-6.

that "[r]easonableness is the beacon by which institutions must steer…"[24] "So too, common sense must inform a court's assessment of the reasonableness of a university's belief that the reporting of the crime is compulsory under the [Clery] Act."[25]

More generally, the Secretary also has held that the exercise of an institution's discretion is not without its limits. In a case involving the discretion of financial aid administrators to use their professional judgment in finding special circumstances warranting departure from the standard needs analysis for federal student aid, the Secretary stated that it is ED's duty to ensure that the exercise of professional judgment does not constitute an abuse of discretion. Of some significance here, the Secretary noted that the abuse of discretion standard should not necessarily take into account whether ED agreed with the outcome of the determination. See *In re Saint Louis University*, Dkt. No. 99-29-SA, U.S. Dep't of Educ. (Decision of the Secretary) (November 12, 2010).

In *Havlik*, a student was involved in an altercation with a fellow student, resulting in the victim being knocked to the ground, sustaining a concussion and fractured skull. The university issued a timely warning under the Clery Act.[26] The university official charged with making the decision to issue a timely warning considered the crime itself as well as whether there had been previously reported incidents, and there was, and the fact that the witnesses told the campus police that they feared retaliation at the hands of the fraternity of which the alleged perpetrator was a member. The Court concluded that the university official's belief, whether or not unarguably correct, was reasonable. The Havlik Court looked at three factors in making the determination "whether a duty to publish a timely notification exists…." First, the institution must determine whether the crime is of a type covered by the Clery Act; second, the institution must determine whether it has been reported to campus security or local law enforcement; and third, the institution must "determine whether the underlying conduct signals a threat to the [campus] community…"[27] In *Havlik*, the institution reasonably believed that all of these factors supported notification.[28] Thus, the institution had a responsibility to issue a timely warning about the incident.[29] The Court also noted that "…in making that assessment, the need to assure safety and security for campus communities counsels that doubts should be resolved in favor of notification."[30]

A review of ED's guidance on timely warning reveals it is neither detailed nor specific. Whether or not a warning should go out and when are judgment calls, which must be decided on a case-by-case basis in light of all the factors surrounding a crime. Such a determination must be an informed one based on factors such as the nature and circumstances of the crime and its continuing threat to the campus community. Thus, an institution's determination must be guided by the totality of the circumstances.

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[24] *See Havlik* at 31.
[25] *See id*. at 32.
[26] The crime occurred on September 16-17, 2004. The timely warning was sent out on September 21, 2004. *See id*. at 27-28.
[27] *See Havlik* at 32.
[28] *See id*.
[29] *See id*.
[30] *See id*.

In reviewing the reasonableness of Virginia Tech's position that a timely warning was not required, I accept the VTPD's conclusion that the incident presented itself, albeit erroneously, as a targeted act of violence likely stemming from a domestic argument. I am persuaded by the factors cited by Virginia Tech such as the isolated location of the room in which the murders occurred, the dress of the victims, the lack of forced entry and no evidence of robbery as a motive. Importantly, it is FSA that has the burden of proof in this proceeding and it has not presented persuasive evidence that Virginia Tech's conclusion was somehow unreasonable. Virginia Tech presented testimony from the VTPD Police Chief regarding his policing judgment and the policing judgment of other police agencies on the scene. FSA did not present any evidence, such as expert testimony demonstrating that the conclusion reached by the police was unreasonable. Moreover, the State Review Panel itself found that the police determination was reasonable. In fact, the Panel noted that "[it was reasonable albeit wrong that the VTPD thought this double murder was most likely the result of a domestic argument, given the facts [Virginia Tech] had initially, including the knowledge that the last person known to have been with the female victim was her boyfriend who owned a gun and cared greatly for her, plus the fact that she was shot with a young man in her room under the circumstances found."[31]

Despite the VTPD's conclusion, my inquiry concerns whether it was reasonable for Virginia Tech to conclude it was not a threat to the campus community. Weighed against the conclusion and judgment of the VTPD must be the factors identified by FSA. This crime represented the most heinous crime listed in the offenses for which a Clery Act warning comes into play. It was a violent crime involving the use of a firearm. Virginia Tech also did not know the identity or location of the shooter. As there was no suspect in custody, Virginia Tech did not know whether or not the gunman was loose on campus. Further, Virginia Tech did not know the identity of the weapon or its location. Even though there may have been a low probability that the murders would be followed by more shootings, the threat was still present. Any threat is a threat and what's reasonable is to act upon that threat. What was reasonable also is illuminated by the fact that when people learned that the shootings had occurred, they took action to protect themselves or otherwise alter their behavior.

