UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE SECRETARY

In the Matter of

LINCOLN UNIVERSITY

Docket No. 13-68-SF

Federal Student Aid Proceeding

PRCN: 200920726890

Respondent.

DECISION OF THE SECRETARY[1]

The matter before me originates from cross appeals by Lincoln University (Lincoln) and the office of Federal Student Aid (FSA) of the U.S. Department of Education (Department). These appeals concern the basis and amount of several fines issued by FSA for violations of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f). As discussed below, I affirm the appealed decision.

Background

The background of this case is discussed in detail in both underlying decisions[2] and a previous decision by former Secretary John B. King, Jr.[3] It is summarized here only briefly.

In 2009, FSA conducted a program review of Lincoln to determine its compliance with the Clery Act. Among other things, the Clery Act requires postsecondary institutions participating in federal student aid programs to disclose campus crime statistics and security

[1] Secretary of Education Betsy DeVos resigned as Secretary effective January 8, 2021. In accordance with 20 U.S.C. § 3412(a)(1) which states in pertinent part ". . . in the event of a vacancy in the office of the Secretary, the Deputy Secretary shall act as Secretary," Deputy Secretary Mitchell M. Zais began his service as the Acting Secretary upon the vacancy.

[2] *Lincoln Univ.*, Dkt. No. 13-68-SF, U.S. Dep't. of Educ. (Mar. 16, 2015) (Initial Decision); *Lincoln Univ.*, Dkt. No. 13-68-SF, U.S. Dep't. of Educ. (Sept. 13, 2016) (Remand Decision).

[3] *Lincoln Univ.*, Dkt. No. 13-68-SF, U.S. Dep't. of Educ. (Decision of the Secretary) (Apr. 25, 2016) (Secretary King Decision). John B. King, Jr. served as the 10th U.S. Secretary of Education from 2016 to 2017. In that capacity, he issued the decision remanding this matter to the Office of Hearings and Appeals for further proceedings. Hereinafter, he is referred to as "Secretary King."

information.[4] FSA issued a Final Program Review Determination (FPRD) dated February 14, 2011, in which it concluded that Lincoln committed 10 violations of the Clery Act between 2006 and 2009, primarily based on the annual security reports (Reports) Lincoln filed with the Department.[5] Based on those violations, FSA issued a Notice of Intent to Fine (Fine Notice) in the amount of $275,000 on October 25, 2013.

Lincoln filed an appeal with the Office of Hearings and Appeals (OHA). During the hearing, Chief Administrative Judge Ernest Canellos (the Chief Judge) held that violations occurring more than 5 years prior to October 25, 2013, were barred by the 5-year statute of limitations under 28 U.S.C. § 2462 for commencing actions to assess civil penalties.[6] The Chief Judge then reviewed the 10 violations, determining that 8 of the proposed fines were untimely, and 2 proposed fines were timely but should be reduced to $10,000 each.

FSA filed an appeal of the Chief Judge's decision with Secretary King. On appeal, Secretary King found that the Chief Judge had not considered the facts of the case in light of *SEC v. e-Smart Technologies, Inc.*, 31 F.Supp.3d 69 (D.D.C. 2014) (*e-Smart*), interpreting the rule for when a violation "accrue[s]" under *3M Co. (Minnesota Min. and Mfg.) v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994).

As discussed further below, the District Court held in *e-Smart* that a violation which is inherently a misrepresentation in an annual filing with a government agency is renewed under the statute of limitations each time it is repeated in subsequent annual filings.[7] In light of that case, Secretary King remanded the Lincoln matter to the Chief Judge to consider whether Lincoln had, in effect, renewed eight of its Clery Act violations when it filed subsequent Reports.[8] Secretary King described the legal questions as follows:

> The relevant questions are: 1) whether any misrepresentations or omissions in the 2006, 2007 and 2008 [Reports] themselves constituted violations of the Clery Act; and 2) whether Lincoln made essentially the same misrepresentations or omissions in the 2009 [Report]. Any violation that satisfies both of the above

