DATE: 07-18-90

CITATION: VAOPGCPREC 83-90
Vet. Aff. Op. Gen. Couns. Prec. 83-90

TEXT:

Subject: Course Substitution By Institutions

(This, opinion, previously issued as General Counsel Opinion 12-83, dated September 20, 1983, 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.)

QUESTIONS PRESENTED:

(1) Does 38 U.S.C. § 1732 which bars the VA from exercising supervision or control over any educational institution or State approval agency, prohibit the VA from questioning the reasonableness of course substitutions approved by either? If not, may the VA withhold benefit payments in such cases?

(2) Must a veteran affirmatively seek a change of program?

(3) May the school exercise on behalf of a veteran his or her right to an optional change of program?

(4) May changes of program be granted if no application for the change of program has been submitted to the VA within 1 year of the commencement of the new course?

(5) Does submission of a new catalogue to the SAA by a school act as a constructive application for approval of courses instituted by the school after publication and approval of courses in an earlier catalogue? If so, may the delay in the approval of a new course be waived to allow an earlier effective date consistent with the date the course first was offered by the school?

COMMENTS:

Obviously, these questions all involve related issues, but each merits a separate review and discussion. However, the issues all share a common historical heritage which must first be understood before the conclusion can be discussed.

With the enactment of the Servicemen's Readjustment Act of 1944, known as the "GI Bill," Congress recognized that returning service personnel would require education to enable them to acquire employment. Because of the hundreds of thousands of individuals coming into the educational system, the Federal Government did not have the opportunity to establish a special set of rules for determining which schools would

be acceptable.

Rather, a decision was made to utilize schools already recognized by State authorities. The Servicemen's Readjustment Act (Pub.L. No. 346, 78th Congress) amended Veterans Regulation 1(a), adding Part VIII which, in part, provided with reference to eligible veterans that:

3. Such person shall be eligible for an entitled to such course of education or training as he may elect, and at any approved educational or training institution at which he chooses to enroll, whether or not located in the State in which he resides, which will accept or retain him as a student or trainee in any field or branch of knowledge which such institution finds him qualified to undertake or pursue ...

4. From time to time the Administrator shall secure from the appropriate agency of each State, a list of the educational and training institutions (including industrial establishments), within such jurisdiction, which are qualified and equipped to furnish education or training (including apprenticeship and refresher or retraining training), which institutions together with such additional ones as may be recognized and approved by the Administrator, shall be deemed qualified and approved to furnish education or training to such persons as shall enroll under this part.... (Emphasis added.)

These statutory provisions did not specifically prescribe any standards for determining the character or quality of the training to be accorded the student by the school. In effect, Congress was relying upon the fact that at the time of enactment certain schools had survived in the marketplace and were deemed qualified by an "appropriate" State agency. New institutions were to be added to the list of those approved by the Administrator of Veterans' Affairs, recognizing that a need for additional schools would undoubtedly arise.

In subsequent years, a variety of changes were made to the basic provisions of law enacted by Pub.L. No. 346, 78th Congress. Several were among the most significant for our purpose. Pub.L. No. 862, 80th Congress; Pub.L. No. 266, 81st Congress; and Pub.L. No. 610, 81st Congress, in one form or another, authorized the Administrator to bar benefits to veterans enrolled in courses deemed avocational or recreational in nature. Experience with the program following its implementation demonstrated that some veterans perceived the readjustment benefits as an opportunity to indulge their desire for income while pursuing courses which were unrelated to getting back into the mainstream of the civilian work force.

Pub.L. No. 610, 81st Congress, 2d session, specifically amended Veterans Regulation No. 1(a), Part VIII, par. 11 to provide as to profit making schools that the school must show among other things:

c. A detailed curriculum showing subjects taught, type of work or skills learned, and approximate length of time to be spent on each.

The SAA must find:

a. The curriculum and instruction are consistent in quality, content, and length with similar courses in the public schools or other private schools with recognized and accepted standards.

* * * * * * *

e. Appropriate credit is given for previous training or experience, with training period shortened proportionately. No course of training will be considered bona fide as to a veteran who is already qualified by training and experience for the course objective.

f. A copy of curriculum as approved is provided to the Veterans' Administration by the school.

