THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the Matter of

TARLETON STATE UNIVERSITY,

Docket No. 09-56-SF
Federal Student Aid Proceeding

Respondent.

DECISION OF THE SECRETARY AND ORDER OF REMAND

This matter comes before me on appeal by the office of Federal Student Aid (FSA) of an Initial Decision issued by Chief Judge Ernest C. Canellos (ALJ) on September 21, 2010. The ALJ found that the pertinent fact in the case is undisputed; namely, that Respondent failed to provide complete and accurate campus crime information in its crime report as required by the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act).[1] That notwithstanding,[2] the ALJ reduced the fine sought by FSA from $137,500 to $27,500. FSA argues that the proposed fine should have been upheld. For the reasons set forth below, I reverse the ALJ's reduction of the fine, and remand this matter for further proceedings on a recalculation of the fine in the manner consistent with this decision.

Under the Clery Act, postsecondary institutions participating in Federal student aid programs must, among other things, publish an annual report listing the number and category of

[1] Pub. L. 89–329, title IV, §485(f), as added Pub. L. 101-542, title II, §204(a), Nov. 8, 1990, 104 Stat. 2385 (20 U.S.C. 1092(f)) (the Clery Act is an amendment of the Higher Education Act of 1965, as amended, (Title IV or HEA), 20 U.S.C. § 1070 *et seq.* and 42 U.S.C. § 2751 *et seq.* Among other things, the Clery Act requires all postsecondary institutions participating in Title IV student aid programs to disclose campus crime statistics and security information annually.

[2] Although FSA asserts that the ALJ's "discussion of the facts...in the decision is inconsistent with the record in this case," the ALJ appears to be discussing facts as they relate to his conclusion that the fine should be reduced, rather than that the facts undermine the merits of FSA's argument that Respondent violated the Clery Act's crime reporting requirement. At any rate, Respondent does not dispute the pertinent fact that its September 1, 2006 crime report omitted at least 40 crimes and 22 arrests.

crimes committed on campus covering a three-year period.[3] The Clery Act requires disclosure in an annual report of campus crime statistics for nine categories of criminal offenses: [i] murder; [ii] sex offenses, forcible or nonforcible; [iii] robbery; [iv] aggravated assault; [v] burglary; [vi] motor vehicle theft; [vii] manslaughter; [viii] arson; and [ix] arrests for drug, liquor, and weapons violations.[4] As a result of a review of Respondent's annual report issued on September 1, 2006, FSA determined that Respondent failed to meet Clery Act crime reporting standards. The report contained multiple errors resulting in the institution's underreporting of campus crime for the three years covered by the September 2006 report. A revised report also contained errors.

FSA proposed to fine Respondent: $27,500 for each of "three forcible sex offenses" not included in Respondent's crime report;[5] $27,500 for Respondent's failure to include in the report 35 burglaries, 22 drug arrests, one robbery and "one referral for drug law violations"; and $27,500 for an additional four burglaries and six drug arrests (and two referrals of drug law violations that were not included in Respondent's original report or the revision).[6]

In his decision, the ALJ notes that Respondent requested either dismissal of the fine action on the basis that the action was per se arbitrary and capricious or, in the alternative, that the fine be reduced to $25,500 as a result of the circumstances of the case, including mitigating factors such as the institution's prompt actions to correct the crime report, the institution's lack of intent to produce an inaccurate report, and the lack of any claim or evidence by FSA that the institution had previously violated Clery Act crime reporting requirements. Additionally, the ALJ found that FSA had not persuasively established that its calculation of the fine was appropriate, and that the mitigation factors, on balance, favored reducing Respondent's fine. By recasting the numerous crime reporting failures by Respondent as "the improper filing of a single report," the ALJ implicitly rejects the proposition that each crime reporting failure constitutes a violation of the Clery Act for which a fine may be imposed. Therefore, the ALJ's reduction of FSA's proposed fine to $27,500[7] raises the issue whether the statutory authority to impose up to the maximum fine for each violation of the HEA precludes the ALJ's substantial reduction in FSA's fine.

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[3] 34 C.F.R. §§ 668.41 & 668.46 (the Department regulations identify specifically what should be included in the crime report, including a requirement to identify the source(s) of the institution's crime statistics, and listing the types of crimes reported). To help institutions comply with the Clery Act's detailed statutory and regulatory scheme, the Department issued the 300-page Handbook for Campus Safety and Security Reporting, which is made available to institutions on the Department's website: www.ed.gov/admins/lead/safety/handbook.pdf.