[4] 20 U.S.C. § 1092(f); s*ee also U.S. Dep't. of Educ., Office of Postsecondary Educ., The Handbook for Campus Safety and Security Reporting*, (Feb. 2011) at 1, *available at* http://www2.ed.gov/admins/lead/safety/handbook.pdf.
[5] 34 C.F.R. § 668.41(e) ("Annual security report and annual fire safety report—(1) Enrolled students and current employees-annual security report and annual fire safety report. By October 1 of each year, an institution must distribute to all enrolled students and current employees its annual security report described in § 668.46(b), and, if the institution maintains an on-campus student housing facility, its annual fire safety report described in § 668.49(b), through appropriate publications and mailings."). Among other things, under 34 C.F.R. § 668.46(c)(1) the institution must "disclose in its annual security report statistics for the three most recent calendar years concerning the number of each of the following crimes [several crimes are delineated in 34 C.F.R. § 668.46(c)(1)(i)-(iv)] that occurred on or within its Clery geography and that are reported to local police agencies or to a campus security authority."
[6] 28 U.S.C. § 2462 ("Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.").
[7] *SEC v. e-Smart*, 31 F.Supp.3d 69, 88–89 (D.D.C. 2014).
[8] Secretary King upheld the two violations the Chief Judge found timely under the statute of limitations. However, Secretary King increased the fine amount for each violation to $27,500. Those violations are not at issue in the case before me.

elements would be renewed under the holding in *e-Smart* for the purposes of § 2462.[9]

On remand, the Chief Judge considered the questions posed by Secretary King and found that two of the eight remaining violations satisfied both criteria. Those violations were: (1) Lincoln's failure to maintain and provide documentation to support the crime statistics reported by the institution for the 2006, 2007, and 2008 calendar years; and (2) Lincoln's incorrect reporting in the crime logs in 2006, 2007, and 2008.[10] These violations were both misrepresentations[11] that Lincoln repeated in the 2009 Report. Thus, the Chief Judge affirmed FSA's findings of violations and imposition of a $27,500 fine for each violation, for a total of $55,000. The Chief Judge did not affirm any of the remaining six findings of violations for various reasons.[12]

Both Lincoln and FSA have appealed the Chief Judge's decision. I will now separately turn to each party's appeal.

Lincoln's Appeal

In its appeal, Lincoln argues that the Chief Judge erred in finding that two of its violations were renewed in the 2009 Report based on the *e-Smart* holding. In *e-Smart*, the court considered when the statute of limitations started to run for fraudulent statements made in a company's 10-KSB annual report filed with the Securities and Exchange Commission (SEC).[13] Ordinarily, the statute of limitations begins to run from the date a violation occurs.[14] However, the court held that the defendant in *e-Smart* renewed the violation by repeating the same fraudulent statements in each subsequent filing of its 10-KSB annual report.

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[9] Secretary King Decision at 5.
[10] Remand Decision at 6.
[11] The Clery Act requires an institution to take a variety of actions regarding campus safety and crime reporting. 34 C.F.R. § 668.46. In this appeal, the key issue is whether any alleged violations committed by Lincoln under the Clery Act are sufficiently similar to the misrepresentations made in the annual securities filings under consideration in the *e-Smart* case. Alleged Clery Act violations that are not also repeated misrepresentations are barred by the statute of limitations, because they cannot qualify as renewed by repeated publication in the 2009 Report.
[12] The Chief Judge found that FSA withdrew one violation, he dismissed another violation as duplicative of one he had affirmed, and he found that the remaining four violations were not renewed and thus were barred by the statute of limitations.
[13] Public companies in the United States must submit annual 10-K reports to the SEC. A 10-K report "provides a comprehensive overview of the company's business and financial condition and includes audited financial statements." FORM 10-K, U.S. Securities and Exchange Commission, https://www.sec.gov/fast-answers/answers-form10khtm.html (last visited Jan. 4, 2021). During the years at issue in *e-Smart*, small businesses could file their annual reports with the SEC on form 10-KSB rather than form 10-K. 6B Securities Regulation Forms § 9:35, Compliance date guidance for current small business issuers, October 2019 Update.
[14] In *3M Co.*, the court rejected a proposed "discovery of violation" rule. The court held such a rule unworkable and contrary to Congressional intent. 17 F.3d at 1462. However, in *e-Smart*, the court held that a defendant cannot repeat misrepresentations each year in annual filings without renewing its liability. The statute of limitations would normally bar a fine 5 years after the first instance of misrepresentation, but in this case, each subsequent year "they made their misrepresentations anew, violated the statute anew, and exposed themselves to liability anew. The fact that e-Smart had published the same falsehoods for years prior is immaterial." *SEC v. e-Smart*, 31 F.Supp.3d 69, 88 (D.D.C. 2014).

