



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

In the Matter of

BORICUA COLLEGE (NY)

Respondent

Docket No. 19-52-SP

Federal Student Aid Proceeding
PRCN: 201620229245

Appearances: Dennis M. Cariello, Esq.
Hogan Marren Babbo & Rose Ltd. for Boricua College

Karen S. Karas, Esq.
Office of the General Counsel for Federal Student Aid

Before: Robert G. Layton, Administrative Law Judge

DECISION

Boricua College (Boricua) is a private, nonprofit, postsecondary education institution offering associates, bachelors and masters level degree programs. Boricua has been accredited by the Middle States Commission on Higher Education (“MSCHE”) since 1980. Boricua is regulated by the New York State Board of Regents and New York State Education Department (“NYSED”). Boricua has been a postsecondary education participant in programs under Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. §§ 1070 *et seq.* (Title IV, HEA programs) since January 1976. The United States Department of Education (Department), the Office of Federal Student Aid (FSA) has jurisdiction and oversight over Title IV programs.

A program review was conducted by the Department’s New York/Boston School Participation Division (SPD) at Boricua from February 22, 2016 through February 26, 2016. A Program Review Report (PRR) covering Boricua's administration of programs authorized by

Title IV for award years (AY) 2010-2016 was issued on August 31, 2017. The PRR included twelve findings against Boricua. Following a review of Boricua's response to the PRR and a subsequent site visit, a Final Program Review Determination (FPRD) was issued on April 26, 2019.

The FPRD listed twelve findings of improper administration of programs under Title IV and non-compliance with 34 C.F.R. § 600.10(b)(3) by Boricua. The FPRD imposed a total liability of \$5,652,875.67 against Boricua. Of the twelve findings, eleven involved AY 2014-2015 and 2015-2016 (Findings 2-12). Of those eleven findings, eight findings were without liabilities (Finding 2, 4, 6, 8, 9, 10, 11 and 12) and three findings were assessed with liabilities totaling \$161,683 (Finding 3, 5 and 7). Only one finding involved AY 2010-2012 (Finding 1). Finding 1 has an assessed liability without interest of \$5,341,664.08.

Under 34 C.F.R. § 600.10(b)(3), an institution may not disburse Title IV funds to students receiving instruction at an additional location that offers at least 50% or more of an educational program, unless the additional location is accredited and the institution notifies the Department of the additional location. Finding 1 determined Boricua had an additional location in Bronx, NY which did not comply with 34 C.F.R. § 600.10(b)(3) for AY 2010-2012. The Finding determined that Boricua disbursed Title IV to students receiving instruction at the additional location during AY 2010-2012.

Boricua contends that for AY 2010-2012, the Bronx site was a part of the main campus and not an additional location subject to 34 C.F.R. § 600.10(b)(3). Boricua timely filed an appeal with the Administrative Actions and Appeals Service Group (AAASG), which was received on June 6, 2019.

Boricua appealed only Finding 1 of the FPRD, which pertained to the ineligible location determination for award years 2010-2012. Boricua's appeal specified issues and facts in dispute, identified pertinent facts and reasons in support of the appeal, and provided legal arguments in support of the appeal. Under the authority of 34 C.F.R. § 668.114, an Order Governing Proceeding (OGP) was issued on July 2, 2019 setting a briefing schedule. In accordance with the OGP, Boricua and FSA timely filed their respective briefs and exhibits.

This appeal is governed by the procedures set out in 34 C.F.R. Part 668, Subpart H. A timely request for review was submitted and the parties were notified of the hearing process. Briefs and relevant evidence have been accepted and reviewed. This matter is ready for decision pursuant to 34 C.F.R. § 668.118.

Issue

To support the validity of the liabilities in Finding 1, the Department asserts that Boricua established an additional location in Bronx, New York, which was not compliant with 34 C.F.R. §§ 600.10(b)(3) and 600.21(a) (2010). The Department contends Boricua did not treat the Bronx site as an extension of the Boricua's main campus, but rather, Boricua treated the Bronx site as an additional location subject to 34 C.F.R. §§ 600.10(b)(3) and 600.21(a) (2010). The Bronx site offered at least 50% of a degree program. ED Br. at 2. Boricua began offering Title IV aid at the Bronx site in the Fall of 2010, even though Boricua had not received recognition of the Bronx site as an additional location from its accrediting agency, MSCHE, until January 2013. Boricua did not notify the Department about the addition location until December 17, 2014. Ed Ex.1 at ¶¶10-12.