[4] 20 U.S.C. § 1092(f)(1)(F). The statute also requires reporting if the commission of the criminal offense accompanied the selection of the victim who occupies certain protected classes like gender or race. In addition, the statute requires reporting of certain acts punishable by an institution's disciplinary code of conduct. *See*, 20 U.S.C. § 1092(f)(1)(F)(i)(IX).

[5] According to FSA, it proposed the maximum allowable fine for each of the unreported sex offenses due to the seriousness of the offense and due to crime statistics that indicate that sexual assaults are consistently underreported by postsecondary institutions.

[6] The record shows that, in response to a 2007 article in Respondent's student newspaper documenting errors in the crime report, Respondent revised its crime report fixing many errors, but not all.

[7] The ALJ also noted that the lack of evidence of fraud or malfeasance and the lack of evidence that Federal funds were put at risk constituted additional mitigating factors warranting the reduction in the fine.

On appeal, FSA argues that the ALJ's reduction in fine is improper because it is based on the ALJ's "personal speculation about the reason for [Respondent's] errors rather than on the facts in the record." In FSA's view, there is no fact in the record supporting the ALJ's conclusion that Respondent's failure to "disclose 40 crimes, including three sexual assaults and 22 arrests in one year" in the September 2006 crime report was due to a misunderstanding of Clery Act requirements or that a mitigation of the fine is warranted. FSA also argues that giving favorable weight, as the ALJ did, to the fact that Respondent did not intend to issue an erroneous crime report is an erroneous application of law because the Clery Act does not require a showing of intent as an element showing a violation of the statute.

To support its calculation of an appropriate fine, FSA asserts that in calculating the proposed fine, it considered the numerosity of the errors in the crime report, the serious nature of the unreported crimes, and the purposes of the Clery Act. According to FSA, the unreported forcible sex crimes are considered serious offenses because of their violent characteristic. In addition, FSA argues that the failure to report such crimes undermines an important objective of the Clery Act, which is to improve public safety by providing notice of campus crimes to students, faculty, and staff who may use the crime reports to avoid becoming future victims of campus crime. In FSA's view, when the aforementioned factors are included with the statutory factors relevant in the assessment of fines (noted below), the fine amounts proposed are warranted.[8]

Opposing FSA's appeal, Respondent argues that the ALJ's findings relevant to the mitigation of the proposed total fine should be upheld. In addition, Respondent argues that FSA's calculation of the total fine is unsupportable because the individual fine amounts were determined arbitrarily on an ad hoc basis. Respondent argues, for example, that in one instance, FSA imposed three maximum fines based on the seriousness of three unreported crimes, yet, under other circumstances, FSA imposed one maximum fine for 57 unreported crimes. Similarly, in Respondent's view, FSA inexplicably imposed a single maximum fine for four unreported burglaries and eight unreported arrests.[9] In Respondent's view, these wide-ranging fine calculations demonstrate that FSA has no particular standard in mind for determining an appropriate fine for the failure to report a campus crime in the annual crime report.

First, I agree that the imposition of a monetary penalty is an appropriate way to enforce the goals of the Clery Act. There is no doubt that the failure to accurately report crimes on campus pursuant to the requirements of the Clery Act risks undermining the goals to which Congress expressly intended to meet by enacting the Clery Act, including the goal of encouraging postsecondary institutions to provide reports of campus crimes to students, faculty, and staff, who, as a result, may use the crime reports to avoid becoming future victims of campus crime. I also agree with FSA that a substantial fine is warranted in a case like this, where there is repeated crime reporting failure across a wide range of categories of crime. In determining the amount of the fine, however, I find that FSA failed to provide a clear explanation of how it calculated the total proposed monetary penalty.

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[8] *See*, 20 U.S.C. § 1094 (c)(3)(B)(ii).

[9] The record reflects that FSA's asserted rationale for the latter fine amount is Respondent's failure to report the particular burglaries and arrests in both the institution's original crime report and its revised crime report.