Lincoln makes three main arguments against the Chief Judge's finding that it renewed two violations. First, Lincoln challenges the use of the 2009 Report as the basis for the FSA fines. Second, Lincoln asserts that FSA bore the burden of proof in its FPRD and erroneously shifted that burden to Lincoln. Third, Lincoln asserts that the fine amounts are too high based on the circumstances. I will address each argument separately.

A. The 2009 Report as the Basis of FSA's Fines

Lincoln asserts that its publication of data in the 2009 Report "is irrelevant because the [FSA] fine letter imposed the fine for the publication of those statistics in the 2006 Report, not the 2009 Report," and there is no amended complaint from FSA citing the 2009 Report as the basis of the fine.[15] In its response to Lincoln's appeal, FSA argues that information published in the 2009 Report renewed the seven violations under consideration in this appeal and extended the statute of limitations with relation to them.[16] Thus, FSA asserts that the date each violation accrued was the date Lincoln published its 2009 Report and the 5-year statute of limitations runs from then. Because fewer than 5 years elapsed from publication of the 2009 Report and the date FSA notified Lincoln of the fines, the fines are not barred by the statute of limitations.

I turn first to the text of FSA's Fine Notice to Lincoln. FSA cited Lincoln's failure to maintain records to substantiate the data in the Reports "for calendar years 2006, 2007, and 2008."[17] It also cited Lincoln's failure to adequately substantiate data in the 2009 Report, which was "riddled with discrepancies in data, and errors" even after Lincoln produced a revised version.[18] Regarding identification of crimes in the crime logs, FSA found that "Lincoln had not correctly identified reported crimes, underreported crimes, and listed incorrect crime locations in its crime logs for the 2006, 2007, and 2008 calendar years," and discrepancies remained in the data even after Lincoln produced revised crime statistics.[19] The FSA Fine Notice demonstrates that FSA based its fines on more than the 2006 Report.

Nevertheless, relying on the Federal Rules of Civil Procedure, Lincoln contends that FSA cannot rely on the holding in *e-Smart* without having filed an amended complaint against Lincoln citing the data in the 2009 Report as the basis for its fines. I note that the Federal Rules of Civil Procedure do not control FSA's fine process or the subsequent administrative review. An "amended complaint" is not contemplated in administrative proceedings and is not necessary to satisfy a respondent's due process rights.[20] FSA cited the publication of certain data as a basis for the two violations (for inaccurate recording and reporting of crime statistics) at issue, and the Chief Judge found those violations were renewed when Lincoln published the same data in the 2009 Report. Indeed, FSA specifically cited the 2009 Report as part of the basis of the first of

[15] Appeal of Lincoln University to the Secretary of Education of Hearing Official's Decision After Remand Brief of Lincoln University (Lincoln Brief) at 3.
[16] Federal Student Aid's Reply to Respondent's Appeal to the Secretary (FSA Reply Brief) at 4–5.
[17] Fine Notice at 3.
[18] *Id.* at 3–4.
[19] *Id*. at 5.
[20] *See State of South Carolina*, Dkt. No. 13-43-O, U.S. Dep't. of Educ (Decision of the Secretary) (Feb. 26, 2016) at 5–6 ("Due process is flexible and calls for such procedural protections as a particular situation demands. Due process in an administrative hearing is not the same as in a judicial proceeding, because administrative and judicial proceedings are inherently different.").

the two violations at issue here.[21] Lincoln seeks to elevate form over substance to avoid the consequences of these violations. Accordingly, I find that Lincoln's argument fails.