Boricua states that in 2009, it applied to NYSED for approval of the Bronx site as a branch campus because NYSED does not use the term additional location. Resp't. Ex. R-2.

NYSED uses the terms branch campus and extension center when an institution is seeking approval of a site other than the main campus.

According to the Department, if Boricua believed the Bronx site was an extension of the main campus, then Boricua would have sought approval of the Bronx site as an extension center and not as a branch campus. The Department also points out Boricua also did not treat the Bronx site as an extension of the main campus with its accrediting agency either.

While an exact date is not provided by Boricua, sometime in the Fall of 2010, the Bronx site was designated as an “other instructional site” by Boricua's accrediting body, MSCHE. Resp't. Br. at 3. However, even prior to MSCHE's designation that the Bronx site as an “other instructional site”, Boricua petitioned MSCHE for a substantive change for the Bronx site. The substantive change was to reclassify the Bronx’s site from an “other instructional site” to an additional location. Ed Br. at 4.

The Department argues that during AY 2010-2012, Boricua considered the Bronx site to be a branch campus under NYSED's definitions, and an additional location under MSCHE's definitions. The Department relies upon *In Re Prairie View Agricultural and Mechanical University*, Dkt. No. 10-32-SP (2011) for its finding that when institution fails to notify the Department that it has added an additional location, the institution must return all Title IV funds. Ed Br. at 4.

Boricua argues that during AY 2010-2012, the Bronx site was an extension of the main campus and is not geographically separate from the main campus. Boricua indeed sought certification by NYSED for the Bronx site as a branch campus. Resp't. Ex. R-2. With the Bronx site designated by NYSED as a branch campus, the Bronx site was authorized to offer the same academic programs that were offered at Boricua’s main campus in Manhattan. Resp't. Br. at 3.

Boricua states that while it did seek accreditation of the Bronx site as an additional location from MSCHE, the request was out of abundance of caution, and made without seeking the advice of counsel. Boricua now believes that an additional location accreditation from MSCHE was unnecessary for the Bronx site. Resp't. Br. at 5.

Boricua points out that the NYSED, MCSHE and the Department use numerous words and phrases that all describe the Bronx site as a site where academic instruction takes place. Each of those designations carries with its own definition and requirements and even those that use the same phrases do not necessarily have the same definitions. Resp't. Reply Br. at 2. Boricua argues that its statements and actions are not controlling factors for the Department's definition of an additional location. Boricua argues that it simplified the nature of the Bronx site to be easily understood by the press, community leaders and others. *Id* at 3. Boricua also argues that Boricua's characterization of the Bronx site in its internal working papers and to its auditors is irrelevant as to whether the Bronx site is an additional location as defined by the Department. Boricua contends that it again simplified the nomenclature it used to describe a technical topic. Boricua believes it was not required to have the Bronx site accredited as an additional location or notify the Department before disbursing FSA funds for students receiving instruction at the Bronx site. *Id* at 4.

Boricua disputes the factual determination by the Department that the Bronx site was an additional location. According to Boricua, the Bronx site is an extension of the main campus, and not geographically separate from the Boricua's campus in Manhattan. Boricua points to the Department's statement in codifying the definition of an additional location in 2019 to argue that for an institution's facility to be an additional location, the facility must be geographically separated from the main campus. Resp't. Brief at 5. "The Department has long recognized as its

policy that an ‘Additional Location’ is a location that is geographically apart." 84 Fed. Reg. 27404, at 27411 (June 12, 2019).

Boricua argues that in an August 17, 2018, FPRD for the Des Moines Area Community College (“DMACC”) the Department determined that a separate site located about two miles from the accredited main campus was not “geographically apart” as an additional location. Resp’t. Ex. R-7. Boricua contends, that just like DMACC's Des Moines downtown site, the Boricua's Bronx site is 2 miles from the main campus. Boricua notes that according to the Department, geographic separation is a prerequisite for a facility to be defined as an additional location, and which would require notice to the Department. Boricua believes the DMACC FPRD indicates how the Department determines geographic separation as it relates to an institution's main campus and an institution’s other facility close to the main campus. More specifically, a facility that is not geographically connected contiguously with an institution’s main campus is not considered geographically separate as an additional location. Boricua argues that in the same way the Department found there was no geographic separation of the DMACC's facilities, there was no geographic separation between Boricua's main campus and Bronx site. Resp’t. Reply Brief at 2.