Pub.L. No. 610, 81st Cong., 2d sess.

As reported in U.S. Code Congressional Service, 81st Congress, 2d Session (1950) p. 2714:

(T)he Administrator of Veterans' Affairs is not authorized to promulgate any regulation or instruction which denies or is designed to deny to any eligible person, or limit any eligible person in, his right to select such course or courses as he may desire, during the full period of his entitlement or any remaining part thereof, in any approved education or training institution or institutions, whether such courses are full-time, part-time, or correspondence courses. This provision is designed to prevent any action on the part of the Administrator that might prevent eligible veterans from exercising their right to determine for themselves the educational course or courses they desire to pursue.

The Congress also noted that the 1-year period of operation requirement being enacted was not intended to bar any course which:

does not completely depart from the whole character of the instruction previously given by such institution. It is clearly intended by the latter provision that the Administrator shall not disapprove a new course in an established institution simply because such institution adopts and offers such a course, although he shall disapprove such course if it departs so completely from the course or type of instruction previously given as to constitute an extreme or complete change in the nature of the instruction offered by such institution. Notwithstanding the foregoing provisions of this section, the Administrator may approve a new institution if any State approval agency certifies that such institution is essential to meet the requirements of veterans in such State. It is intended by the latter provision that the Administrator exercise sound administrative discretion in the approval of such institutions as distinguished from his promulgation of regulations or instructions so inflexible as to be unrealistic in light of the particular

situation which may exist in any State or local area.

Id. at 2715

As to avocational or recreational courses, the Congress intended to grant the VA authority to prevent enrollment in such courses unless they could otherwise be justified:

It is clearly intended that courses taken purely for avocational or recreational purposes be disapproved by the Administrator. However, in all instances where such courses are completely justified by the veteran as being in connection with his present or contemplated business or occupation, it is not intended that such courses be disapproved. It has come to the attention of the committee that some photography schools or courses, for example, offer professional training and placement in professional positions. It clearly is not the intent of this provision that such professional courses be disapproved by the Administrator.

This section also provides that the Administrator may find any other courses to be avocational or recreational in character, but no such other course shall be considered avocational or recreational in character when a certificate in the form of an affidavit supported by corroborating affidavits by two competent disinterested persons has been furnished by a physically qualified veteran stating that such education or training will be useful to him in connection with earning a livelihood.

Id. at 2716-17

Pub.L. No. 610, 81st Congress, for the first time established Federal standards for approval of certain for-profit schools, but specifically made the State approving agencies rather than the VA the final arbiter of whether the school met the standards.

With the advent of the Korean conflict--and enactment of the second so-called GI Bill--the Congress had become aware of the need to ensure that veterans were being actually trained or educated in quality institutions. As the Congress noted in a landmark report prepared by a special Committee chaired by Congressman Olin E. Teague of Texas:

The basic act of 1944 did little other than establish the nature and scope of the benefit. The Administrator of Veterans' Affairs was given unlimited authority to promulgate regulations and administer the act. Shortly after passage of the basic act, Congress liberalized the law by removing the age restriction and extending the period of time during which a veteran could enroll in training. Subsistence benefits were also raised. The incentives created by these liberalizations stimulated millions of veterans to participate in the program. As the full impact of increased participation was felt, it was necessary for the Congress to curb excesses which developed. For the past 5 years Congress has passed one restrictive amendment after another. Standards have been established for on-the-job training, agricultural training, and vocational schools. Funds have been provided to the State approval agencies to intensify supervision. The

Administrator has been given authority to determine fair and reasonable tuition rates, curb avocational courses, restrict course changes by veterans, and to deny approval to a school which had not been in successful operation for 1 year. This series of restrictive legislation has served to correct many of the abuses which developed; however, since these patchwork amendments were developed over a period of time, it is recommended that before benefits are extended to additional groups of veterans that the law be rewritten and certain other changes in addition to the ones described above incorporated.

House Select Committee to Investigate Educational, Training, and Loan Guaranty Programs Under GI Bill, H. Rep. No. 1375, 82d Cong., 2d Sess. p. 19

In reviewing the past history of the World War II GI Bill, the House Select Committee acknowledged that under the law, as amended in 1952:

The Administrator is not permitted to disapprove any course in an institution which has been in operation for a period of more than 1 year which does not completely depart from the whole character of the instruction previously given (Public Law 610, 81st Congress, July 13, 1950). (Emphasis added.)