B. Lincoln's Assertion that the Burden of Proof Shifted to FSA

Next, I consider Lincoln's assertion that FSA fined Lincoln "based on conduct and failures to act" and such action shifted the burden of proof to FSA. According to Lincoln, this action negated FSA's "right to require [Lincoln] to prove compliance."[22] Based on the following analysis, I disagree.

An institution acts as a fiduciary of the Department when it participates in Title IV programs.[23] As such, an institution "is subject to the highest standard of care and diligence" in administering Title IV programs and accounting for funds it receives.[24] It bears the burden of acting "at all times . . . with the competency and integrity necessary to qualify as a fiduciary."[25] Generally, the Title IV regulations require any institution that participates in Title IV programs to retain records and make them "readily available for review," with the goal of demonstrating compliance with program requirements for 3 years.[26] One of the program requirements is the publication of a Report each year including crime statistics for the three most recently completed calendar years.[27] At the time of Lincoln's program review, FSA considered whether the 2006, 2007, and 2008 Reports complied with the regulations. Those Reports must include crime statistics from calendar years 2003 through 2008.[28] This regulatory framework required Lincoln to maintain and make "readily available" records demonstrating that it accurately published crime statistics from 2003–2005 in its 2006 Report, 2004–2006 in its 2007 Report, and 2005–2007 in its 2008 Report.

FSA found that Lincoln published statistics, but its internal spreadsheets listing the number of incidents for each year contradicted the Reports.[29] After reviewing all material provided by Lincoln in the course of its program review, FSA found a total of 56 crime incidents not reported in the 2006, 2007, and 2008 Reports.[30] It also generally found that Lincoln could not "reconstruct a sufficient audit trail of reported crimes in prior years."[31] FSA also found that Lincoln miscoded incidents in the crime log—the FPRD cites 118 erroneous incident entries from 2003 through 2007.[32] Lincoln also incorrectly omitted six incidents from the Reports entirely.[33] Thus, FSA imposed fines for these violations.

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[21] Fine Notice at 3–4.
[22] Lincoln Brief at 3.
[23] 34 C.F.R. § 668.82(a).
[24] *Id*. § 668.82(b)(1).
[25] *Id*. § 668.82(a).
[26] *Id*. § 668.24.
[27] *Id*. §§ 668.41(e)(5) and 668.46(c).
[28] *Id*. § 668.46(c).
[29] FPRD at 1.
[30] *Id*. at 11.
[31] *Id.*
[32] *Id*. at 11–13.
[33] *Id*. at 12–13.

As a fiduciary of the Department, Lincoln bore the burden of demonstrating its compliance with the Clery Act regulations.[34] This burden included publishing accurate crime statistics supported by properly maintained records. I find no legal support for Lincoln's argument that the alleged failure of FSA to serve an amended complaint upon Lincoln thereby shifted the evidentiary burden. Rather, FSA properly concluded that Lincoln did not comply with the crime incident reporting regulations and did not refute the findings in the FPRD.[35]

C. The Amounts of Lincoln's Fines

Finally, I consider the appropriateness of the fine amounts. When imposing a fine, the Secretary or a designated Department official sets the fine amount in its notice to the institution.[36] The maximum fine amount at the time FSA issued its Fine Notice to Lincoln was $27,500 per violation.[37]

Lincoln contends that the maximum fine amount in each violation is too high, both because of the time elapsed between the accrual of the violations upon publishing the 2009 Report sometime in 2009[38] and the October 23, 2013, issuance of the FSA Fine Notice, and because the violations are not severe enough to warrant the maximum allowable fine.[39] FSA argues that the imposition of the maximum fine amounts in each violation conforms to the intent of Congress with regard to the Clery Act as well as past Department practice.[40]

The rationale behind the fine amounts in this case is discussed at length in Secretary King's decision.[41] The Chief Judge's analysis of the two fine amounts for the renewed violations is sound. In imposing the maximum fines, the Chief Judge found that Lincoln committed "repeated and long-term violations of the basic requirements of the Clery Act."[42]

Based on the foregoing analysis, I affirm the two violations earlier upheld in the Remand Decision in the amount of $27,500 per violation.[43]