The HEA requires consideration of two factors: [1] the appropriateness of the penalty to the size of the institution of higher education that is subject to the fine, and [2] the gravity of the violation, failure, or misrepresentation.[10] The gravity of a violation of the HEA reflects the relative degree of the seriousness of the violation vis-a-vis other violations as well as the relative nature and extent of the violation itself.[11] The amount of loss suffered, if any, by the Department has also been identified as an appropriate guide in the assessment of a fine.[12] Moreover, the maximum fine for "each violation" of "any provision" of the HEA is currently $27,500.[13] The ALJ imposed a single maximum fine for all of Respondent's unreported crime statistics. Therefore, a threshold issue in this case is whether the statutory authority to impose up to the maximum fine for "each violation" of the HEA precludes the ALJ's substantial reduction in FSA's proposed fine.

The HEA provides, in pertinent part:

(B)(i) Upon determination, after reasonable notice and opportunity for a hearing, that an eligible institution -

(I) has violated or failed to carry out any provision of this subchapter and part C of subchapter I of chapter 34 of title 42 or any regulation prescribed under this subchapter and part C of subchapter I of chapter 34 of title 42; or

(II) has engaged in substantial misrepresentation of the nature of its educational program, its financial charges, and the employability of its graduates, the Secretary may impose a civil penalty upon such institution of not to exceed $25,000 for **each violation** or misrepresentation. (Emphasis added).[14]

In light of the text of the HEA and its relevance to the ALJ's reduction of the fine, an assessment of FSA's proposed fine involves two related questions: [1] whether the HEA authorizes a fine for each failure to report a crime, and, if so, [2] whether FSA's proposed calculation of the fine is proper.

On the first question, there is guidance in the Department's case law regarding the appropriate standard used to determine what constitutes "each violation" of the HEA. *In re Bnai Arugath Habosem (Bnai)*, Secretary Richard W. Riley interpreted the HEA by rejecting the ALJ's view in that case that "multiple violations of the same prohibition" constituted a single violation. In *Bnai*, the institution made Pell grant payments to 58 students who, ultimately, were

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[10] *See*, 20 U.S.C. § 1094 (c)(3)(B)(ii) ("Size" is assessed by comparing the amount of Title IV funds disbursed by the institution in relation to other schools that disburse Title IV funds; there is no dispute that Respondent's size is large, which tilts in favor of imposing a substantial fine).

[11] *See In re Hartford School of Modern Welding*, Dkt. No. 90-42-ST, U.S. Dep't of Education (Jan. 31, 1991).

[12] *In re Bnai Arugath Habosem*, Docket No. 92-131-ST, U.S. Dep't of Educ. (Decision of the Secretary) (August 24, 1993).

[13] 20 U.S.C. § 1094(c)(3)(B)(i); 34 C.F.R. § 668.84(a) (2010) (the HEA's statutory maximum fine of $25,000 has been adjusted in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 & note).

[14] *Id.*

ineligible for Pell grant funding.[15] On the basis of those facts, Secretary Riley concluded that each ineligible student who received a Pell grant disbursement should be counted in the calculation of "each violation" of the statutory provision; thus, rendering *Bnai* subject to a fine for each ineligible student.

I agree with Secretary Riley. The statutory meaning of "each violation" is best understood in light of a common sense interpretation of the words "each violation." Moreover, that standard is particularly fitting for this case where the imposition of a single fine -- in light of repeated crime reporting failure across a wide range of categories of crime -- provides the wrong incentive for promoting exacting compliance with the Clery Act's crime reporting requirement.[16]

A single fine for issuing a crime report missing multiple crimes is tantamount to sending the message to postsecondary institutions throughout the nation that regardless of whether your crime report omits one crime or 101 crimes, the maximum fine is the same. Although I do not assume that postsecondary institutions desire to avoid the consequences of having to report a high incident of crime when required to do so, it is common sense that the calculation of such a fine carries less compulsion of compliance than the calculation required by this decision. Given the statutory mandate authorizing a civil penalty for each violation or misrepresentation of any provision of the HEA, it follows that evidence showing that Respondent failed to include specific criminal offenses in its crime report should result in the imposition of a fine calculated on the basis of each missing criminal offense.[17]

Even so, for its part, FSA fails to specify precisely how it calculated the proposed total fine.[18] FSA should have identified the fine amounts for each unreported offense since an unreported crime constitutes a single violation of the Clery Act's crime report requirement set forth at 20 U.S.C. § 1092(f).[19] Instead, FSA identified fine amounts for some violations, but

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[15] *In re Bnai Arugath Habosem (Bnai)*, Docket No. 92-131-ST, U.S. Dep't of Educ. (Decision of the Secretary) (August 24, 1993).