Consequently, I find that it was not reasonable for Virginia Tech to conclude that the shootings at WAJ did not represent a threat to the campus community. Moreover, the actions of Virginia Tech on the morning of April 16, 2007 demonstrate that the institution thought it needed to do something in reaction to the incident. The President convened the Policy Group, which immediately began discussing what to do, including notifying the campus community. It is obvious that the Policy Group thought the campus community needed to know what had occurred and they drafted and disseminated the aforementioned 9:26 a.m. email notifying the campus community.

9:26 a.m. Email Notification

At 9:26 a.m., the Policy Group issued an email to the campus community[32] stating:

[31] *See* ED Ex. 5 at 37.

[32] *See id*. Although the parties did not stipulate as to time the email was sent, Virginia Tech identified the email as being sent at 9:26 a.m. in its brief filed on August 15, 2011.

> A shooting incident occurred at West Ambler Johnston earlier this morning. Police are on the scene and investigating. The university community is urged to be cautious and asked to contact Virginia Tech Police if you observe 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.[33]

As I have determined that the timely warning requirement was triggered, the question then becomes whether the 9:26 a.m. email constitutes a timely warning under the Clery Act. The parties disputed whether or not the email met the requirements for a timely warning. The issue before me is, therefore, whether or not the 9:26 a.m. email functioned as a timely warning. My review of the sufficiency of the email is focused on two factors: the time the email was sent and its content.

FSA argues that as soon as the police had sufficient information to determine that they did not have a suspect in custody, a reasonable decision would have been for Virginia Tech to issue a timely warning. FSA also argues that Virginia Tech should have used a "more reasonable description" of the crime rather than referring to the crime as a shooting incident because the email did not put the campus community on alert that there was an ongoing threat. Thus, FSA claims it did not serve the purpose of a timely warning as required by the Clery Act. Further, because the email did not state that two students had been shot or seriously wounded, it did not tell recipients what to be cautious about or give them enough information to recognize if there was a situation that might be considered dangerous. FSA argues that the 9:26 a.m. email was not reasonably designed to prevent similar incidents since it did not provide accurate or complete information and did not give them information needed to identify suspicious situations.

FSA states that it consistently has viewed the 9:26 a.m. email as a failed attempt at a timely warning, although it asserts that Virginia Tech has changed its characterization of the email. FSA argues that if the email was not intended to be a warning, Virginia Tech has not given a good explanation for what it was intended to be. FSA stated that at the hearing, there was testimony from a member of the Policy Group that the email was in part to be a notice to the media.[34] However, FSA asserts that the email was sent primarily to students and employees, and not the media. FSA argues that if the tribunal accepts Virginia Tech's claim that the 9:26 a.m. email was not a timely warning notice, then it should also conclude that the institution did not issue a timely warning. Alternatively, if the tribunal concludes the email was intended as a timely warning, then it also should conclude the notice was inadequate.

Virginia Tech defends that its notification regarding the first shooting incident was timely and prepared in accord with the Clery Act. Virginia Tech asserts that the standard in the regulation is vague and leaves significant discretion to the institution on both the timing and content of a timely warning. Virginia Tech claims that FSA is trying to impose a standard based on its post-incident knowledge about what happened at Norris Hall. It argues that its 9:26 a.m. message met the reasonableness standard and was well within the discretion conferred by the regulation.

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[33] *See* ED Ex. 5 at 40.
[34] *See* Tr. p. 301, lines 2-8.