Id. at 112-113

The Select Committee then notes that the VA attempted to hold that a course in automobile body and fender repair departs completely from the whole character of a course in automobile mechanics if it contains a phase of training in painting. The Committee when on to say:

The Committee is unable to ascertain how the law can be interpreted to deny a veteran training which is so obviously useful to him and which is a part of recognized training programs having as their purpose the teaching of skills which will make him a desirable employee.

Id. at 114

The Select Committee was obviously displeased with VA interference with the determinations of the State approving agencies and the schools as to the nature of the training that was offered. In the balance of this study the Committee clearly indicated its intent that the Administrator was to have final authority in matters of veterans' eligibility and by inference matters of an academic nature were reserved to the SAA's or schools.

Subsequently, Pub.L. No. 550, 82d Congress, the Korean conflict GI Bill, was enacted. The General Counsel of the Veterans Administration was asked to interpret the extent to which these new statutory provisions permitted the Administrator to refuse benefits to veterans enrolled in courses approved for VA purposes by the appropriate SAA.

As that decision, dated February 16, 1956, noted, the provisions of Pub.L. No. 550 for the first time included section 201, which provided in part:

(3) the term 'program of education or training' means any single unit course or subject, any curriculum, or any combination of unit courses or subjects, which is generally accepted as necessary to fulfill requirements for the attainment of a predetermined and identified educational, professional, or vocational objective;

(4) the term 'course' means an organized unit of subject matter in which instruction is offered within a given period of time or which covers a specific amount of related subject matter for which credit toward graduation or certification is usually given
...
Section 221 of the Act provided that each eligible veteran may select "a program of education or training to assist him in attaining an educational, professional, or vocational objective" at any educational institution or training establishment selected by him which will accept and retain him as a student or trainee.

Section 222 provided that any eligible veteran "who desires to initiate a program of education or training" under this title shall submit an application to the Administrator and that the Administrator shall approve such application unless he finds:

that such veteran is not eligible for or entitled to the education or training applied for or that his program of education or training fails to meet any of the requirements of this title, or that the eligible veteran is already qualified, by reason of previous education and training, for the educational, professional, or vocational objective for which the courses of the program of education or training are offered. (Emphasis added.)

Section 223 referred to the change of "program of education or training." Part V of Title II, Public Law 550, relates to the "State approving agencies" and section 242 provided for the approval of the "course of education or training" by the State approving agency.

Section 243 provided:

(a) The Administrator and each State approving agency shall take cognizance of the fact that definite duties, functions, and responsibilities are conferred upon the Administrator and each State approving agency under the veterans' educational programs. To assure that such programs are effectively and efficiently administered, the cooperation of the Administrator and the State approving agencies is essential. (Emphasis added.)

Part VI dealt with "Approval of Courses of Education and Training" and each particular type of training therein referred to in which the State approving agency had a function was specifically applicable to "the course or courses of training" rather than to the "program of education or training."

In view of the foregoing, the VA General Counsel determined that the functions and jurisdiction of the State approving agencies under Public Law 550 were limited to “course or courses," and the determination as to whether a particular course or courses constitute a proper "program of education or training" is a matter solely within the jurisdiction of the Administrator of Veterans' Affairs and his designated officials. Therefore, if the VA should find that a correspondence course as TV Cameraman and Studio Technician is not generally accepted as necessary to fulfill the requirements for that vocational objective, the fact that the State approving agency has approved the course does not require the approval of applications by veterans for such course.

Interestingly, subsequently, when educational benefits were extended to the children of veterans under the War Orphans' Educational Assistance Act of 1956 (Pub.L. No. 84-634), as codified into title 38, United States Code, by Pub.L. No. 85-857, the definitions referred to in the Korean veterans' law were substantially changed, but only for the children. Section 1601(3) and (4) were the same as section 201(3) and (4) in Pub.L. No. 550. However, there was no definition for the term "course" for the children's program. The definition of the term "program of education," applicable to children as codified in Pub.L. No. 85-857, is as follows:

(5) The term "program of education" means any curriculum or any combination of unit courses or subjects pursued at an educational institution which is generally accepted as necessary to fulfill the requirements for the attainment of a predetermined and identified educational, professional, or vocational objective.