The Department argues that the Department’s treatment of geographic separation in the DMACC FPRD is not relevant in this case. The Department distinguishes the DMACC FPRD by pointing out that when FSA considered the DMACC's Des Moines downtown facility it was not just geographic separation. FSA also considered how the DMACC curriculum and students utilized the DMACC's downtown facility in relation to the main campus. According to Boricua, the students and the curriculum treated the Bronx site as an extension of the main campus. Thus,

Boricua believes, the Bronx site, just like the DMACC downtown site, is not an additional location requiring notice under 34 C.F.R. § 600.10(b)(3). Resp't. Reply Br. at 4.

The Department finally argues that Boricua has not proven, by a preponderance of the evidence, that Boricua disbursed Title IV funds at the Bronx site in accordance with statutory and regulatory guidelines. Boricua states Title IV funds were properly disbursed.

The issues to be addressed are:

- 1. During AY 2010-2012, was the term “Additional Location” defined in 34 C.F.R. § 600.2?**
- 2. During AY 2010-2012, was Boricua’s Bronx site geographically separate from the Boricua's main campus, and not an additional location subject to the requirements in 34 C.F.R. § 600.10(b)(3)(ii)?**
- 3. During AY 2010-2012, was the Respondent’s Bronx site an extension of the main campus, or an additional location requiring require accreditation and notice to the Secretary under 34 C.F.R. §§ 600.10(b)(3) and 600.21(a)?**
- 4. Has Boricua proven by a preponderance of the evidence that it disbursed Title IV funds at its Bronx site in accordance with the statutory and regulatory requirements?**

Summary of Decision

During the AY 2010-2012, the Bronx site of Boricua was a part of the Boricua’s accredited main campus. Boricua has proven by the preponderance of the evidence that the Bronx site was not an additional location requiring separate accreditation and notice to the Secretary under 34 C.F.R. § 600.10(b)(3). Boricua was entitled to disburse and use Title IV

funds at the Bronx site consistent with the main campus. Finding 1 of the FPRD is SET ASIDE. Boricua is not liable for the assessed liability in Finding 1 of \$5,341,664.08.

Finding of Facts

In this proceeding, Boricua bears the burden of showing by the preponderance of the evidence that it disbursed Title IV funds for programs at the Bronx site in according to statutory and regulatory guidelines.

It is undisputed that Boricua's main campus has been accredited by the MSCHE since 1980 and is regulated by NYSED. Boricua's main campus has continuously been an eligible postsecondary education participant in Title IV, HEA programs since January 1976. The main campus was eligible to disburse Title IV funds during the AY 2010-2012. It is also undisputed that the Bronx site is approximately 2 miles away from the main campus and was authorized by the NYSED as a Branch Campus to begin offering the same programs as the main campus in the Fall of 2010. Boricua began disbursing Title IV funds to students contemporaneously with new course offerings at the Bronx site in the Fall of 2010.

NYSED defines a branch campus as “[a] unit of an institution located at a place other than the institution's principal center or another degree granting institution, at which the institution offers one or more curricula leading to a certificate or degree.”¹ NYSED defines an extension center as “[a] unit of an institution located at a place other than the institution's principal center or another degree granting institution, at which the institution does not offer any curricula leading to a certificate or degree, but at which the institution either conducts more than 15 courses for credit or has more than 350 course registrations for credit in any academic year.”² A principal center is defined as “the location of the principal administrative offices and

¹ N.Y. COMP. CODES R. & REGS. tit. 8 § 50.1 (2007)

² *Id.*

instructional facilities of a college, university, or other degree-granting institution, as defined by the institution's officers. In exceptional cases and with the approval of the commissioner, an institution may designate more than one principal center for an institution that offers curricula leading to degrees and that is part of a public or independent multi-institution system, principal center means the location of the institution's principal administrative offices and instructional facilities, as defined by the institution's officers, but not the location of the system's central administration.”³ NYSED does not require an approval process for a new unit of an institution located as part of the designated principal center, so a new unit that is part of the principal center does not need NYSED additional approval.