Virginia Tech argues that the Clery Act does not require an institution to issue a warning as soon as the police discover that a crime has been committed nor does it require an institution to issue a warning before there is sufficient information to know what happened. Virginia Tech argues that it should be entitled to rely on ED's guidance in the Handbook, which indicates that the issuance of a timely warning was to be measured in days rather than hours. Virginia Tech points to model warnings contained in the Handbook wherein warnings were issued days after the crime. Virginia Tech also cites to its expert witness' testimony[35] that the Handbook's statement that the warning should be issued as soon as the pertinent information is available provides "an opportunity to conduct some preliminary investigation to determine whether or not there is an ongoing, continuing threat to the community."[36] Virginia Tech also cites the VTPD Police Chief Flinchum for the same proposition that "[t]here has to be some time for investigation to determine what you actually have or what the crime is or what's occurring."[37] Virginia Tech's expert witness also pointed to training done on Clery Act compliance, stating that most trainers used 24 to 48 hours as the guideline, based on examples provided in the Handbook.[38] Thus, the 9:26 a.m. notification was issued in a timely fashion, within the guidance and training provided by ED and consistent with the practices of other institutions.

Virginia Tech asserts, in essence, that FSA is attempting to impose an immediate warning requirement in the guise of a timely warning. Virginia Tech argues that the 2008 amendments to the Clery Act confirm that the timely warning requirement cannot be interpreted to be an immediate warning requirement. A completed crime, such as occurred on April 16, 2007, should not be the type of event that would require an immediate notification. Virginia Tech argues that the fact that Congress chose to amend the Clery Act to impose an immediate notification requirement for events other than completed crimes demonstrates that the Clery Act never imposed an immediate warning requirement for completed crimes. Virginia Tech cites the principle that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[39] Thus, the inclusion of the requirement to immediately notify the campus community for emergencies involving an immediate threat, confirms that there is no such immediate notification requirement for timely warnings.

In addition, Virginia Tech argues that there is nothing unusual in classifying and reporting homicides on campus as shootings or shooting incidents. Virginia Tech points to two timely warnings issued by other institutions in which this occurred. According to Virginia Tech, in warnings at both the University of Alabama Huntsville and Ohio State University, homicides were reported as shootings.[40] Virginia Tech also stated that its 9:26 a.m. email provided sufficient information to put people on notice by including the following: the location of the shooting, that police were investigating, urging the community to be cautious and to contact police if anything suspicious was observed or with information on the case.

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[35] Testimony of Delores Stafford, President and CEO, D. Stafford and Associates.
[36] *See* Tr. p. 354, line 19 – p. 355, line 12.
[37] *See* Tr. p. 249, lines 10-22
[38] *See* Tr. p. 350, lines 10-17
[39] *See Russello V. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).
[40] *See* Resp. Ex. 3-24. *See also*, Tr. p. 323, line 12-18, 19 – p. 324, line 4.

The official guidance on when to issue timely warnings is amorphous. Congress stated that timely warnings should be issued as soon as reasonably possible. ED chose not to define when timely warnings should be issued. Again, the regulatory guidance is that it must be decided on a case-by-case basis in light of all the facts surrounding the 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. ED's Handbook also tells institutions that the warning should be issued as soon as pertinent information is available. In another vein, it must be recognized that fines are pecuniary actions that constitute punishment. As such, constitutional principles of due process are applicable and dictate that there must be clear guidance as to the requirements complained of so as to assure that violations can be rightly and fairly judged and attributed to any potential wrongdoer.

Timely warning or timely reports were intended to function as a notice to the campus community of a Clery Act crime. It was not, however, intended to function as an emergency notification as later adopted after the Virginia Tech incident. The tribunal notes 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.[41] It also seems reasonable that there has to be some time for the police to ascertain what the crime scene represents, to conduct at least a preliminary investigation as well as time for the warning to be crafted and disseminated.[42] Another factor which may influence what is considered timely is when the institution became aware of the crime.[43] For example, if a crime is discovered in the middle of the night when the majority of the campus community is in their dormitory rooms or off campus, it may be reasonable to wait until the morning to issue a timely warning. Additionally, it seems reasonable that the more potentially dangerous the situation, the more quickly an institution should act to issue a timely warning. For example, it may be reasonable that a crime involving motor vehicle theft, a property crime, does not prompt a timely warning as soon as a crime as serious as murder. In applying these factors, the tribunal notes that, in effect, there may be a sliding scale as to determining what is timely based on the totality of the circumstances.