Note that a combination of "courses or subjects" is required rather than "any single unit course or subject." The Congress explained this change as follows:

'Program of education' means any curriculum or any combination of unit courses or subjects pursued at an educational institution, but only if such curriculum or combination of unit courses or subjects is generally accepted as necessary to fulfill the requirements for the attainment of a predetermined and identified educational, professional, or vocational objective. This definition is substantially like that contained in the Veterans' Readjustment Assistance Act of 1952, except that under this act single unit courses or subjects cannot themselves constitute the eligible person's program. This change is consistent with the provision in section 309(c) which prohibits training under this act on a less than half-time basis. It should be noted that while the Administrator or Veterans' Affairs has the responsibility of determining whether a certain curriculum or combination of unit courses or subjects is generally accepted as necessary to fulfill the requirements for the attainment of a predetermined and identified educational, professional, or vocational objective, it is expected that he will, as he has under the Veterans' Readjustment Assistance Act of 1952, consult with State and Federal educational agencies and other qualified bodies in making these determinations. (Emphasis added.)

S. Rep. No. 2063, 84th Cong., 2d Sess; 1966 U.S. Code Cong. & Ad. News p. 2960

As the Korean conflict wound down, Congress came to believe that the decreasing number of veteran trainees would eventually cause the continued funding of State approving agencies to be too costly. As a result, the law provided that upon expiration of the Korean conflict program the approval of courses for the remaining war orphans program (which would survive the Korean conflict veterans' bill) would devolve upon the Administrator. The SAA funding would terminate. However, the ensuing debate resulted in the enactment of sections 1771 through 1778 of title 38, United States Code, by Pub. L. No. 88- 126. These provisions retained the State approval agency system and codified provisions of law previously found in sections of the law enacted subsequent to the original Korean GI Bill. The present GI Bill for post-Korean conflict veterans, enacted by Pub.L. No. 89-358, retains the same basic provisions for approval of courses, with later amendments not relevant to our discussion.

In addition to the approval provisions, the current program enacted by Pub.L. No. 89-358 retained only the definition of program of education found in the childrens' program rather than either of the Korean conflict law definitions:

'Program of education' is defined as any curriculum or any combination of unit courses pursued in an educational institution which is generally accepted as necessary to fulfill the requirements for attainment of a predetermined educational, professional, or vocational objective. This definition is identical to that contained in chapter 35 of title 38, United States Code, for the purposes of war orphans' educational assistance.

H. Rep. No. 1258, 89th Cong., 2d Sess; 1966 U.S. Code Cong. & Ad. News p. 1894

The essence of the foregoing legislative history is to demonstrate that originally the GI Bill education programs were focused upon the schools rather than the specific programs or courses of education. As the Government gained experience the need to consider the quality of the education being provided was of greater concern. However, the basic consideration of whether a particular course should be approved has, since the enactment of Pub.L. No. 610, been the exclusive task of the State approving agencies. While the "course of education" is approved by the SAA (38 U.S.C. § 1772(a)), the Administrator shall pay benefits only to an eligible veteran who is pursuing a "program of education" (38 U.S.C. § 1681(a)), a term defined in 38 U.S.C. § 1652(b) as being composed of "unit courses or subjects."

Clearly, in the enactment of Pub.L. No. 89-358, Congress intended that the administrator "has the responsibility of determining whether a certain curriculum or combination of unit
courses or subjects is generally accepted as necessary to fulfill the requirements for the attainment of a predetermined and identified educational, professional, or vocational objective." In discharging this responsibility, the Administrator will continue to consult with the State agencies, as has been the practice since enactment of the Korean conflict GI Bill. We believe, therefore, that, if a state approving agency exercising its authority under chapter 36, title 38, United States Code, approves courses at a particular educational institution as being appropriate for VA purposes, the Administrator

has independent authority to determine whether the approved courses lead to a suitable objective. If they do not, no benefits may be paid the veteran enrolled in such courses. In keeping with the objections of the Teague Report and the caution found in the report on Pub.L. No. 89-358, Congress did not intend for the VA to use this power to arbitrarily prevent the creation of new courses by schools or to narrowly define the courses appropriate to a given objective or to prevent a student from taking unit courses that are only tangentially related to the objective. Our earlier attempts at such degree of control were specifically denounced by Congress.