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[34] 34 C.F.R. §§ 668.24(a)(3) (requiring institutions to maintain records of its compliance with all Title IV program requirements), 668.24(d)(2) (requiring institutions to make their compliance records readily available for inspection by the Secretary), 668.82(a) (requiring institutions to "at all times act with the competency and integrity necessary to qualify as a fiduciary").
[35] *See generally* FPRD; 34 C.F.R. § 668.46.
[36] 34 C.F.R. § 668.84.
[37] *Id.* § 668.84(a)(1). When FSA issued the Fine Notice on Oct. 25, 2013, the maximum fine per violation of the Clery Act was $27,500 per violation. As of Jan. 2020, the maximum fine amount is $58,328. *Id.* § 36.2.
[38] The 2009 Report does not bear a specific publication date.
[39] Lincoln Brief at 5.
[40] FSA Reply Brief at 7.
[41] Secretary King Decision at 5–8.
[42] Remand Decision at 8.
[43] In its appeal, Lincoln also argues that three of FSA's witnesses during the hearing, who it claims did not participate in the investigation or assessment of fines, testified about "irrelevant matters." Lincoln Brief at 1–2. Lincoln does not specify how this criticism of certain testimony demonstrates any error in the Remand Decision. Therefore, it is not relevant to the matter before me and is hereby rejected.

FSA's Appeal

Of the original 10 violations, two were decided with finality in Secretary King's decision, one was voluntarily dismissed at FSA's request while the case was on remand, and I have addressed the two which the Chief Judge found renewed under *e-Smart*.

Five violations remain at issue in FSA's appeal wherein FSA seeks to have the violations affirmed. The first is a violation for failure to maintain a crime log, which the Chief Judge rejected as duplicative.

The Chief Judge rejected the other four violations as time barred under the *e-Smart* holding.[44] These four violations include two violations for failure to notify sexual assault victims of the outcomes of investigations, a violation for failure to properly identify campus geographic boundaries in Reports, and a violation for failure to provide proof of requesting crime statistics from law enforcement agencies.

I will address each of the five violations in turn.

A. The Violation for Failure to Maintain a Crime Log

The Chief Judge rejected FSA's proposed violation for failure to maintain a crime log. The Chief Judge stated that FSA had already proposed to fine Lincoln for "'incorrect reporting on the crime logs' in 2006, 2007 and 2008."[45] If Lincoln had incorrect reporting in a crime log, it could not logically also commit a separate violation for not having a crime log.[46]

FSA points out that Lincoln's campus security department maintained a collection of "8 inch by 5 inch incident report cards in the front office and available to the public. The incident report cards contained the date, time, location, and nature of the incident."[47] FSA argues these incident cards do not meet the legal requirements constituting a crime log.[48] However, FSA argues Lincoln separately violated the Clery Act by reporting inaccurate crime statistics based on maintaining inaccurate information in its incident cards.[49] FSA asserts that "the Department accepted Lincoln's titling of those incident [cards] as its crime log" only for the purposes of the violation.[50] Thus, it urges me to uphold two separate violations based on both the failure to maintain a crime log and the failure to maintain accurate crime statistics for the creation of the Report.

I agree with the Chief Judge. The requirement of maintaining a crime log is fundamentally tied to the requirement of publishing crime statistics. Maintenance of the crime log presupposes that it will be used to create accurate Reports. A violation for failing to maintain

[44] As mentioned above, FSA notified the Chief Judge it no longer stood behind one of its proposed fines; so that fine is not at issue in this decision. *Supra*, n.12.
[45] Remand Decision at 6.
[46] *Id*. at 7.
[47] FPRD at 17.
[48] FSA Brief at 14.
[49] *Id.*
[50] *Id.*

a crime log encompasses the resulting lack of accurate information for inclusion in a Report. If there is no crime log, there is nothing on which to base a report. Therefore, I do not find a basis for separate violations. I will affirm the Chief Judge's dismissal of this violation.

B. The Four Violations Time Barred Under the Statute of Limitations

Finally, the Chief Judge rejected four proposed violations as time barred after considering them based upon the *e-Smart* holding. My conclusions follow.

