THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the Matter of

WASHINGTON STATE UNIVERSITY,

Docket No. 11-56-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 March 12, 2012. The pertinent facts in the case are undisputed; namely, that Washington State University (the Respondent) failed to provide complete and accurate 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, the ALJ reduced the fine sought by FSA from $82,500 to $15,000. For the reasons set forth below, I reverse the ALJ's reduction of the fine.

I

Under the Clery Act, postsecondary institutions participating in Federal student aid programs must, among other requirements, publish an annual report listing the number and category of crimes committed on campus covering a three-year period.[2] The 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]

[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.* (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.

[2] 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 aid institutions to comply with the Clery Act's detailed statutory and regulatory scheme, the Department issued the 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.

burglary; [vi] motor vehicle theft; [vii] manslaughter; [viii] arson; and [ix] arrests for drug, liquor, and weapons violations.[3] In addition, the Clery Act requires that the annual report include a statement of current campus policies regarding procedures for (1) students and others to report criminal actions or other emergencies occurring on campus; and (2) the institution's response to reports of criminal activity, including specifying opportunities for victims of crime to receive counseling.[4]

After reviewing Respondent's annual crime report issued on September 14, 2007, FSA determined that the report contained three omissions resulting in violations of the Clery Act's reporting requirements. The violations included two "forcible sex offenses," and each of these omissions, in FSA's view, warranted a maximum fine. The remaining crime reporting violation involved Respondent's failure to include three policy statements in the crime report informing the campus community of the institution's policies for handling and processing allegations of criminal activity, including counseling opportunities for victims of certain crimes, and potential sanctions imposed following a final determination made by the institution. FSA determined that this failure to include required policy statements also warranted the maximum possible fine of $27,500 because "Congress considered it important for institutions to provide students and employees with these policies."[5]

For a variety of reasons, the ALJ reduced the total fine sought by FSA from $82,500 to $15,000. According to the ALJ, "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."[6] Applying this standard to the case, the ALJ determined that: "the only indication of any consideration of the amount of the fine [by FSA] 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."[7]

The ALJ acknowledged that "the failure to properly satisfy the Clery Act reporting requirements does have potential serious consequences and should be sanctioned appropriately," but questioned the "serious[ness] [of] the failures enumerated in the fine notice." In this regard, the ALJ concluded that "FSA [] failed to satisfy its burden of persuasion that $82,500.00 is an appropriate fine under the circumstances."[8] The ALJ seemed concerned that FSA had not made a sufficient evidentiary showing why a maximum fine should be imposed. Nor was the ALJ convinced that FSA had shown that it was proper to fine an institution for each Clery Act violation in a single crime report.

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3 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).

4 34 C.F.R. § 668.46.

5 Government Br. at 13.

6 *Washington State University*, U.S. Dep't of Educ., Dkt. No. 11-56-SF (Initial Decision, March 12, 2012) at 3.

7 *Id.*

8 *Id.* at 4.

In addition, the ALJ noted that a reduction in the fine was also supported by the following mitigating factors: (1) "there was no evidence of a fraudulent intent by anyone associated with the erroneous submissions," (2) "there was no evidence of previous violations of the reporting requirements," (3) Respondent "corrected its violations prior to the issuance of the FPRD," and (4) "there were no federal funds put in jeopardy by virtue of the violations."[9] Finally, the ALJ noted the reduction was also appropriate considering the "current economic environment [which renders] the viability of educational institutions [] tenuous and [potentially] exacerbated by the imposition of a very substantial fine."[10]

On appeal, FSA seeks a reversal of the ALJ's decision to reduce the fine because the reduction was based on mitigating factors that have no applicability in the instant case. Furthermore, FSA argues that the ALJ's decision should not "stand [because it] would seriously undercut the Department's ability to sanction violations of the Clery Act at a time when campus security remains a serious public concern."[11] FSA argues a maximum fine is warranted for each of the unreported "forcible sex offenses" because it would deter postsecondary institutions from underreporting sex offenses.[12] In support of this position, FSA points outs that studies show that postsecondary institutions have a strong incentive to underreport sex offenses so students, parents, and prospective students do not view the campus as unsafe.[13] As for the three missing policy statements -- each of which are required by the Department's regulations -- FSA argues that a fine of $27,500 is a reasonable sanction "in light of the fact that [Respondent] violated its statutory duty to its students and employees in three separate instances."[14]

Opposing FSA's appeal, Respondent argues that the ALJ's findings in support of reducing the amount of the proposed total fine should be upheld. Respondent argues that the lack of any evidence in the record showing that the institution attempted to "deliberately conceal" the omitted crime statistics demonstrates that the maximum fine is unwarranted.[15] In addition, Respondent argues that FSA's maximum fines are unsupportable because none of the omitted crime statistics "placed any member of the [campus] community in danger."[16] In Respondent's view, even the campus crime reporting policy omissions "did not create a risk of harm to the [campus] community" because the policies were made available in a pamphlet and in the campus police manual.[17]

Respondent also argues that the violations do not have the significance that FSA attaches. As an example, Respondent indicates that one of the forcible sex offenses was omitted due to a coding mistake -- the incident was not included in the crime report because it was erroneously coded as "a domestic dispute," which is not a reportable offense under the Clery Act. Similarly, according to Respondent, a forcible sex offense was omitted because a records manager

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9 *Id.*

10 *Id.*

11 Government Br. at 3.

12 Government Br. at 2.

13 Respondent does not challenge the probative value of the studies cited by FSA, and the ALJ does not address them.

14 Government Br. at 13.

15 *See* Respondent Br. at 8.

