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CITATION: VAOPGCPREC 30-90  
Vet. Aff. Op. Gen. Couns. Prec. 30-90

**TEXT:**

**Subject:** Correct Interpretation of 38 U.S.C. § 1673(c) and VAR 14233(C)(1)

(This opinion, previously issued as General Counsel Opinion 11-79, dated July 11, 1978, is reissued as a Precedent Opinion pursuant to 38 C.F.R. §§ 2.6(e)(9) and 14.507. The text of the opinion remains unchanged from the original except for certain format and clerical changes necessitated by the aforementioned regulatory provisions.)

**QUESTION PRESENTED:**

Do the provisions of section 1673(c), title 38, United States Code, and VAR 14233(C)(1) prevent us from paying a veteran for any open circuit television courses whatsoever if a majority of the subjects are being pursued by open circuit television, or may we pay for some of these courses?

**COMMENTS:**

Subsection (c) of section 1673, title 38, United States Code, reads as follows:

"(c) The Administrator shall not approve the enrollment of an eligible veteran in any course to be pursued by open circuit television (except as herein provided) or radio. The Administrator may approve the enrollment of an eligible veteran in a course, to be pursued in residence, leading to a standard college degree which includes, as an integral part thereof, subjects offered through the medium of open circuit television, if the major portion of the course requires conventional classroom or laboratory attendance."

Subsections (C)(1) and (C)(2) of VA Regulation 14233, pertinent here, read as follows:

"(C) Television

"(1) Open Circuit Telecast. A program may be pursued in part by open circuit telecast when:

"(a) The veteran or eligible person is enrolled as a resident student in a program leading to a standard college degree.

"(b) The subjects taken by television are integral parts of his or her degree program.

"(c) A major portion of the credit hours for which the veteran or eligible person is enrolled during any semester or quarter is offered through conventional

classroom and/or laboratory sessions.

"(2) Closed Circuit Telecast. Instruction offered through closed circuit telecast which requires regular classroom attendance is to be recognized to the same extent as regular classroom and/or laboratory instruction."

VA Regulation 14233(C)(1) was amended on March 10, 1977, to delete from subsection (1)(c) a paragraph containing an outdated example for determining the "major portion" of the training, but otherwise is substantially the same as an older VA Regulation 13030(E), since rescinded. (December 2, 1965).

Before responding to your inquiry, we believe it would be helpful to review the legislative history of section 1673(c), title 38, United States Code. The present educational assistance program for veterans evolved from similar programs for persons who served in the armed services during World War II and the Korean conflict. Experience gained with those programs resulted in provisions of law and regulations which specify certain types of training for which benefits may not be paid. Although the Korean conflict program had provisions of law barring certain types of training, no specific mention was made of television type training.

In 1956, the War Orphans' Educational Assistance Act of 1956 (Public Law 634, 84th Congress) was enacted. For the first time a specific statutory provision was included as to television training. It became the present section 1723(c), title 38, United States Code, and provided as follows:

"(c) The Administrator shall not approve the enrollment of an eligible person in any course of apprentice or other training on the job, any course of institutional on-farm training, any course to be pursued by correspondence, television, or radio, or any course to be pursued at an educational institution not located in a State ..."

On May 15, 1959, the Veterans Administration issued an administrative instruction interpreting section 1723(c), title 38, United States Code. The instruction contained provisions much like VA Regulation 14233(C) and specifically required that the training by open circuit television be approved only if a major portion of the credit hours for which the person is enrolled is offered by conventional classroom and/or laboratory sessions. The instruction further stated:

"It is the view of the VA that the terms 'Course' and 'Program of education' as used throughout Chapter 35, Title 38, U.S. Code (Public Law 634), are synonymous. It has therefore been determined that while a person may not pursue a program (course) exclusively by open circuit television, he is not precluded by law from pursuing a portion of it in such manner when the conditions stated in paragraph 2 above are met. That is to say, a program being pursued in residence will not be considered to be changed in character when

only a minor portion of the person's enrollment during any one quarter or semester is by open circuit television.

"Instruction offered through the medium of closed circuit telecast which requires regular classroom attendance is not considered to be a course offered by television for the purpose of determining benefits under Chapters 33 and 35."