The shootings at WAJ should have prompted a timely warning. Despite the import of Virginia Tech's arguments to the contrary, ED's guidance does not provide a basis for determining that an institution has days in which to issue a timely warning. If the circumstances justify the need for a warning to be issued sooner than that, it should be issued sooner in order for it to be considered timely. The sample warnings included in the Handbook are useful for institutions in determining what to put in a timely warning; however, these samples cannot be used to create a time standard that may be measured in days. Moreover, that may be in conflict with the guidance provided by Congress that it be as soon as reasonably possible as well as ED's guidance that it be issued as soon as pertinent information is available.

Once again, the standard for reviewing Virginia Tech's actions is one of reasonableness. Virginia Tech's actions can only be judged on the basis of the shootings that occurred at WAJ and not the later massacre perpetrated at Norris Hall. I must balance the factors present at the crime scene as well as Virginia Tech's need to assess what had occurred. The crime was violent

[41] *See* ED Ex. 4 at 3.
[42] *See* Tr. p. 249, line 20 - 22 and p. 355, line 7 - 12 (Testimony of Chief Flinchum and Dolores Stafford).
[43] *See* Tr. p. 82, line 18 – p. 83, line 2 (Testimony of James Moore, Senior Reviewer, FSA, ED).

and involved a firearm, and both the identity and location of the shooter and the weapon were unknown. Also a factor was the VTPD's conclusion that the crime was an isolated domestic incident. Given the violent nature of the crime scene, the fact that the shooter was armed and still at large as well as the timing of the incident all suggest that in order for a warning to be considered timely, Virginia Tech did not have days in which to issue a timely warning. Indeed, the institution did not take days in which to issue their 9:26 a.m. email; it was issued a little over two hours after the crime was discovered. This was not an unreasonable amount of time in which to issue a warning. Yes, the warning could have gone out sooner, and in hindsight, it is beyond regretful that it did not. However, if the later shootings at Norris Hall had not occurred, it is doubtful that the timing of the email would have been perceived as too late. Although speculative, a notification that came more quickly may have prevented or mitigated the losses that occurred at Norris Hall. While incredibly tragic, the fact that it did not come soon enough to possibly protect some individuals from losing their lives does not mean that Virginia Tech's email was not sent in a reasonable amount of time so as to satisfy the timeliness requirement.

In review, ED's regulations do not specify what information must be included in a timely warning. Neither the law nor the regulation mandates the form or content of the message such as enumerating the specific Clery Act crime. The Handbook states that "because the intent of the timely warning is to enable members of the campus community to protect themselves, the warning should include all information that would promote safety." In *Havlik*, the Court reviewed the content of the university's message, which identified the student and his fraternity, under a reasonableness standard, finding that the timely warning appeared reasonably calculated to prevent similar incidents.

I find that Virginia Tech's 9:26 a.m. email message contained sufficient information to put the community on notice as to the incident. The content of Virginia Tech's email message must be assessed based on whether it was reasonable. The analysis should not focus on whether Virginia Tech's email could have been more explicit as to what occurred. It is obvious that it could have enumerated the crime that occurred and explicitly stated that the gunman has not been apprehended. It is not unreasonable, however, to identify murders as shootings as was done in the two examples cited by Virginia Tech. The message also did not contain inaccurate information as FSA alleges. The message advised that a shooting had occurred, identified the location of the incident, and also stated the "[t]he 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." The implication was present that a gunman had yet to be apprehended.

For the aforementioned reasons, I find that FSA has failed to satisfy its burden of proof and persuasion that the timing and content of the 9:26 a.m. email did not satisfy Virginia Tech's obligation to issue a timely warning. Consequently, I find that no fine shall be imposed.