16 *Id.*

17 *See* Respondent Br. at 9.

improperly assumed authority to recodify the crime as "unfounded" – and therefore not a reportable offense – because the victim later appeared to deny that the incident had occurred. With regard to the crime report's missing policy statements, Respondent argues that even though the policy statements did not appear in the crime report as required, the campus community was informed of the crime reporting policies by other means. In Respondent's view, the errors and mistakes surrounding its omissions show that the institution did not intend to submit an inaccurate crime report, and that imposing a maximum fine for these omissions is unwarranted.

II

The issues and arguments in this case travel along a similar path as those raised in an appeal I recently reviewed in *In the Matter of Tarleton State University (Tarleton)*.[18] At issue in *Tarleton* were two related questions: [1] whether the HEA authorizes a fine for each omission in a single Clery Act crime report, and, if so, [2] whether FSA's proposed calculation of the fine was proper. On the first question, I held that the meaning of "violation" in the HEA authorizing a civil penalty for *each violation* of any provision of the HEA should be given its long-standing, straightforward, and common sense interpretation. This interpretation resulted in the imposition of a fine for each unreported criminal offense in a single crime report since each omission constituted a separate violation of the HEA.

Regarding the second question, the ALJ in *Tarleton* reduced Respondent's fine after considering several factors, including: [1] the institution's prompt actions to adopt corrective measures to ensure the accuracy of future campus crime reports, [2] the institution's lack of intent to produce an inaccurate report, and [3] the lack of any claim or evidence presented by FSA showing that the institution's omissions increased the likelihood of a loss of Federal student aid funds. I summarily rejected the ALJ's conclusion, noting that mitigation should not be applied in a manner that was inconsistent with the Clery Act's 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.

Further, I noted that the imposition of a maximum fine was warranted for the Respondent's failure to report three forcible sex offenses and a robbery -- crimes that were violent in nature. Nonetheless, I also held that FSA failed to provide a rational basis explaining how it calculated the fine for the remaining unreported crimes. Accordingly, I remanded the case to the ALJ and ordered FSA to recalculate the proposed fine for each of the remaining violations and submit that recalculation to the ALJ along with a rational explanation for the basis thereof in order to prevent the imposition of an arbitrary and capricious fine.

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18 *Tarleton State University*, U.S. Dep't of Educ., Dkt. No. 09-56-SF (Decision of the Secretary, June 1, 2012) (*Tarleton* was issued after the ALJ issued his decision in this matter).

III

My decision in *Tarleton* controls much of the instant case. First, in light of *Tarleton*, I reverse the ALJ's decision that FSA could not impose the maximum fine for each of the two unreported forcible sex offenses in the Respondent's crime report. As I made clear in *Tarleton*, the HEA authorizes the Department to impose a fine calculated on the basis of each missing criminal offense in a single crime report. Moreover, consistent with *Tarleton*, I also hold that FSA's decision to impose a maximum fine for each of those omissions is warranted because both of the unreported crimes were violent in nature.

Second, I review the ALJ's findings on mitigation.[19] To the extent that mitigation plays any role in the calculation of a fine pursuant to the HEA (which is an issue that I do not need to decide in this case), mitigation in the context of the Clery Act should not be applied in a manner that is inconsistent with the Clery Act's important objectives, 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 a future victim of campus crime. Indeed, the standard of care expected of institutions completing Clery Act crime reports is high because of the potential impact on campus security and safety that may arise as a result of not reporting or underreporting the serious nature of campus crimes. Accordingly, neither Respondent's purported lack of intent to violate the Clery Act nor its argument that it took prompt actions to adopt corrective measures to ensure the accuracy of future campus crime reports is relevant under the statute. The fact remains that students, faculty, and staff were unable to use the crime report in question as Congress intended because Respondent failed to provide complete and accurate campus crime information.

Third, the fact that there was no evidence that Respondent's reporting failures increased the likelihood of a loss of Federal student aid funds should not be used as a basis to reduce FSA's proposed fine. Since the failure to file an accurate crime report never impacts the risk that Title IV funds will be disbursed to an ineligible recipient or ineligible institution, all institutions violating the Clery Act on this basis would qualify for a reduced fine. This is inconsistent with the rare and exceptional circumstances that should surround the use of mitigation.