[16] This follows from the legislative history of the Clery Act as well. In particular, the legislative history of the 1998 amendment of the Clery Act shows that Congress declined to adopt a proposed change that would have required the Department to calculate fines under the Clery Act in a manner similar to the calculation used by the ALJ. The rejected calculation was based on "substantial misrepresentations of the number, location, or nature of the crimes required to be reported." Instead of using that method, the legislation conferees "strongly encourage[d] the Department of Education to enforce the provisions of the law and to penalize those schools that do not comply with the reporting requirements" as required by section 487(c)(3)(B) of the Higher Education Act. *See*, H.R. CONF. REP. NO. 105-750, at 363-364 (1998), *reprinted in*, 1998 U.SC.C.A.N. 404, 441. In other words, Congress specifically intended that fines for Clery Act violations be calculated under the same standard used for any violation of the HEA.

[17] The Notice of Fine indicates that the fine action is based on FSA's conclusion that Respondent "failed to accurately report its crime statistics by omitting several incidents." Clearly, the failure to report a single codified crime would violate the Clery Act – even if FSA decided not to pursue a fine.

[18] The filing of a crime report with multiple errors or omissions constitutes a serious lack of compliance by an institution receiving Federal funds. Therefore, I do not agree with the ALJ's reasoning supporting mitigation of the fine amount. Neither a misunderstanding of the law, nor Respondent's purported lack of intent to violate the law is relevant to this case.

[19] *In re Bnai Arugath Habosem (Bnai)*, Docket No. 92-131-ST, U.S. Dep't of Educ. (Decision of the Secretary) (August 24, 1993). Although FSA provided total fines for multiple missing crimes, the record lacks any basis upon which to conclude how the total was derived.

summarized the fine amount for other violations. As such, a review of FSA's calculation of the total fine is required.

In the calculation of the fine, FSA proposed to fine Respondent $27,500 for each of "three forcible sex offenses" not included in Respondent's crime report. According to FSA, the maximum fine was proposed for each unreported sex offense due to the seriousness of the violent offense. Applying the statutory standard in the HEA, I find FSA's imposition of the maximum fine for failure to report a violent crime warranted. The gravity of the failure to report violent crimes -- such as a forcible sex offense or robbery -- is serious enough to come within the range of a maximum fine because the fine will both punish an institution for the violations and deter other similarly situated institutions from committing similar violations. Therefore, the three maximum fines totaling $82,500 are upheld.

The record lacks a clear indication of how FSA determined the remaining proposed $55,000 fine. According to FSA, $27,500 was imposed for Respondent's failure to include in the report 35 burglaries, 22 drug arrests, one robbery, and one referral for drug law violations; and $27,500 was imposed for an additional four burglaries and six drug arrests, and two referrals for drug law violations. Robbery is generally considered an aggravating or violent theft offense. Consequently, I find that the maximum fine should be imposed as noted above.[20] Therefore, a fine of $27,500 is imposed for failure to report the violent crime of robbery. The fines I have upheld, which Respondent must repay, total $110,000. As for the other unreported crimes, FSA did not precisely specify the fine amount for each of the remaining 70 crime reporting violations. Therefore, FSA's calculation of the fine for the remaining 70 unreported crimes appears arbitrary because the fine calculation lacks a rational explanation for the basis of the amount of the fine.

On the basis of the foregoing, I reverse the findings by Chief Administrative Judge Ernest C. Canellos regarding the calculation of fine. I remand this matter for recalculation of the appropriate fine for the remaining 70 violations of the Clery Act. FSA shall be permitted an opportunity to submit to the ALJ a recalculation of the proposed fine for each the remaining 70 violations along with a rational explanation for the basis thereof. To be clear, this remand does not invite the parties to relitigate the merits of the institution's violations or the amount of the fines I have upheld. Rather, the precise questions for each of the 70 remaining violations are: what should the fine be and why.

ORDER

ACCORDINGLY, I HEREBY ORDER that Respondent shall pay the U.S. Department of Education $110,000.

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

[20] Robbery is defined as the taking of property by violence. *See*, Black's Law Dictionary, 2nd ed. (2001).

So ordered this 1st day of June 2012.

Arne Duncan

Washington, D.C.

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