Finding # 2: Failure to Comply With Timely Warning Policy

The Fine Notice alleges that Virginia Tech's published timely warning policy did not include sufficient information and failed to reflect the institution's actual practice or policy. Virginia Tech's timely warning policy as published in its ASR stated:

> At times it may be necessary for "timely warnings' to be issued to the university community. If a crime(s) occur and notification is necessary to warn the university of a potentially dangerous situation then the Virginia Tech Police Department should be notified. The police department will then prepare a release and the information will be disseminated to all students, faculty, and staff and to the local community.[44]

Virginia Tech also had an internal policy, known as policy 5615 which stated:

> REQUIRED REPORTS: 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.[45]

FSA alleges that the timely warning process Virginia Tech followed did not comply with the policy contained in its ASR. FSA also alleges that Virginia Tech failed to comply with its internal policy 5615, which gave the University Relations office an essential role in issuing a timely warning. FSA notes that the VTPD did not have the technical capability to send out the warning. FSA states that on the morning of April 16, 2007, it was the Policy Group and not the VTPD that worked on a notice of the shootings. According to FSA, the police were not consulted about the warning emails sent out by the Policy Group regarding the shooting at WAJ as well as the later shootings that occurred at Norris Hall. FSA further contends that Virginia Tech's claim that the VTPD made the decision that a timely warning was not required is not supported by any contemporary documentary evidence or by the Review Panel Report.

Virginia Tech argues that the evidence in this case demonstrates that the VTPD did not consider there to be a threat on campus, and so informed the Policy Group. Virginia Tech points to Chief Flinchum's testimony for two points: that he did not believe the WAJ crime scene represented a threat to the campus and that it was his conclusion that there was no need for safety measures. According to Virginia Tech, Chief Flinchum provided this information to Policy Group members. Virginia Tech points to testimony by Lisa Wilkes, a Policy Group member, who stated that they were aware that the police believed the shooting was a domestic incident. Virginia Tech also asserts that the testimony from Ms. Wilkes indicated that the Policy Group did not think there was a danger on the campus and that the purpose of the 9:26 a.m. email was to notify the community of the incident and let them know the institution was waiting for additional information to provide to the community. According to Virginia Tech, these communications do not indicate that the police and the Policy Group were collaborating on a timely warning.

Virginia Tech also contends that there is no requirement that an institution's timely warning policy must specify the physical or procedural mechanics for issuing a timely warning. According to Virginia Tech, the mere fact that the Policy Group drafted the notice based on input from the VTPD did not mean that it wasn't a police led notification. Virginia Tech maintains that its internal policy 5615 merely laid out the operating procedure behind the issuance of

[44] *See* December 2, 2011 Stipulated Facts.
[45] *See id*.

timely warnings. Virginia Tech argues that FSA puts arbitrary form over substance. As the VTPD were busy investigating a crime, it would be an illogical interpretation of the institution's policies to require the VTPD to physically compose a message rather than provide substantial input on which the message is based. I agree.

On the morning of April 16, 2007, the VTPD was occupied investigating the crime scene at WAJ. The VTPD provided information regarding the investigation, and it was then the Policy Group that was charged with making the determination to issue the 9:26 a.m. email notification. Although, the VTPD did not have the requisite computer code to mechanically issue the warning, this fact does not mean that the spirit and intent of Virginia Tech's timely warning policy was violated because the VTPD could and did participate in the issuance of the timely warning. The ultimate notification was, in reality, the cooperative effort of the VTPD and the Policy Group and that is not unreasonable under the circumstances. Having found that Virginia Tech did issue a timely warning, 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 when there was no ill intent on the part of Virginia Tech in convening the Policy Group to assist the institution in responding to the shootings that day on the campus.

ORDER

On the basis of the foregoing, it is ORDERED that Virginia Polytechnic Institute and State University is relieved of any obligation to pay to the United States Department of Education a fine for an alleged failure to follow the timely warning requirements of the Clery Act.

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Ernest C. Canellos
Chief Judge

Dated: March 29, 2012

SERVICE

A copy of the attached initial decision was sent by certified mail, return receipt requested, to the following:

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