THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the Matter of
VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY,

Docket No. 11-30-SF
Federal Student Aid Proceeding

Respondent.

DECISION OF THE SECRETARY

This matter comes before me on appeal by the Office of Federal Student Aid (FSA) of a Decision Upon Remand issued by Chief Judge Ernest C. Canellos (ALJ) on December 10, 2012.[1] In that decision, the ALJ fined the Virginia Polytechnic Institute and State University (Virginia Tech or Respondent) $5,000 for violating the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act's (Clery Act) requirement that Respondent disclose its timely warning policy to students and employees as part of its Annual Security Report (ASR).[2]

On appeal, I must decide whether, under the Clery Act, it was appropriate for the ALJ to fine Respondent $5,000 for having inconsistent timely warning policies and failing to disclose one of them, consistent with the Act's requirements. FSA argues that the findings by the ALJ should be reversed and the total fine reinstated. In the alternative, FSA argues that should I "conclude that the maximum fine is most appropriately applied when an institution has not disclosed a timely warning policy at all," then the fine should be reduced by 25 percent to $20,625 to "acknowledge Virginia Tech's compliance with the regulation while still imposing an appropriately significant sanction."[3] In response, Respondent argues that I should uphold the ALJ's decision because imposing the maximum fine would not: (1) accurately reflect the relative

[1] *In re Virginia Polytechnic Institute and State University*, Dkt. No. 11-30-SF, U.S. Dep't of Educ. (December 10, 2012) (Decision Upon Remand), hereafter referred to as "Remand Dec."
[2] 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*. (Federal student aid programs are authorized under Title IV.)) (The Clery Act has been amended several times, including on Aug. 14, 2008, where Congress amended the Clery Act by creating additional safety and security requirements for postsecondary institutions.) Among other requirements, the Clery Act requires all postsecondary institutions participating in Title IV student aid programs to disclose campus crime statistics and security information annually.
[3] "Appeal to the Secretary, Brief of the Office of Federal Student Aid" (January 15, 2013), pp. 15-16 (hereafter referred to as "FSA Br.").

degree of the seriousness of the violation; (2) be consistent with prior enforcement actions; and (3) be consistent with the Department's guidance on the issue. For the reasons set forth below, I uphold the ALJ's decision to fine Respondent $5,000 for its deficient timely warning policies in violation of the Clery Act.

I

On August 30, 2012, I issued a decision finding that Respondent violated the Clery Act's requirement that it disclose its timely warning policy to students and employees as part of its ASR. Specifically, I found that Virginia Tech's timely warning policies were inconsistent and that it failed to disclose one of them. I stated that "[p]ostsecondary institutions should not have multiple timely warning policies – only some of which are disclosed to the campus community – that are inconsistent with each other. University policies and procedures provide vital assurance of informing students, faculty, and staff of the specific procedures followed by the institution in the event of criminal activity on campus that may threaten the safety of members of the campus community."[4] Accordingly, I decided that Respondent should be fined and then remanded the case for further proceedings on the issue of how much the fine should be and why. Further, I noted that the violation did not "warrant[] the maximum possible fine."[5]

As I mentioned above, on December 10, 2012, the ALJ determined that the fine should be $5,000, substantially less than the $27,500 fine sought by FSA. In making his determination, the ALJ was guided by two 2011 determinations by FSA involving inadequate timely warning policies, one at the University of Vermont (Vermont) and one at the University of Utah (Utah). In a Final Program Review Determination (FPRD) issued in April 2011, FSA found that Vermont's timely warning policy violated the Clery Act because the disclosure did "not describe the mode of communication in which those warnings will be made in the case of an imminent threat."[6] In spite of this violation, FSA worked to bring Vermont into voluntary compliance and did not impose a fine.

Similarly, in an FPRD issued in May 2011, FSA found that Utah's ASR "lacked… policies for making timely warning reports to the campus community."[7] In response to this finding, the University of Utah drafted and implemented several policies, including ones regarding the reporting of "criminal actions and other emergencies on campus."[8] As a result of these actions, FSA closed this finding.