While planning and establishing the Bronx site, Boricua did take action to have the Bronx site accredited as an additional location by its accrediting body. Boricua also publicly advertised the future growth and use plans for the Bronx site as a branch campus. However, advertising and planning for future usage of the Bronx site is not relevant to how students and the curriculum utilized the Bronx site during AYs 2010-2012.

In AY 2010-2012, 789 students received instruction at the Bronx site. 6.0% (49) students completed more than 50% of the courses in a program at the Bronx site, so the majority of students, 94% (739) students, did not complete more than 50% of a program at the Bronx site. There was only 1 student who completed an entire program at the Bronx site. Resp't. Ex. R-1 at 0086-87. The evidence shows that Boricua's students used the main campus and the Bronx site interchangeably to complete their degree components. Boricua offered 20 general education core curriculum courses and 24 courses in the major program of study. It can be extrapolated from the Boricua data, that the Bronx site served the same students, from the same areas, taking the

³ *Id.*

same programs, in the same manner as DMACC's downtown location. Boricua's sites (main campus and Bronx site) are both located in New York City, just as the DMACC's sites (main campus and downtown site) were both located in Des Moines. In fact, the Bronx site is in the borough adjacent to the main campus' borough. The Boricua's sites are not geographically distinct, just as DMACC's site are not geographically distinct.

Pursuant to 20 U.S.C.A. § 1099c-1(b), the Department is to provide consistent determinations from a program reviews by establishing guidelines designed to ensure uniformity. The Department published a *Federal Student Aid Handbook 2010-2011* and *2001 Student Financial Assistance Program Review Guide* to aid in uniformity of program determinations.

In AY 2010-2012, the Department did not have any published guidance to address when a school asserts that a facility is a part of the main campus even though it is not geographically contiguous with the main campus. For award years 2010-2012, there was no controlling definition of Additional Location in 34 C.F.R. § 600.2.

The FPRD proffered by Boricua is from another institution that is not a party to this case, but it shows that the Department has determined a facility need not be contiguous to the main campus in order for the facility to be considered a part of the main campus. For this tribunal to consider this FPRD from DMACC, there must be a showing of clear probative value.

Principles of Law

To disburse Title IV funds for students receiving instruction at a location, the institution's location must be eligible to disburse Tile IV. The controlling regulation regarding Boricua's Bronx location is at 34 C.F.R. 600.10(b). Eligibility:

(1) If the Secretary determines that the entire applicant institution, including all its locations and all its educational programs, satisfies the applicable requirements of this part, the

Secretary extends eligibility to all educational programs and locations identified on the institution's application for eligibility.

(2) If the Secretary determines that only certain educational programs or certain locations of an applicant institution satisfy the applicable requirements of this part, the Secretary extends eligibility only to those educational programs and locations that meet those requirements and identifies the eligible educational programs and locations in the eligibility notice sent to the institution under § 600.21.

(3) Eligibility does not extend to any location that an institution establishes after it receives its eligibility designation if the institution provides at least 50 percent of an educational program at that location, unless—

(i) The Secretary approves that location under § 600.20(e)(4); or

(ii) The location is licensed and accredited, the institution does not have to apply to the Secretary for approval of that location under § 600.20(c), and the institution has reported to the Secretary that location under § 600.21.

When an institution requests review of the final audit determination or final program review determination, the institution has the burden of proving that expenditures questioned were proper and that it complied with program requirements. 34 C.F.R. § 668.116(d)(1)-(2).

To ensure consistent determinations by the Department during a program review, the Department is required to establish guidelines designed to provide uniformity of practice in the conduct of program reviews. 20 U.S.C.A. § 1099c-1(b)(1).

The Hearing Official may accept into evidence otherwise irrelevant and inadmissible evidence relating to an audit or program review of an institution other than the institution bringing the appeal when there is clear probative value. 34 C.F.R. 668.116(f)(2).