1. Lincoln's Failure to Notify Sexual Assault Victims of Outcomes of Investigations

The first two violations stem from Lincoln's failure to notify two sexual assault victims of the outcome of campus disciplinary proceedings. The Chief Judge found that the statute of limitations began to run on these violations on the "date of first accrual" under *Gabelli v. SEC*.[51] "First accrual" means the date when a violation actually occurs and subjects the party committing the violation to liability.[52] Because neither violation was the subject of a misrepresentation in any of Lincoln's Reports, the 2009 Report did not repeat a misrepresentation that would renew under the *e-Smart* holding.[53]

FSA argues that Lincoln's failure to notify the victims of the outcome of campus disciplinary proceedings was a continuing action that would not invoke the statute of limitations. FSA's theory relies on *Birkelbach v. SEC*.[54] In relevant part, that case dealt with an SEC violation for "failure to supervise" committed by Birkelbach, the founder of the investment firm, Birkelbach Investment Securities, Inc.[55] Birkelbach had transferred an account to Murphy, an employee of the firm, in July 2002 and supervised Murphy from then until the account closed in February 2006.[56] Murphy's activities during that period included making trades against the wishes of account holders and making thousands of trades and buybacks solely to generate additional transactional fees.[57] The Financial Industry Regulatory Authority conducted an investigation of these activities and levied sanctions, which the SEC upheld after a *de novo* review.[58] These sanctions included a single cause of action against Birkelbach for "failure to supervise" under the National Association of Securities Dealers rules requiring firms to "'establish and maintain a system to supervise the activities of each registered representative . . . that is reasonably designed to achieve compliance' with applicable laws" and requires diligent supervision of customer accounts.[59]

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[51] Remand Decision at 7 (citing *Gabelli v. SEC*, 568 U.S. 442 (2013)).
[52] The statute of limitations that applies states that a proceeding for the enforcement of any fine or civil penalty "shall not be entertained unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462.
[53] *Id.*
[54] 751 F.3d 472 (7th Cir. 2014).
[55] *Id*. at 475.
[56] *Id.* at 475–76. The case also involved a second account managed by Murphy, but the statute of limitations argument analyzed here was limited to the first account discussed above.
[57] *Id*.
[58] *Id*. at 477–78.
[59] *Id*. at 477.

Birkelbach argued that the violation for "failure to supervise" was time barred because his supervision commenced in July 2002 and the disciplinary complaint was issued over 5 years after that date.[60] The court disagreed, holding that the duty to supervise is not a "single indivisible act" and "[t]he rules contemplate a continuing duty to reasonably supervise, and any violative conduct that falls within the statute of limitations is independently sanctionable."[61] During the period in question, Birkelbach engaged in "continuing and divisible" acts of supervision that could be sanctioned as "timely violative conduct, even if there was additional untimely violative conduct."[62]

I find the facts of *Birkelbach* distinguishable from the facts of the case before me. There is no evidence that Lincoln engaged in specific violative conduct on a continuing basis that is similar to the president of a firm supervising an associate of the firm in an ongoing capacity. Lincoln accrued a duty to inform victims upon the conclusion of disciplinary proceedings. The general rule that applies here is that the statute of limitations runs from the date of accrual. Here, the accrual occurred when the disciplinary proceedings concluded. Therefore, I affirm the Chief Judge's dismissal of these two violations as time barred.

2. Lincoln's Failure to Properly Define the Campus Geographic Boundaries for Clery Act Purposes

The next violation concerns Lincoln's failure to define the boundaries of its campus property, noncampus property, and public property to categorize the locations of crimes reported in its statistics.[63] Under the regulations at the time, an institution "must provide a geographic breakdown of the statistics reported."[64] The statistics must set forth three distinct categories: (1) crimes on campus (including how many took place in dormitories or other student residential facilities); (2) crimes in a noncampus building or property; and (3) crimes on public property.[65]