In the ALJ's opinion, FSA failed to explain why Virginia Tech should be assessed a substantial fine in the instant case when FSA "took no such fine action against two other large

[4] *See, In re Virginia Polytechnic Institute and State University*, Dkt. No. 11-30-SF, U. S. Dep't of Educ. (August 30, 2012) (Decision of the Secretary and Order of Remand), pp. 10-11 (hereafter referred to as "Sec. Dec.").
[5] *Id*. at 11.
[6] *See*, "University of Vermont Final Program Review Determination" (April 25, 2010), p. 7 (hereafter referred to as "Vermont FPRD"), included as an attachment to "Brief of Respondent Virginia Polytechnic Institute and State University" (February 12, 2013) (hereafter referred to as "Resp. Br."). Respondent provided the information included in the attachment to its Brief as a courtesy. Although no new evidence is permissible when a case is appealed to this Office, it is clear from the ALJ's Decision Upon Remand that the two FPRDs were introduced into the record on brief during that deliberation. *See*, Remand Dec. at 5.
[7] *See*, "University of Utah Final Program Review Determination" (May 23, 2011), p. 4 (hereafter referred to as "Utah FPRD"), included as an attachment to Resp. Br.
[8] *Id*. at 6.

universities for, what appears to be, very similar violations."[9] Although the ALJ noted that the "proposed fines are not necessarily required to be always exactly the same for the same violation because of potentially unique circumstances, treatment for very similar violations with no discernible distinction cannot be so different as to be considered arbitrary."[10] Due to this "obvious disparate treatment,"[11] the ALJ substantially reduced the fine to $5,000.

II

On appeal, FSA contends that I should reverse the Decision Upon Remand and impose the maximum fine of $27,500 on Respondent because the ALJ "exceeded his authority and abused his discretion by considering FSA's actions in other matters not before him."[12] Specifically, FSA argues that the ALJ "improperly changed the focus of this proceeding from determining the appropriate amount to fine Virginia Tech for its violation of the Clery Act to whether FSA's proposed fine was consistent with its decision not to pursue fines in [University of Vermont and University of Utah] cases."[13] Comparing FSA's proposed fine for Virginia Tech would, FSA argues, "put [the ALJ] in the position of reviewing FSA's decision not to propose fines in those cases… and is outside his jurisdiction."[14] Notably, FSA chose not to respond to Virginia Tech's brief "on this point because it is clear that the decision whether or not to pursue another case is irrelevant to whether a fine should be imposed on Virginia Tech and that the hearing official has no authority to consider or evaluate FSA's decision not to propose a fine in another case."[15]

Instead, FSA argues that Virginia Tech's failure to have consistent timely warning policies warrants a "significant penalty" because FSA's proposed fine of $27,500 is "consistent with recent decisions in which the Secretary has addressed the criteria that should be used for the imposition of fines in Clery Act cases."[16] In support of its arguments, FSA cites two recent decisions that involve institutions which failed to publicly report specific criminal offenses in their ASRs. In *Tarleton*, I found that FSA's decision to impose the maximum fine for the respondent's failure to report certain crimes was warranted due to the seriousness of the unreported offenses – for instance, the respondent failed to report several crimes that were violent in nature, such as forcible sex offenses and robberies.[17] Similarly, in *Washington State*, the respondent omitted two "forcible sex offenses" from its ASR, and I held that the failure to report a violent crime is "serious enough to come within the range of a maximum."[18] In both of these cases, I found that each reportable crime not included in the ASR is a separate violation of the Clery Act, and the fine should be calculated on the basis of each missing reportable offense.

[9] Remand Dec. at 5.
[10] *Id*. at 4.
[11] *Id*. at 5.
[12] FSA Br. at 6.
[13] *Id*. at 8.
[14] *Id*.
[15] *Id*. at 6.
[16] *Id*. at 12.
[17] *See*, *In re Tarleton State University*, Dkt. No. 09-56-SF, U.S. Dep't of Educ. (Decision of the Secretary and Order of Remand) (June 1, 2012).
[18] *See*, *In re Washington State University*, Dkt. No. 11-56-SF, U.S. Dep't of Educ. (Decision of the Secretary and Order of Remand) (August 29, 2012), p. 6.

