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

In the Matter of

WASHINGTON STATE UNIVERSITY,

Respondent.

Docket No. 11-56-SF

Federal Student Aid Proceeding

Appearances: Daniella A. Hess, Esq., Senior Assistant Attorney General, Washington State University Division, Pullman, Washington, for Washington 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

Washington State University (WSU) is a public institution of higher education located in Pullman, Washington. It offers a variety of programs leading up to doctoral degrees. These programs are accredited by the Northwest Commission on Colleges and Universities, and are eligible to participate in the various federal student assistance programs that are authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV). The office of Federal Student Aid (FSA) is the organization within the U.S. Department of Education (ED) that is charged with oversight of these programs.

The present proceeding had its genesis from a FSA conducted program review at WSU from July 21, 2009 to July 23, 2009. The on-site program review examined the school's compliance with the requirements of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f) as implemented by ED's regulations at 34 C.F.R. §§ 668.41(e) and 668.46. The Clery Act requires that institutions participating in Title IV student aid programs publish and distribute an Annual Security Report (ASR) notifying students, employees, potential students and employees, and ED, of statistical information regarding certain crimes reported to have occurred on campus and adjacent public areas and to provide those persons with information on the procedures for reporting such crimes.

Categories that need to be reported include: homicide, sex offenses, robbery, burglary, vehicle theft, arson, drug and liquor violations, and illegal weapon violations. In addition, hate crimes must be specifically enumerated in the report. The Clery Act also requires that eligible institutions report the full extent of its campus and other designated locations; requires that the institution properly staff the office having Clery Act reporting responsibility; and requires it to have policies and procedures in place so as to assure compliance. WSU was found to have failed to include two forcible sex offenses and three required policy statements in the ASR for calendar year 2007.

The review team issued a program review report on July 6, 2010, in which it detailed the above instances where WSU had failed to comply with requirements of the Clery Act. WSU's response to the program review report was considered by FSA, after which FSA issued a Final Program Review Determination (FPRD) on March 11, 2011. The FPRD notified WSU that, although all of the findings had been corrected, the report and its accompanying background information would be forwarded to FSA for consideration of possible adverse administrative action pursuant to 34 C.F.R. Part 668, Subpart G. Subsequently, on August 19, 2011, FSA issued a notice of its intent to fine WSU $82,500.00 for the three violations of the Clery Act, as reported in the FPRD.

By letter, dated September 9, 2011, WSU's counsel filed a written request for a hearing to contest the proposed fine. In due course, the parties submitted their respective briefs and proposed evidentiary matter. In its appeal, WSU does not contest the facts as alleged by FSA in the fine notice, however, it disputes the appropriateness of the amount of the fine. WSU counsel points out that one violation resulted from a call to the campus police as a domestic dispute. The investigating police officer determined that no crime had been committed and referred the parties for counseling. Later, the complainant provided a written statement to the police department including a comment that the complainant's husband confessed to her that she had been raped by his friend while she was asleep. Attempts to contact the complainant afterwards by the police to obtain further information were unsuccessful – apparently, the couple was no longer enrolled at WSU. As a consequence, the incident was not upgraded to a sexual offense and, therefore, improperly not reported. In the second incident, WSU Police received a call that a rape had occurred in the residence hall. The responding police office contacted the alleged victim, but she informed him that nothing had happened. The incident was originally categorized as a rape but was changed based on the police officer's report. Apparently, the individual who downgraded the report did not have the authority to do so. Finally, although three required policy statements were not included in the Annual Security Report, they were available elsewhere on campus. Basically, WSU argues, in effect, that the fine action is excessive and requests that the fines be reduced to a total of no more than $15,000.00, arguing that this figure is more appropriate under the facts and circumstances.

As delineated in the fine notice, the proposed fine includes: $27,500.00 for each of two failures to properly include two forcible sex offenses in the campus crime statistics for calendar year 2007. In one case, an incident was listed as a domestic dispute rather than a forcible sex

offense. In the other, a reported rape was improperly downgraded and determined to be unfounded. Also, the notice proposed a fine of $27,500.00 for failure to include required policy statements in the security reports, even though the statements were included elsewhere. Other than delineating the violations of the Clery Act by WSU, FSA supports the amount of the proposed fine by stating that the inaccurate information deprived the campus community of vital and reliable information on campus security to take adequate steps to provide for their own safety and that of others. While that may well be so, the ultimate question is, does that type of declaration satisfy FSA's burden of proof relative to the establishment of the appropriateness of the fine it seeks?

