THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

In the matter of

BORICUA COLLEGE

Docket No. 19-52-SP

Federal Student Aid Proceeding

PRCN: 201620229245

Respondent.

DECISION OF THE SECRETARY

The question presented in this case is whether Boricua College (Boricua), an institution participating in Title IV of the Higher Education Act of 1965 (HEA), as amended 20 U.S.C. § 1070 *et seq.* (Title IV), is liable for funds disbursed to students who attended classes at a campus location 2 miles away from the main campus under the extent of eligibility regulations in force during the 2010–2012 award years. Based on the following analysis, I find that the circumstances under which Boricua operated do not render it liable for those funds.

Under the regulations in force at the time period relevant to this case, the Department extends Title IV eligibility only to educational programs and institutional locations approved in the eligibility notice sent to the institution.[1] Eligibility does not extend to locations established by the institution after it receives its eligibility designation "if the institution provides at least 50 percent of an education program at that location" unless the Secretary approves the location or the location is licensed and accredited, the institution is exempt from applying for approval under the applicable regulations, and the institution has reported the location to the Secretary.[2]

Boricua is a private, nonprofit, postsecondary education institution offering degree programs at the associate's through master's levels. Boricua was established in 1974 and began its candidacy for accreditation in 1976. Boricua has participated in Title IV programs since January 1976. Boricua has been accredited by 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).

[1] 34 C.F.R. § 600.10(b)(1) and (2) (2010).
[2] *Id*. § 600.10(b)(3).

Boricua's Main Campus is located in Manhattan. Boricua opened its Bronx Campus in the fall of 2010. NYSED certified the Bronx Campus as a branch campus of Boricua on October 5, 2010. This NYSED designation of "branch campus" authorized Boricua to offer the same programs at the Bronx Campus as were offered at the Main Campus. Also in fall of 2010, MSCHE authorized the Bronx Campus as an "Instructional Site" which allowed Boricua to offer "one or more courses" there.[3] Based on MSCHE's "Instructional Site" accreditation and NYSED certification, Boricua began offering programs at the Bronx Campus in the fall of 2010.

FSA conducted a program review from February 22 through 26, 2016, and issued a Program Review Report (PRR) on August 31, 2017, containing 12 findings. FSA issued a Final Program Review Determination (FPRD) on April 26, 2019, after considering Boricua's response to the PRR and conducting an additional site visit. The FPRD also contained 12 findings. Boricua only appealed Finding 1.

Under Finding 1 – Ineligible Location, FSA found that Boricua awarded Title IV funds from fall 2010 through January 2, 2013, to students at an "additional location" in the Bronx offering at least 50% or more of an educational program without first obtaining approval of the location from MSCHE or providing notice to the Department. MSCHE approved the additional location on January 2, 2013. Boricua submitted an electronic application to the Department on December 17, 2014.

FSA required Boricua to provide a spreadsheet for all Title IV funds disbursed to students at the Bronx location from fall 2010 through January 2, 2013. Boricua first responded that the Department erred in Finding 1 because the Bronx location was an "Instructional Site." Boricua also stated "all students taking courses at the Bronx location between Fall 2010 and Fall 2012 were eligible to receive Title IV funds whether they completed their academic program or left before completion."[4] FSA required Boricua to resubmit the spreadsheet on June 5, 2018, to correct errors with the file review. Boricua submitted a second response on July 5, 2018, in which it "acknowledged the institution's misunderstanding of 34 C.F.R. § 600.10(b)(3) and [MSCHE's] definition of 'Instructional Site' and 'Additional location.'" Boricua resubmitted the spreadsheet several more times before finally submitting a "correct copy" on September 13, 2018.

FSA found Boricua liable for $5,341,664.08 of improperly disbursed Title IV funds under Finding 1. Boricua appealed the FPRD to the Department's Office of Hearings and Appeals (OHA).

Boricua's Appeal to OHA

In an appeal under 34 C.F.R. Part 668 Subpart H (Appeal Procedures for Audit Determinations and Program Review Determinations), the institution bears the burden of showing that all expenditures were proper and that the institution complied with program

[3] Boricua also began the process of requesting approval from MSCHE for a change in the Bronx Campus' accreditation from an "Instructional Site" to an "Additional Location" out of an abundance of caution.
[4] FPRD at 6.

requirements.[5] After considering the arguments and evidence submitted on appeal, Administrative Law Judge (ALJ) Robert G. Layton set aside the entire liability under Finding 1. First, the ALJ determined that the term "additional location" was not defined in the regulations during the time period relevant to Finding 1. Therefore, the ALJ primarily relied on FSA's actions in a similar case involving the Des Moines Area Community College (DMACC) in which FSA "determined that a separate site located about two miles from the accredited main campus was not 'geographically apart' as an additional location."[6]

Based on the DMACC case, the ALJ found that geographic proximity was the key determinant of whether a site was an "additional location." In Boricua's case, because the Bronx Campus was only 2 miles from the Main Campus, it was in close enough geographic proximity that it was "not geographically separate . . . and was not an additional location."[7]

FSA has appealed the ALJ's Decision to me. I now turn to my analysis.

Analysis

In an appeal before the Secretary, the appealing party bears the burden of demonstrating, with a preponderance of the evidence, that the hearing official erred in his or her findings.[8] Based on the following analysis, I find that FSA has failed to carry its burden, and I agree with and affirm the ALJ's Decision.