FSA concedes that, unlike the *Tarleton* and *Washington State* cases it relies upon, the instant case "does not involve the inclusion of violent crimes in crime statistics."[19] Nonetheless, because "timely warnings are required when there is a violent crime on campus" and due to the "relationship of the timely warning policy to violent crimes," FSA argues that I should impose the maximum fine of $27,500.[20] In the alternative, FSA argues that should I "conclude that the maximum fine is most appropriately applied when an institution has not disclosed a timely warning policy at all," then the fine should be reduced by 25 percent to $20,625 to "acknowledge Virginia Tech's compliance with the regulation while still imposing an appropriately significant sanction."[21]

In response, Virginia Tech argues that the *Tarleton* and *Washington State* cases cited by FSA are inapposite and that Vermont and Utah FPRDs are "more appropriate comparisons."[22] Virginia Tech contends that these cases are more comparable to the instant case because they both involve insufficient timely warning policies and disclosures. Virginia Tech attached the FPRDs for both Vermont and Utah, and I discuss both in further depth below.[23]

In July 2009, FSA conducted a program review of Vermont's compliance with the Clery Act. On April 25, 2011, FSA issued an FPRD finding that Vermont:

(1) Failed to report accurate crime statistics to FSA for calendar year 2007;

(2) Failed to maintain an accurate crime log for calendar year 2007;

(3) Failed to include in its timely warning policy a description of the mode of communication in which warnings will be made to the campus community in the case of an imminent threat;

(4) Failed to include in its 2007 ASR a clear statement that, in a disciplinary proceeding involving an alleged sexual offense, the accuser and the accused are entitled to the same opportunities to have others present during the proceeding; and

(5) Failed to properly distribute its ASR for calendar year 2008.

As a result of these findings, FSA fined Vermont a total of $65,000. After considering the gravity of the violations and the size of the institution, FSA imposed a fine of $27,500 for Vermont's failure to report accurate crime statistics in 2007; $27,500 for miscoding of its 2007 crime log which resulted in the reporting of erroneous crime statistics to the public; $5,000 for Vermont's failure to include in its 2007 ASR that the accuser and the accused are entitled to the same opportunities to have others present during a disciplinary hearing; and $5,000 for Vermont's failure to properly distribute its 2008 ASR to the campus community. Notably, for Finding (3), FSA chose not to impose a fine for Vermont's insufficient timely warning policy. In response to Finding (3), Vermont revised its timely warning policy by including language

[19] FSA Br. at 13.
[20] *Id*.
[21] *Id*. at 15-16.
[22] Resp. Br. at 7.
[23] *See*, fn. 6 *supra*.

regarding the mode of communication for timely warnings. In the FPRD, FSA determined that Vermont's response was "sufficient to address this finding" and that the "Department will consider this finding closed."[24] This FPRD was not appealed.

In May 2011, FSA issued another FPRD regarding a university's failure to comply with the Clery Act. Specifically, FSA found that the University of Utah:

(1) Failed to include adequate policy statements in its ASR, including policies for making timely warning reports to the campus community;

(2) Failed to properly classify crimes that occurred on campus;

(3) Failed to properly disclose crime statistics;

(4) Failed to correctly report all reportable crimes occurring in non-campus buildings or property; and

(5) Failed to properly distribute its 2007 ASR to the campus community.

Utah responded to the initial Program Review Report to the satisfaction of FSA such that FSA closed all five findings in the FPRD and did not assess any fines.

Because a fine should "reflect the seriousness of the violations vis-à-vis other violations," Respondent argues that its deficient timely warning policy is "no more serious than the omissions contained in the policy disclosures of the University of Vermont and the University of Utah," and that the "fine FSA now seeks to impose against Virginia Tech is far out of line with its handling of cases involving similar violations."[25] Further, Virginia Tech argues that FSA has failed to justify that the "$5000.00 fine imposed by the ALJ should be increased."[26]

Finally, Respondent argues that the ALJ did not exceed his authority when he considered the Vermont and Utah FPRDs. Virginia Tech contends that FSA's argument on this issue misses the point; the ALJ was not reviewing whether FSA's decisions not to fine Vermont and Utah were appropriate, but whether FSA's proposed fine in the instant case was consistent with the decisions it made in those prior – and factually comparable – cases. In other words, Respondent argues that the Vermont and Utah FPRDs are relevant to the extent that they represent guideposts for determining the appropriate amount of the fine.