The procedures for fining an eligible institution are enumerated in 34 C.F.R. Subpart G. In accordance with 34 C.F.R. § 668.84 (a) (1), the Secretary is authorized to impose a fine of up to $27,500.00 for each violation of a statutory or regulatory provision applicable to Title IV. In any such fine proceeding, 34 C.F.R. § 668.88 (c) (2) provides that FSA has the burden of persuasion and when considering the appropriate fine, 34 C.F.R. § 668.92 instructs that the gravity of the violation must be considered. In the present case, since both parties agree to the facts as enumerated above, I have determined that there is no need to hold an evidentiary hearing. My responsibility is, therefore, to determine the appropriate fine to impose.

This is not the first time that I have considered the question of the appropriate fine for established violations of the Clery Act. *See, In the Matter of Tarleton State University*, Docket No. 09-56-SF, U.S. Dep't of Educ. (September 23, 2010). *See also, In the Matter of Aims Academy,* Docket No. 08-49-SF, U.S. Dep't of Educ. (Decision of the Secretary, November 12, 2010). Without any doubt, the one authorized to impose a fine has discretion in determining the amount of a fine within the authorized maximum permissible punishment. However, just as clear, to be considered an appropriate action, fines like any other pecuniary action must be assessed only after giving due consideration to the seriousness of the violation as well as to the degree of culpability of the violator. That analysis must include a consideration of: the injurious effect of the violation on others, the intent or lack thereof of the perpetrator, and the possible deterrent and the rehabilitative effects that the punishment might have. Historically, maximum permissible punishments have been reserved only for those most aggravating examples of the violations being sanctioned. Here, the record reveals no such analysis -- if it were carried out, it is not described or reported by FSA. In fact the only indication of any consideration of the amount of the fine is a reference to the maximum fine allowable ($27,500.00 per violation), and a generalized statement to the effect that each violation is serious because without access to correct information students and employees are unable to make informed decisions about the safety of the campus community. Although no dispute of such determination is apparent, no specific example of such possibility is mentioned.

Although I have found that there is a recognizably wide discretion in the assessment of a fine, I have opined that discretion must be tempered by reason. To satisfy due process standards, judicial review of such fine action must assure fairness and appropriateness applying the classic balancing of the established mitigating and aggravating factors. Here, as to the mitigating

factors, I have considered: there was no evidence of a fraudulent intent by anyone associated with the erroneous submissions -- in fact, there was no evidence of previous violations of the reporting requirements; WSU corrected its violations prior to the issuance of the FPRD; and clearly there were no federal funds put in jeopardy by virtue of the violations. Finally, it seems quite apparent that similar errors in the Clery Act reporting process will not recur in the future by virtue of the corrective measures that WSU's new police chief has implemented. Of some significance is the submission of an affidavit from the Assistant Police Chief at WSU with primary responsibility for Clery Act compliance stating that since the program review, at least two other universities have contacted him for advice on Clery Act compliance after a referral from FSA. However, on the other hand, although not an intentional violation, the failure to properly satisfy the Clery Act reporting requirements does have potential serious consequences and should be sanctioned appropriately. In that vein, one is left to ponder how serious the failures enumerated in the fine notice were, given that such errors were not noticed prior to the program review.

Here, FSA chose to select out and treat as separate a number of offenses and proposes a total fine of $82,500.00. No discussion of the application of the limiting doctrine of an unreasonable multiplication of charges is included. Surely, the imposition of the maximum fine for two failures to collect and report crime statistics in the same crime report raises that issue. On balance, I find that FSA has failed to satisfy its burden of persuasion that $82,500.00 is an appropriate fine under the circumstances. Since the facts are not in dispute and based on the entire record before me, I find appropriate only $15,000.00 of the proposed fine. In reaching this decision, in addition to the above, I am not unmindful of the fact that in our current economic environment, the viability of educational institutions is tenuous and clearly can be exacerbated by the imposition of a very substantial fine.

ORDER

On the basis of the foregoing, it is ORDERED that Washington State University pay to the United State Department of Education a fine of $15,000.00 for its admitted failure to comply with the reporting requirements of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act.

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Ernest C. Canellos
Chief Judge

Dated: March 12, 2012

SERVICE

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

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