Analysis

The parties agree that during AY 2010-2012, Boricua's main campus was eligible to disburse Title IV funds. The basis for Finding 1 is the Department's determination that Boricua's Bronx site offered at least 50% or more of an educational program, and Title IV funds were dispersed to students receiving instruction at the Bronx site before the Bronx site was accredited by MSCHE to offer at least 50% or more of an educational program. The Department also determined that Boricua did not provide notice of the Bronx site to the Secretary of the additional location before Title IV funds were dispersed. It is the correctness of that determination which is at issue in this appeal for Finding 1.

This is a case of first impression for this tribunal. In prior cases such as *In Re CC's Cosmetology College*, Dkt. No. 94-214-SP, (Dec. 11, 1996); *In Re Instituto Fontecha*, Dkt. No. 04-25-SP; *In Re Prairie View Agricultural and Mechanical University*, Dkt. No. 10-32-SP, (Aug. 3, 2011); *In Re CC's Cosmetology College*, Dkt. No. 13-56-SP, (July 7, 2014) and *In Re Institute of Allied Medical Professions*, Dkt. No. 14-68-SP (Aug 3, 2015) the institutions did not dispute the Department's factual determination that the institution's other facility was an "additional location" subject to 34 C.F.R. § 600.10(b)(3). Here, Boricua does dispute that determination. The other institutions did not assert that notice to the Secretary under 34 C.F.R. § 600.21(a) was not required because the other facility was a part of the institution's main campus and not geographically separate from the main, which is what Boricua asserts. In the other matters, the institutions also did not provide evidence that the students and curriculum treated the facility in question as an extension of the main campus. The Department's reliance on the prior decision of *In Re CC's Cosmetology College*, *In Re Prairie View Agricultural and Mechanical University*, and *In Re CC's Cosmetology College*, is non-persuasive and distinguishable.

The Department asserts that the DMACC FPRD is irrelevant in this matter but did not object to the DMACC FPRD being presented in the record for this appeal. In general, evidence relating to an audit or program review of an institution other than the institution bringing the appeal or the resolution of the audit or program review is deemed irrelevant and immaterial to the current proceedings.⁴ However, the regulations also provide that upon a clear showing of probative value respecting the matters described in 34 C.F.R. § 668.116(d), the Hearing Official may accept program reviews of another institution as well as the resolution of the findings.⁵ Although not controlling in this proceeding, the Fed. R. Evid. 401 provides that evidence is relevant when the evidence has “any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.” A fact that is “of consequence” is a material fact.⁶ Evidence has probative value if it tends to prove the issue in dispute.⁷ DMACC disputed that there was geographic separation between its main campus to the Des Moines downtown site, just as Boricua disputed that there was geographic separation of its main campus from its Bronx site. The core matter in dispute is what constitutes geographic separation of an institution's facilities. The Department's regulations, the *Federal Student Aid Handbook* 2010-2011 and 2001 *Student Financial Assistance Program Review Guide* do not directly address Boricua's point that an institution's facility need not be geographically contiguous to the main campus to be considered a part of or extension of the main campus.

The FPRD for DMACC has clear probative value on the issue of geographic separation. The material facts in Finding 2 of the DMACC FPRD are indistinguishable on the issue of

⁴ See 34 C.F.R. 668.116(f) (2020).

⁵ *Id.*

⁶ See *United States v. Carriger*, 592 F.2d 312, 315 (6th Cir. 1979)

⁷ See *Washington v. Nicholson*, 19 Vet.App. 362, 368 (2005) (citing *United States v. Welsh*, 774 F.2d 670, 672 (4th Cir. 1985))

geographic separation and the material facts in Finding 1 of the Boricua FPRD. The DMACC FPRD is not being considered for its precedential value to review FSA's enforcement decision for another institution, but has clear probative value on how the Department determines geographic separation in relation to an institution's facilities.

The DMACC FPRD considered the proximity of the facility to the main campus, how the institution used the other facility, and how the institution's curriculum and students treated the facility. At DMACC, the distance between its main campus and its Des Moines downtown site is 2 miles, which is the same distance between Boricua's main campus and Bronx site. At both institutions, students and staff traveling between the main campus address to the institution's other site address could easily bike, drive, use public transportation, or a combination of travel methods. At both institutions, the distance between the main campus and other site was so close that it is feasible for students and staff to walk between the institution's locations. At Boricua, the students and the curriculum treated the Boricua Bronx site as part of the main campus. The students and curriculum at DMACC did the exact same, and treated the downtown site as a part of the main campus. Both institutions' main campus and other facility served the same population from the same service area. The DMACC FPRD treated the Des Moines downtown site as an extension of the main campus and not geographically separate from the main campus. Applying the same treatment of geographic separation from the DMACC FPRD to the same Boricua material facts, the Boricua Bronx site is an extension of the main campus and not geographically separate from the main campus. Application of any other treatment in this appeal would be arbitrary.