III

As I discussed in my first decision in this case, the Clery Act requires postsecondary institutions to disclose their crime reporting policy in an ASR, which is sent to the Department and distributed throughout an institution's campus community. Although the Act restricts the Department from requiring "particular policies, procedures, or practices by institutions of higher education with respect to campus crimes or campus security," it does impose requirements and

[24] Vermont FPRD at 7.
[25] Resp. Br. at 8.
[26] *Id*. at 11.

enumerates the type of policy statements that must be included in the ASR.[27] That Congress included specific guidelines governing what types of crime policies institutions must identify and explain reinforces, rather than mitigates, the importance of the accurate disclosures of such policies.

In determining the amount of a fine, the HEA requires the 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.[28] Regarding the first factor, the size of an institution is based on whether it is above or below the median funding levels for the Title IV, HEA programs in which it participates.[29] As for the second, the gravity of a violation of the HEA reflects the relative degree of the seriousness of the violation compared to other violations, as well as the relative nature and extent of the violation itself.[30] The amount of loss suffered, if any, by the Department has also been identified as an appropriate guide in the assessment of a fine.[31] Moreover, the maximum fine for "each violation" of "any provision" of the HEA is currently $27,500.[32]

Beyond these considerations, the Clery Act allows for wide discretion in the imposition of a fine, and the only absolute limitation is that it cannot exceed the authorized maximum.[33] However, whatever fine is proposed, to be supportable upon review, must be determined to be reasonable under the circumstances and supported by a rational explanation for the basis of the amount of the fine.[34] As a corollary, I concur with the ALJ that although proposed fines are not necessarily required to be exactly the same for the same violation because of potentially unique circumstances, treatment for very similar violations with no discernible factual distinctions cannot be so different as to be considered arbitrary and capricious as a matter of law.[35]

IV

Applying the statutory standard in the HEA to the facts at hand, I find that the maximum fine is unwarranted in this case.[36] While I agree with FSA that having inconsistent warning policies and failing to disclose one of them is more than a technical violation of the Clery Act, the HEA also requires me to compare the seriousness of the violation against other violations of the Clery Act when determining the appropriate amount of a fine. FSA argues that Virginia Tech's inconsistent timely warning policies and its failure to disclose one of those policies are similar to the respondents' failures to report violent crimes in *Tarleton* and *Washington State*. I disagree. The violations that occurred in *Tarleton* and *Washington State* strike at the very heart

[27] 20 U.S.C. § 1092(f).
[28] *See*, 34 C.F.R. § 668.92.
[29] *In re Bnai Arugath Habosem*, Dkt. No. 92-131-ST, U.S. Dep't of Educ. (Decision of the Secretary) (August 24, 1993), pp. 2-3.
[30] *Tarleton* at 4.
[31] *Id*.
[32] 34 C.F.R. § 668.84 (a) (1).
[33] *Id.*
[34] *Tarleton* at 6.
[35] *See Israel v. USDA*, 282 F.3d 521, 526 (7th Cir. 2002); 5 U.S.C. § 706(2)(A).
[36] Regarding the first factor in the analysis, it is undisputed that Respondent is a large institution. The latest year for which complete funding data is available for Respondent is the 2008-09 award year. According to FSA, in 2008-09 – the latest year for which complete funding data is available – Virginia Tech received federal funds that exceeded the median level of funding, indicating that Respondent is a large institution for purposes of the Clery Act.

of the Clery Act's protections and are precisely the kinds of acts that Congress intended to prohibit – namely, colleges failing to inform their communities of violent crimes on their campuses. These kinds of Clery Act violations are the most serious and warrant a similarly serious penalty. However, the particular violation we are discussing here – Virginia Tech's deficient timely warning policy – does not implicate the same concerns as *Tarleton* and *Washington State* and is neither *de minimus*, nor clearly egregious.

Virginia Tech's published policy stated:

> At times it may be necessary for 'timely warnings' to be issued to the university community. If a crime(s) occur[s] 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.[37]

Indeed, if that were the only policy in place, there would have been no violation. Instead, Virginia Tech had in place a second, undisclosed policy, Virginia Tech Policy #5615, which provided for University Relations and the University Police to have a joint role in alerting students.[38] As I previously decided, Virginia Tech's practice violates the Clery Act.[39] Still, I cannot say the inconsistency between the two policies is an egregious one. While one can imagine a situation where an inconsistency between policies is so extreme that one policy completely contravenes the other, that is not the case here. For example, a comparison between the published policy and the undisclosed internal policy suggests some consensus regarding the role of the University Police. While Respondent may have failed to provide the kind of detail that the Clery Act requires regarding who will be issuing the warning to the campus community, by comparing this violation to those that occurred in *Tarleton* and *Washington State*, FSA is essentially arguing that, for the purpose of assessing an appropriate fine, having inconsistent timely warning policies is tantamount to an institution hiding the fact that violent crimes have occurred on its campus.