The Chief Judge found simply "there was no such violation [of the geographic reporting] in the 2009 Report, since none is alleged" and "FSA conceded such in its brief."[66] On appeal, FSA disagrees with the Chief Judge, asserting that this violation was inherent in the statistics published in the 2006, 2007, and 2008 Reports, for which Lincoln did not include its farms where it conducts research.[67] FSA argues that the statistics Lincoln reported in the 2006, 2007, and 2008 Reports should have included crimes committed at the research farms, but did not.[68] Because Lincoln included the crime statistics from these Reports in its 2009 Report, FSA asserts

[60] *Id*. at 478.
[61] *Id*. at 479.
[62] *Id*.
[63] FSA Brief at 17.
[64] 34 C.F.R. § 668.46(c)(4).
[65] *Id*.
[66] Remand Decision at 7.
[67] FSA Brief at 17 (citing FPRD at 22–23). According to the FPRD, Lincoln's geographic boundaries should have included a public park and the Busby, Carver, and Freeman Research Farms (and the Greenberry Farm for statistics covering 2006). The FPRD also mentions a need to classify instructional facilities at Fort Leonard Wood, which should be classified as a separate campus and should provide its own, separate campus security report under the Clery Act. In its brief, FSA combines these issues and refers to them simply as a need to "include its research farms" in its annual Reports. FSA Brief at 17.
[68] *Id*.

that this violation occurred upon issuance of the 2009 Report on or about October 1, 2009, and was therefore not time barred when the Fine Notice was issued on October 25, 2013.[69]

Lincoln asserts that FSA erred by identifying this violation. At the hearing, Lincoln provided testimony that the school identified the research farms as part of its property in a student bulletin, and the farms were under the jurisdiction of its campus police.[70]

On this matter I do not find a violation renewed within the 2009 Report. The 2009 Report includes crime statistics for 2006, 2007, and 2008 by geographic location.[71] I have already upheld a violation for failure to publish accurate crime statistics in the 2006, 2007, and 2008 Reports. FSA's alleged separate violation for failure to properly define its geographic boundaries is both duplicative and not renewed as an identical misrepresentation in the 2009 Report. I need not reach the question of whether previous reports constituted a violation as any such violation would be time barred.

3. Lincoln's Failure to Provide Proof it Requested Crime Statistics from Law Enforcement Agencies

The last violation concerns Lincoln's failure to provide evidence that it requested crime statistics from local law enforcement agencies in 2006 and 2007. The Chief Judge held that this violation inherently lacked an aspect of misrepresentation that could be repeated in the Reports.[72] Therefore, this violation could not be renewed under the *e-Smart* holding and was time barred.[73]

FSA argues that Lincoln's failure to request this information impacted the statistics created for the 2006 and 2007 calendar years. Since these statistics were republished in the 2009 Report, FSA argues that Lincoln's violation accrued as late as 2009 and was not time barred when FSA issued the Fine Notice on October 25, 2013.[74]

I agree with the Chief Judge. The general rule in *Gabelli* controls. That rule states that a right accrues upon coming into existence, so the government's right to assess a civil penalty runs from the date when the claim first accrued.[75] In this case, Lincoln's violation accrued at the time it originally failed to request statistics from local law enforcement. Lincoln did not repeat or renew this violation in any way, so it accrued, at the latest, in 2007. Thus, it was time barred well over 5 years later when FSA issued the Fine Notice on October 25, 2013. To the extent this action is conflated with the publication of erroneous statistics, I have already affirmed two such violations. To affirm this alleged violation on the same grounds as earlier violations would be duplicative.

[69] *Id.* at 17–18.
[70] Transcript at 22, 138.
[71] ED Ex. 13 (2009 Report) at 16–19.
[72] Remand Decision at 7.
[73] *Id*.
[74] FSA Brief at 19.
[75] *Gabelli*, 568 U.S. at 447–49.

ORDER

ACCORDINGLY, the Remand Decision by Chief Administrative Judge Ernest Canellos is HEREBY AFFIRMED. I order Lincoln University to pay a fine of $55,000 for the fines approved herein.

So ordered this 14th day of January 2021.

Mitchell M. Zais, Ph.D.
Acting Secretary

Washington, DC

Service List

Kent L. Brown, Esq.
Kent L. Brown, PC
621 E. McCarty Street, Suite A
Jefferson City, MO 65101

Brian Siegel, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202-2110