Instead, we believe that the intent was for the VA to consult with the educational community, the State, and the public-service accrediting groups to seek a consensus as to the degree to which a given course or subject is relevant to the objective of the program of education. The Congress did not want the VA to arbitrarily impose its own views upon the educational community, but rather to recognize the accepted standards of the educational community.

Also legally important is the fact that the benefits are paid upon the existence of a program of education, as defined in the statute, rather than upon enrollment in particular unit subjects. (38 U.S.C. § 1681(a)) The student must select a "program of education." (38 U.S.C. § 1670) The student may change the "program of education" only as provided in 38 U.S.C. § 1791 Nothing specifically bars the substitution of one unit course or subject in a given program of education, except for the fact that the program of education must lead to the attainment of the "predetermined and identified" objective. As long as the program of education is composed of two or more approved unit courses or subjects and the predetermined objective can be achieved with the substitution of course, we believe the VA may pay benefits. If, on the other hand, the substitution of the courses is of such a nature that the new approved courses are not "generally accepted as necessary" for attaining the objective previously determined for the program of education, or the substitution alters the predetermined objective of the program of education, the VA may not pay benefits under 38 U.S.C. § 1681 In the event that the curriculum or combination of courses that includes the substituted courses qualified as a new, determinable objective, the student could be paid upon complying with the change of program of education requirements of 38 U.S.C. § 1791.

Therefore, we conclude that Congress intended that the Administrator may independently review to assure that the program of education really does consist of courses which, taken as a unit, lead to an identified and predetermined objective, even though the State approving agency has already approved the courses as being suitable for veteran enrollment. If unit courses or subjects do not contribute to the attainment of the objective, they may not be accepted as part of a program of education for which benefits may be paid. Thus, if a school has obtained approval from the State approving agency for a program of education consisting of certain unit subjects listed in a particular issue of the school's catalogue as leading to a liberal arts undergraduate degree with a major in history, the VA may, and should, if doubt exists, review the program of education to insure that the approved unit courses do lead to the attainment of such a degree. Similarly, if they do, but subsequently the school replaces

some of the unit courses with substitutes, the VA may and should determine whether the substituted courses are: (a) approved by the SAA and (b) lead to the original predetermined objective of an undergraduate degree in history. If they do not lead to the original objective, but, when combines with the balance of the original courses, lead to another legitimate objective, then the veteran may make a change of program, if otherwise eligible, to pursue the new objective. If not, the VA may not pay benefits to the veteran for any such courses.

We note, as did the Congress at the time of enactment of the current GI Bill, that the VA should "consult with State and Federal educational agencies and other qualified bodies in making these determinations." Congress did not intend for the VA to resort to the arbitrary practices noted by the Teague Report (paragraph 14, supra). The VA, therefore, should give weight to determinations of the relevancy of training made by the SAA, accrediting bodies and licensing bodies. We believe that in close cases doubt should be resolved in favor of the consensus of such groups, even though the VA might not make the same decision independently.

Furthermore, the acceptance of these courses is different than for those that are avocational or recreational in nature. The latter category of course (including, we believe, individual unit courses or subjects) may be barred by the Administrator under 38 U.S.C. § 1673(a)(3), yet even in these cases the veteran may be allowed to train if he or she can prove the utility of the training in a business or occupation. (See paragraph 11, supra).

In order for the Administrator to make orderly determinations of whether the courses lead to an identifiable objective, the VA could have established specific rules similar to those found in 38 C.F.R. §§ 21.4131(a)(3) and 21.4132 with reference to the time limits within which SAA approval of school courses are to be considered and made effective. However, the VA has not adopted any formal rules for dealing with the questions related to substitution of courses. We believe formal rules would be possible and desirable to apprise all concerned as to the nature of substitutions that will be accepted, the manner in which the school should communicate to the SAA and the VA that courses are being substituted and the period of retroactivity, if any, for which payment in substituted courses will be made. To be consistent with the rules for approval of courses, we would recommend that 38 C.F.R. § 21.4131 and 38 C.F.R. § 21.4132 be used as models, especially since the new unit courses must be approved by the SAA before the VA considers whether they meet the requirements of a program of education. We understand that your office has informally indicated that the substitutions will only be honored, if otherwise appropriate, when communicated to the VA within 1 year of their adoption. That period is not unreasonable, but it conflicts with the shorter 60-day rule for retroactive course approvals.