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19 In support of his factors of mitigation, the ALJ cites his decision in *Tarleton*, and a decision I issued in *In the Matter of Aims Academy*, U.S. Dep't of Educ., Docket No. 08-49-SF, (Decision of the Secretary, November 12, 2010). These cases, however, are not helpful. First, *Tarleton* was not a final decision when cited by the ALJ -- it was on appeal prior to issuance of the ALJ's current decision. Second, in *In the Matter of Aims Academy*, which involved the institution's failure to file a timely Integrated Postsecondary Education Data System Survey (IPEDS), I affirmed the ALJ's reduction of FSA's proposed fine from $14,000 to $1,000, but I made no indication that mitigation should be used broadly in IPEDS cases or with regard to any other HEA violation. My affirmance was based on the specific findings and result of the ALJ for which I found "no reason to modify." More broadly, my rulings on mitigation have consistently counseled against broad application of equitable remedies. Most important, notwithstanding that IPEDS provides the Department with important data from institutions receiving Federal financial assistance funds, I do not accept the view that the underlying goals of enhancing campus security are on equal footing -- subject to the same factors for reducing fines as the ALJ cited in *In the Matter of Aims Academy* -- with the goals of collecting IPEDS reports. Moreover, there is at least one Decision of the Secretary expressing a view contrary to the ALJ's seemingly general inclination to apply mitigation to reduce fines involving failures to file IPEDS. *See, e.g., In the Matter of Powder Springs Beauty College*, U.S. Dep't of Educ., Docket No. 04-41-SF, (Decision of the Secretary, June 1, 2006).

The remaining crime reporting violations involve Respondent's failure to include three policy statements in its crime report informing the campus community of the institution's policies for handling and processing allegations of criminal activity, including informing students, faculty and staff of counseling opportunities for victims of certain crime, and informing students, faculty and staff of potential sanctions imposed following a final determination by the institution of the occurrence of certain campus crime. FSA argues that a maximum single fine of $27,500 is warranted for all three missing policy statements. I do not agree.

Clearly, the imposition of a fine is warranted. There is no doubt that the failure to include in the crime report any statement of policy required by the Clery Act risks undermining the goals which Congress expressly intended to meet by enacting the Clery Act, including the goal of providing campus communities with sufficient information to avoid becoming future victims of campus crime. An indication of the importance Congress attached to the statements of policy is the explicit enumeration of the required statements of policy in section 1092(f) of the Clery Act.[20] Congress described what the policy statements should concern and set forth the constituent elements of each statement. Accordingly, as set forth in *Tarleton* and in light of the statutory mandate authorizing a fine for each violation of any provision of the HEA, it follows that unrebutted evidence showing each omitted statement of policy in the crime report should result in a fine calculated on the basis of each omission.

Here, there are three omitted statements, each subject to a fine: [1] the omission of a statement of current campus policies regarding procedures for students and others to report criminal actions or other emergencies occurring on campus; [2] the omission of a statement of current campus policies concerning campus law enforcement that includes procedures to encourage professional counselors to inform persons about voluntary, confidential reporting of crimes; and [3] the omission of a statement of policy regarding the institution's campus sexual assault programs to prevent sex offenses, and procedures to follow when a sex offense occurs, including a statement on sanctions the institution may impose following a final determination of an institutional disciplinary proceeding regarding rape, acquaintance rape, or other forcible or non-forcible sex offenses.[21] In light of my decision in *Tarleton*, requiring FSA to come forward with a fine calculation that includes a rational explanation for the basis of the amount of the fine, this matter shall be remanded for recalculation of the fine for each omitted statement of policy.

As noted *supra*, Respondent omitted two "forcible sex offenses," and each omission, in FSA's view, warrants a maximum fine. As I held in *Tarleton,* the failure to report a violent crime -- such as a forcible sex offense or robbery -- is serious enough to come within the range of a maximum, which serves to both punish an institution for the violation and deter other similarly situated institutions from committing similar violations. In light of the gravity of these omissions and the undisputed size of the institution, I find that FSA's proposed fines totaling $55,000 are justified.

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20 20 U.S.C. § 1092(f).

21 *See* 34 C.F.R. §§ 668.46(b)(2), 668.46(b)(4), and 668.46(b)(11).

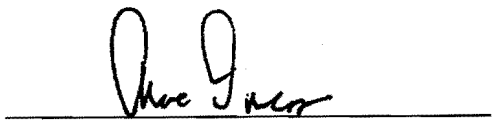
On the basis of the foregoing, I remand this matter for recalculation of the appropriate fine for the remaining three violations of the Clery Act. FSA shall be permitted an opportunity to submit to the ALJ a recalculation of the proposed fine for each of the remaining three violations along with a rational 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 three remaining violations are: what should the fine be and why.

ORDER

ACCORDINGLY, the Initial Decision of Chief Judge Ernest C. Canellos is HEREBY REVERSED; IT IS HEREBY ORDERED that Respondent shall pay the U.S. Department of Education $55,000.

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

So ordered this 29 day of August 2012.



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