Boricua has established that Department does not require for a facility to be considered geographically separate from the main campus if it is in close proximity to the institution's main

campus. Being geographically contiguous to the institution's main campus is not required. 20 U.S.C.A. § 1099c-1(b)(1) requires the Department to have consistent review standards leading to consistent determinations. The Department has not provided convincing evidence to distinguish the Boricua's Bronx facility geographic separation from DMACC's Des Moines downtown facility geographic separation.

Boricua has met its burden by the preponderance of the evidence for Finding 1. During AY 2010-2012, the Bronx site, which was in close proximity to the institution's main campus, was an extension of the main campus and not geographically separate from the main campus. As such Boricua has established that the Bronx site was part of the main campus in AY 2010-2012 and not an additional location requiring further action by Boricua under 34 C.F.R. § 600.10(b)(3). Boricua's main campus was eligible to disperse Title IV funds, and the Bronx site was a part of the main campus pertaining to Finding 1. Boricua complied with Title IV eligibility program requirements.

Conclusions of Law

- 1. During AY 2010-2012, the term “Additional Location” was not defined in 34 C.F.R. § 600.2.**
- 2. During AY 2010-2012, Boricua’s Bronx site was not geographically separate from the Boricua’s main campus, and was not an additional location subject to the requirements in 34 C.F.R. § 600.10(b)(3)(ii).**
- 3. During AY 2010-2012, Boricua’s Bronx site was an extension of the main campus, and was not an additional location requiring accreditation and notice to the Secretary under 34 C.F.R. §§ 600.10(b)(3) and 600.21(a).**

4. **Boricua has proven by a preponderance of the evidence that it disbursed Title IV funds at its Bronx site in accordance with the statutory and regulatory requirements.**

ORDER

Finding 1 of the FPRD is unsupported and **ORDERED SET ASIDE**. Boricua is not liable for the assessed liability in Finding 1 of \$5,341,664.08.

DATE OF ORDER: JANUARY 26, 2021

Robert G. Layton
Administrative Law Judge

NOTICE OF DECISION AND APPEAL RIGHTS-SUBPART H

This is the initial decision of the hearing official pursuant to 34 C.F.R. § 668.118. The regulation does not authorize motions for reconsideration. The following language summarizes a party's right to appeal this decision as set forth in 34 C.F.R. § 668.119.

An appeal to the Secretary shall be in writing and explain why this decision should be overturned or modified. An appeal must be filed within 30 days from receipt of this notice and decision. If an appeal is not timely filed, by operation of regulation, the decision will automatically become the final decision of the Department.

An appeal to the Secretary shall be filed in the Office of Hearings and Appeals (OHA). The appealing party shall provide a copy of the appeal to the opposing party. The appeal shall clearly indicate the case name and docket number.

A registered e-filer may file the appeal via OES, the OHA's electronic filing system. Otherwise, appeals must be timely filed in OHA by U.S. Mail, hand delivery, or other delivery service. Appeals filed by mail, hand delivery, or other delivery service shall be in writing and include the original submission and one unbound copy addressed to:

Hand Delivery or Overnight Mail*	U.S. Postal Service*
Secretary of Education c/o Docket Clerk Office of Hearings and Appeals U.S. Department of Education 550 12 th Street, S.W., 10 th Floor Washington, DC 20024	Secretary of Education c/o Docket Clerk Office of Hearings and Appeals U.S. Department of Education 400 Maryland Avenue, S.W. Washington DC 20202

These instructions are not intended to alter or interpret the applicable regulations or provide legal advice. The parties shall follow the regulatory requirements for appealing to the Secretary at 34 C.F.R. § 668.119. Questions about the information in this notice may be directed to the OHA Docket Clerk at 202-245-8300.

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