Your second question relates to the issues raised when course substitutions so alter the program of education as to create a new educational objective. As indicated above, such situations result in a change of program by the student. The legislative history of 38 U.S.C. § 1791 governing the circumstances under which changes of program are

permitted, is closely associated with the degree to which the VA may be involved in program selection. In the administration of the World War II GI Bill, the VA was charged by Congress with overly restricting a veteran's use of benefits by limiting the individual to his or her original program. However, Veterans Regulation 1(a), Part VIII, par. 3(a) provided that: "for reasons satisfactory to the Administrator, he may change a course of instruction ..."

The Korean conflict GI Bill provided that only one change of program would be approved and only if the veteran either was failing to progress in the present program without his or her fault or the new program, "while not a part of the program currently pursued by him, is a normal progression from such program."

The legislative history of the provisions regarding changes of program illuminates the intent of Congress:

> This section also provides that the Administrator may require consultation by the veteran in case the veteran has discontinued any course of education or training before completing the same, or in any case in which the veteran after completing a course of education or training decides to take another course in an entirely different general field, but after such consultation the Administrator shall have no right to refuse approval to a different course or an additional course in the same general field; except as limited by paragraph D. The committee amendment would have the effect of preventing a veteran from changing from one field to another entirely different and unrelated field.

H. Rep. No. 1444, 81st Cong., 2d Sess; 1950 U.S. Code Cong. Service p. 2710

However, when Pub.L. No. 89-358 was enacted, the current program (38 U.S.C. s 1672) was liberalized to provide that:

(a) Except as provided in subsection (b), each eligible veteran (except an eligible veteran whose program has been interrupted or discontinued due to his own misconduct, his own neglect, or his own lack of application) may make not more than one change of program of education.

(b) The Administrator may approve one additional change (or an initial change in the case of a veteran not eligible to make a change under subsection (a)) in program if he finds that—

(1) The program of education which the eligible veteran proposes to pursue is suitable to his aptitudes, interests, and abilities; and

(2) in any instance where the eligible veteran has interrupted, or failed to progress in, his program due to his own misconduct, his own neglect, or his own lack of application,

there exists a reasonable likelihood with respect to the program which the eligible veteran proposes to pursue that there will not be a recurrence of such an interruption or failure to progress.

(c) As used in this section the term "change of program of education" shall not be deemed to include a change from the pursuit of one program to pursuit of another where the first program is prerequisite to, or generally required for, entrance into pursuit of the second.

Additional changes have further liberalized these provisions, but nonetheless, the degree to which a veteran may undertake a change of program is still limited. While Congress has gradually broadened the opportunities for changes of program, it has clearly indicated that the choice of a program is relevant and important to whether benefits will be paid. The limitations require a determination of the Administrator, which presupposes that facts upon which the determination may be made have been communicated to the VA. In such a matter as a program change the Administrator will not, in the normal course of events, learn of the facts necessary for such a determination unless the veteran provides them. Furthermore, 38 C.F.R. § 21.1030 provides in pertinent part that: "A specific claim in the form prescribed by the Administrator must be filed by the veteran in order for an educational assistance allowance to be paid." Finally, 38 C.F.R. § 21.4234(b) provides:

(b) Application. A veteran or eligible person may request a change of program by any form of communication. However, if the veteran or eligible person does not furnish sufficient information to allow the Veterans Administration to process the request, the Veterans Administration will furnish the prescribed form for a change of program to him or her for completion. (38 U.S.C. § 1671)

Therefore, we conclude that a veteran must affirmatively seek a change of program. Unless the VA has received an application for a change of program from the veteran, no change will be considered. The VA does not, and, under the law and regulations may not, initiate a change of program determination until the veteran has requested it. Otherwise, the VA, by spontaneously acting upon the facts as it perceives them, could be going against the veteran's actual intent.