The parties do not dispute the fact that "additional location" was not defined in the regulations in force during the time period relevant to this case. Accordingly, the ALJ evaluated a case with "indistinguishable" facts – the DMACC case – to determine FSA's practice regarding borderline circumstances where a site may or may not be an "additional location" relative to an institution's main campus.[9] The ALJ found that geographic proximity was the determining characteristic.[10] In the DMACC case, the main campus and site in question were only 2 miles apart. Because of their geographic proximity, FSA agreed with DMACC that the site in question was not an "additional site" but rather an extension of the main campus. The site in question did not need to be reported to the Department for students attending parts of their programs there to be eligible for Title IV disbursements.

The DMACC campuses and Boricua campuses in question are each 2 miles apart and are each, interestingly, separated by a river. The particular roads available in each case dictate how

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[5] 34 C.F.R. § 668.116(d) ("An institution or third-party servicer requesting review of the final audit determination or final program review determination issued by the designated department official shall have the burden of proving the following matters, as applicable:
(1) That expenditures questioned or disallowed were proper.
(2) That the institution or servicer complied with program requirements.").
[6] Decision at 6.
[7] *Id*. at 15.
[8] *Central State University*, Dkt. No. 12-32-SA, U.S. Dep't of Educ. (Sept. 2, 2014) (Decision of the Secretary) at 1 (citing 34 C.F.R. § 668.116(d)); *see* 34 C.F.R. § 668.119(a) ("Within 30 days of its receipt of the initial decision of the hearing official, a party wishing to appeal the decision shall submit a brief or other written material to the Secretary explaining why the decision of the hearing official should be overturned or modified.").
[9] Decision at 13.
[10] *Id*. at 14.

a student or faculty member would travel between the two campuses by, alternatively, walking, biking, driving, or taking public transportation. FSA argues that the 2 miles of separation in the less population dense environs of Des Moines are not comparable to the 2 miles of separation between the Boricua Main Campus in Manhattan and the Bronx Campus. Each area poses its own unique commuting challenges. Traffic would often make the 2 miles in New York City more burdensome to traverse by car or bus than the 2 miles in Des Moines. Furthermore, the safe pedestrian route between the Boricua locations is closer to 3 miles. However, the New York City locations undoubtedly have more varied and frequent public transportation options than one would find in Des Moines. Additionally, the most direct route between the Des Moines locations utilizes I-235, a route which is not accessible to walking or bicycling.

Ultimately, it is not the Department's role to split hairs over the differences in traveling 2 miles in different areas of the country. Even if FSA could conclusively prove that traveling between Boricua's sites is significantly more burdensome than traveling between DMACC's sites, FSA would have to further prove that the students and faculty at each institution have the same tolerances for commuting. In other words, even if traveling the 2 miles in New York City generally takes more time, the students and faculty used to living in that environment are also likely, as a whole, more tolerant to these increased times. We are left to conclude that 2 miles is still 2 miles.[11]

More importantly, in this case we know that not only are the Boricua sites geographically close, but also that students used the Bronx Campus as an extension of the Main Campus rather than as a standalone branch campus. In the 3 award years in question, of the 789 students who received instructions at the Bronx Campus, only 6% completed more than 50% of their courses at the Bronx Campus and only 1 student completed an entire program there.[12] The actual use of the sites by students is the most probative evidence that the Bronx Campus was, in practical fact, an extension of the Main Campus.

Boricua made statements during and after construction of the Bronx Campus that FSA construes as showing an intent to use and market the Bronx Campus as separate and distinct from the Main Campus.[13] However, such statements are overshadowed by the actual use of the campuses by students. Under the regulations in force at the relevant time period, I find that the Bronx Campus was an extension of the Main Campus, not an additional site subject to reporting to the Department.

FSA puts front and center the argument that Boricua admitted that it was confused about the difference between the terms "additional location," "instructional site," and "branch campus."[14] According to FSA, Boricua then "conceded" that the Bronx Campus was an additional location and it should have notified the Department "before it offered 50% or more of an academic program" there.[15] However, this case was one of first impression for OHA, and the

[11] FSA's later argument that DMACC's sites are both in "downtown" Des Moines, whereas Boricua's campuses are "in different boroughs and in different counties," despite both being 2 miles apart from each other, is irrelevant to the question of how students used the sites to complete their programs.
[12] Decision at 9.
[13] *See* FSA Brief at 11–15.
[14] *Id*. at 7.
[15] *Id*. at 8 (quoting Boricua OHA Brief, Ex. R-1 at 85).

regulations did not define the term "additional location." An inartful statement made by Boricua staff without the benefit of legal counsel does not bind or prejudice Boricua. The statement is not an admission of fact, but a tentative agreement with FSA's interpretation of what constituted an "additional location." Based on my analysis above, and that of the ALJ, FSA's interpretation of what constituted an "additional location" is rejected. Boricua's agreement or disagreement with FSA's erroneous interpretation is, therefore, irrelevant to this analysis.

FSA also argues that "an FPRD for one school has no precedential value for another school."[16] While FPRDs are not published and used to establish precedent, FSA ignores a fundamental tenet of administrative law. "An agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so."[17] The ALJ correctly found that a case with "indistinguishable" facts provided significant probative value in deciding the merits of the case presented.

Conclusion

I agree with the ALJ's Decision that Boricua's Bronx Campus was an extension of its Main Campus, not an additional location requiring reporting to the Department prior to disbursing Title IV aid to students who completed parts of their programs there. Boricua substantially complied with the regulations and the ALJ correctly set aside the liability in FSA's Finding 1.

ORDER

ACCORDINGLY, the ALJ's Decision in this case is AFFIRMED.

So ordered this 23rd day of August 2021.

Miguel A. Cardona, Ed.D.

Washington, D.C.

[16] FSA Brief at 10.

[17] *Indep. Petroleum Ass'n of America v. Babbit*, 92 F.3d 1248, 1258 (D.C. Cir. 1996) (citing *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1201 (D.C. Cir. 1984)).

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