The portion of the instruction which set out the conditions upon which payment could be made for open and closed-circuit television training was later offered as a proposed regulation, to which the Comptroller General objected. The interpretation by the Comptroller General of section 1723(c), title 38, United States Code, as set out in paragraph 6 above, was that none of the training by television could be approved even if the television portion was a minor portion of the course.

In response to an inquiry from Congress, the Administrator of the Veterans Administration wrote Senator Ralph Yarborough on June 6, 1960, as follows:

"... provisions governing the war orphans program contain a prohibition against the approval of the enrollment of an eligible person in such a course (38 U.S.C. § 1723(c)). We have not, however, viewed this language as applicable to closed-circuit television, which is essentially a classroom situation, nor as preventing an eligible person from receiving an incidental part of his instruction by open-circuit television if his course--taken as a whole--clearly meets the test of resident schooling."

Congress decided not to leave the matter solely to administrative instructions and regulations and, therefore, Public Law 86-785 amended section 1723(c) to include the substance of the previous 1959 Veterans Administration instruction.

Thereafter, on May 19, 1964, VA Regulation 13030(E) was promulgated. It applied to both the Korean conflict educational program for veterans and to the war orphans program.

When debate and hearing were conducted preparatory to passage of Public Law 89-358, which is the basis for the current educational assistance program for veterans and servicemembers, section 1723(c) was considered as a model for the new law. The following discussion appears in the report of hearings before the House Committee on Veterans' Affairs during the 86th Congress:

"It is realized that similar prohibition was not included in Chapter 33 providing for educational assistance to Korean conflict veterans. However, at the time the later war orphans assistance program was proposed, cogent reasons based on educational and administrative considerations were advanced for the prohibition of these courses. A question also arises as to whether a more liberal program should be afforded peacetime veterans than that provided for war orphans.

Uniform course requirements under the program seem desirable and would tend to simplify administration."

Thus, Congress ultimately enacted the present section 1673(c), title 38, United States Code, and did so with the intent that benefits for television training under chapter 34 should be treated in a like manner as they had been treated under the preexisting War Orphans' program which was codified as chapter 35.

Throughout the legislative development of VA Regulation 14233(C) and section 1723(c), title 38, United States Code, there appears a willingness to permit payment for courses that are pursued in a residence mode--closed circuit television or regular classroom instruction--and to bar payment for courses which do not follow such a mode, except where the training--open circuit television--is incidental to the resident portion of the course. The same intent existed for section 1673(c).

The question you have asked presupposes that in a given term the number of hours of training in an open circuit television mode equal or exceed the number of hours in a residence mode. Thus, for example, if a student is taking a course consisting of 6 hours of each type of training, the residence portion is not the "major" portion of the course.

A strict reading of the legislative history, discussed above, could lead one to conclude that no payment may be made for any part of the course, i.e., the course (consisting of all 12 credit hours of training) is not approvable. Another approach that could be inferred would be to limit payment to the residence portion of the course (consisting of 6 credit hours or half time). A third interpretation would be to recognize that the open circuit television training does qualify for payment, but may only be evaluated, for payment purposes, at less than the residence portion. Thus, in our example the course would be evaluated at 11 credit hours (6 by residence and 5 by open circuit television). This results in three-fourths time benefits. This is the interpretation that has been followed by the VA.

In your request for an opinion, you have alluded to the method for measuring independent study courses as being a possible alternative. A review of the current procedures for determining the rate of benefits when the program of education includes a combination of residence and independent study courses reveals that the third choice cited above is used. Consistency in measuring similar kinds of training is administratively desirable and usually more equitable to comparably situated veterans.

**HELD:**

The intent of Congress was not to bar all payment for the course or even for the open circuit television portion when that portion constitutes a majority of the

subjects being pursued but was to insure that payment for the open circuit television portion would not be the equivalent of the residence portion. Thus, if a school certifies the enrollment as consisting of 6 hours of residence training and 6 or more hours of open circuit television training, for measurement purposes it would be proper for the VA to reduce the open circuit television training to one less credit hour than the residence training (in our example, 5 credit hours-- resulting in payment of three-fourths time benefits).

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