Similarly, the VA could not act upon either an affirmative or implied request for an optional change of program, if the request originates only from the school. The school would not be able to speak for the veteran, for it would not have access to his or her intent. (See 38 C.F.R. § 3.150 requiring claims to be in person or in writing by the person.)

The educational assistance program has long been subject to the provisions of 38 U.S.C. § 3013 which provides:

Effective dates relating to awards under chapter 31, 34, and 35 of this title shall, to the extent feasible, correspond to effective dates relating to awards of disability compensation.

Under 38 U.S.C. §§ 3001 and 3010 and 38 C.F.R. § 3.155, the VA has established a rule that a veteran has 1 year from the event making him or her eligible for compensation benefits to apply or to perfect an application for benefits. Pursuant to these provisions and 38 U.S.C. § 3013 we believe that a veteran may be accorded benefits based upon a change of program no earlier than 1 year prior to his or her application for the change of program in accordance with 38 C.F.R. § 21.4131(a)(2). We would not consider payments for training received under a new program of education instituted more than 1 year prior to the veteran's actual application to the VA for the change. That accords with the spirit and intent of title 38 and the regulations mentioned above.

Your final question has to do with the mechanics of obtaining SAA approval for courses and VA approval for programs of education. SAA approval of courses which are accredited generally is accomplished by specifically referring to a particular issue of a school's catalogue. However, schools do have legitimate reasons for adding and subtracting particular unit subjects and courses from the curriculum outlined in given issues of their catalogues. Instructors may become unavailable, facilities may be lacking, demand for a subject may not justify offering it, etc. If schools were not allowed the flexibility to substitute courses until after a new catalogue is issued and approved by the SAA, an injustice would result. Catalogues are expensive to produce and usually are issued once a year. In the interim periods schools should have a means of seeking and obtaining approval for new courses from the SAA. If the substituted courses in a given curriculum would alter the objective of the program of education, the VA should also be notified. The student should be advised by the school to apply for a change of program in those cases.

Similarly, a given student legitimately may have to select a particular substitute course not already approved for his or her program of education. Frequently, the classes for the unit course scheduled are filled and an alternate would be appropriate for the particular objective he or she is pursuing. Merely because the unit course lacks approval of the SAA as a part of the curriculum of a given veteran prior to the veteran's enrollment does not mean the VA may not pay benefits. We have provided that we normally will pay benefits from date of approval of the course or date of receipt of the approval notice by the VA when the VA receives it within 60 days after the date of approval, whichever is later (38 C.F.R. § 21.4131(a)(3)). However, the requirement that the VA shall receive the notice within 60 days of date of approval may be waived (38 C.F.R. § 21.4132).

We have never issued a formal regulation permitting payments for training received in a course prior to the date the SAA has approved it, nor permitted a SAA to make the SAA approval effective on a date earlier than the date the SAA receives an application from the school for approval. However, we have issued our informal opinion that retroactive approvals by a SAA may be proper if the courses are otherwise appropriate. We

believe that, if the practice is acceptable to you from a policy point of view, prudence would indicate that our regulations should specifically so provide and should place any reasonable limits upon the conditions for such approvals, including the maximum period of retroactivity which will be acceptable. The question of whether the school could seek retroactive approval for courses, first offered by it following publication of a particular issue of a catalogue, by merely tendering a new catalogue reflecting the change would depend upon the VA and SAA willingness to accept that method of applying for approval. Note that every application for approval of an accredited course should include a "catalogue or bulletin which must be certified as true and correct in content" (38 U.S.C. § 1775(a)). This does not specifically require a written application. Nonaccredited courses must be in the form of a written application to be accompanied by the catalogue with a similar certificate (38 U.S.C. § 1776(a)). Thus, one could argue that any communication amounting to a request to change the approval would be acceptable for accredited, but not nonaccredited courses.

Finally, the SAA shall "furnish an official copy of the letter of approval and any subsequent amendments to the Administrator," including the "date of letter and effective date of approval of courses" (38 U.S.C. § 1778). Thus, the date of the letter of approval to the school need not be the same as the effective date of the approval, which could be an earlier date.