I cannot agree with this assessment. *Tarleton* and *Washington State* stand for the proposition that the maximum fine should be imposed for Clery Act violations involving the nondisclosure of violent crimes. The violation being discussed here does not involve the failure to report violent crimes, but inconsistent timely warning policies. While it is true that timely warning policies often address the most serious of crimes, the analogy between the violation being discussed here and the ones that occurred in *Tarleton* and *Washington State* is not a strong one.

Moreover, FSA's previous determinations regarding deficient timely warning policies also suggest that these kinds of violations should be treated less seriously, as evidenced by the

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[37] *See*, Remand Dec. at 2.

[38] Which provided that "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." *Id.*

[39] Sec. Dec. at 11.

FPRDs that FSA issued to the University of Vermont and University of Utah, discussed in Section II above. I find these determinations to be more comparable to the present case than *Tarleton* and *Washington State*. In the Vermont and Utah enforcement actions, FSA identified (among other violations) deficiencies in the universities' timely warning policies. Specifically, in the FPRD issued to Vermont, FSA determined that Vermont failed to disclose in its timely warning policy how it would disseminate the warning to the campus community. In the FPRD issued to Utah, FSA found that the university failed to include a timely warning policy in its ASR. Importantly, in both cases, FSA allowed the universities to come into compliance voluntarily and then, based on the universities' responses, determined that their previously deficient (or nonexistent) timely warning policies warranted no fine at all.

On appeal, FSA makes no attempt to distinguish the FPRDs from the instant case based upon the facts, arguing instead that the ALJ was not permitted to consider the FPRDs on procedural grounds. Considering the FPRDs would, FSA argues, "put [the ALJ] in the position of reviewing FSA's decision not to propose fines in those cases" even though he "has no authority to consider or evaluate FSA's decision not to propose a fine in another case."[40] In support of its argument, FSA cites *Heckler v. Chaney*, 470 U.S. 821 (1985), for the principle that an agency's decision not to take an enforcement action is not subject to judicial review under the Administrative Procedure Act.[41]

Heckler has no application to the present case. The ALJ did not consider FSA's FPRDs for the purpose of reviewing FSA's enforcement decisions in those matters, but as comparables that would help determine the fine amount in the instant case. While the FPRDs are not precedential, they do provide some insight into how serious FSA considers a violation of a timely warning policy to be vis-à-vis other Clery Act violations.[42]

In the alternative, FSA argues that a lower fine might be warranted because Respondent partially complied with the Clery Act's timely warning policy requirements by publishing a policy. Because of this partial compliance, FSA suggests that a 25 percent reduction from the maximum possible fine would be appropriate. Still, when I consider FSA's previous determinations in the Vermont and Utah FPRDs and the seriousness of the violation here measured against other Clery Act violations (such as the violations in *Tarleton* and *Washington State*), I think the ALJ's fine is more appropriate.

To be clear, I agree with FSA that having a consistent and transparent timely warning policy is important – such a policy provides the campus community with a clear picture regarding who will be issuing warnings. Nonetheless, Virginia Tech's transgression is not of the same gravity as other violations that come under the Clery Act's purview and thus does not warrant a similarly severe penalty. Accordingly, in evaluating the gravity of the violation at hand and the justifications for the proposed fines presented by both parties, I uphold the ALJ's decision to fine Respondent $5,000.

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[40] FSA Br. at 6.

[41] *Id.* at 8.

[42] To be clear, although persuasive in the instant case, these FPRDs are not binding as precedent. Because the FPRDs in both cases were never appealed, they have not received the additional scrutiny of an ALJ or a court of law. Moreover, because these FPRDs may have been the result of negotiations that were not captured in the record, it is with some caution that I consider these FPRDs.

ORDER

ACCORDINGLY, the Decision Upon Remand of Chief Judge Ernest C. Canellos is HEREBY AFFIRMED; IT IS HEREBY ORDERED that Respondent shall pay the U.S. Department of Education $5,000.

So ordered this 3rd day of January 2014.

/s/

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Arne Duncan

Washington, DC

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