We believe that the intent of the law and the provisions of 38 C.F.R. § 21.4131(a)(3) and 38 C.F.R. § 21.4132 were not designed to require the school, in all cases, to seek and obtain final approval of the courses involved prior to the beginning date of the course. We interpret the meaning of the phrase "date of approval" to mean the "effective date" of the approval by the SAA. Thus, if a school decides to offer a course between issues of its catalogue and immediately seeks to obtain SAA approval, the SAA should decide that the course is approved as of a certain date. The 60-day period for notifying the VA of the approval begins to run from the date the approval is effective, not the date the SAA acts to determine the effective date. The only problem is that our existing regulation, 38 C.F.R. § 21.4132, does not place any limit upon how far into the past the effective date may be and still qualify for a waiver by the VA of the delay in notification to the VA.

We are of the opinion that the VA should not agree to pay benefits for periods of retroactively approved training when the training was actually received more than 1 year before we had notice of the approval. For example, a student is enrolled in a BA degree program in history for the school year beginning September 1, 1982, and the school decides to substitute an unapproved unit course into the curriculum for the Fall 1982 program. The school first applies to the SAA on October 1, 1982. The SAA approves the course effective September 1, 1982, on February 1, 1983, and notifies the VA on that date. (The SAA, under existing rules, could make the approval effective October 1, 1982, the date of the school's application, rather than the beginning of the term.) The VA receives the SAA notice February 4, 1983. Since more than 60 days have elapsed from the date of approval (September 1, 1982), the VA will only pay benefits from February 4, 1983, unless waiver is appropriate. In view of the fact that the VA was

notified within one year of September 1, 1982, we believe waiver is appropriate and benefits should be paid for the Fall term 1982 for veterans who apply for them within 1 year of September 1, 1982. However, if the VA had not been notified by the SAA until October 1, 1983, no waiver should be granted and not benefits authorized earlier than October 1, 1983, as provided by 38 C.F.R. § 21.4131(a). This opinion, unfortunately, is not fully implemented at this time by specific regulations. In view of that fact, an argument could be made by the school that a waiver of the 60-day notice requirement has no limit as to retroactivity, and the VA could only argue unreasonable delay.

HELD:

(1) The VA has the authority to independently determine that the courses or subject approved by the state approval agency (SAA) and which constitute the veteran's program of education lead to an identified professional, vocational or educational objective. If they do not, no benefits for such courses or subjects may be paid, unless they may properly form the basis of a different program of education and the veteran meets all criteria for an appropriate change of program.

(2) Only the veteran may seek a change of program and he or she must do so affirmatively by making application to the VA.

(3) The school may not, in any case, independently exercise the veteran's right to an optional change of program.

(4) The VA will not pay benefits to a veteran for any portion of training received in a new program of education unless an application for the change of program is received within 1 year of the actual training, just as in any other case for which the beneficiary is required to apply.

(5) Applications by a school to a SAA for approval of a new course must be in writing only if the course is nonaccredited. In all other cases the existing law and regulations would seem to permit the SAA to entertain an informal application such as submission by the school of a revised catalogue listing different unit courses or subjects than were submitted for the original approval. We are of the opinion, however, that the SAA can and should require written applications.

(6) If a school or the SAA delays requesting or approving a course (so that the VA does not receive the approval within 60 days of the effective date of the approval), under existing rules and regulations the VA may only pay benefits from the date the VA receives the notice of approval from the SAA, even though the approval is made effective by the SAA for an earlier date, except when a waiver is granted by the VA for the delay. The date of receipt of the notice of approval would always be later than the effective date of the approval in such cases. If a waiver of delay in notifying the VA is granted, the VA may pay from the effective date of the approval as determined by the SAA.

(7) The existing regulations regarding such a waiver do not impose a specific period of delay (from the date the SAA determines to be the effective date of approval until the VA is notified) which would be considered inordinate, but, rather, impose an equitable test of good faith of the parties. A revised regulation could set a specific period of delay beyond which no waiver would be allowed, however. We would suggest 1 year would be a reasonable rule.

VETERANS ADMINISTRATION GENERAL COUNSEL
Vet. Aff. Op. Gen. Couns. Prec. 83-90