

**Department of
Veterans Affairs**

Memorandum

Date: March 25, 2005 VAOPGCPREC 3-98

From: General Counsel (022)

Subj: VAOPGCPREC 3-98 -- Definition of Institution in 38 U.S.C. §§ 101(4)(A)(iii) and 104(a)

To: Director, Compensation and Pension Service (21)

1. In Theiss v. Principi, 18 Vet. App. 204 (2004), the United States Court of Appeals for Veterans Claims (Veterans Court) held that VAOPGCPREC 3-98 and a March 2000 amendment to 38 C.F.R. § 3.57(a)(1)(iii) are "legislative" or "substantive" rules and are invalid because they were not issued in accordance with the notice-and-comment procedures of 5 U.S.C. § 553(b) and (c). In VAOPGCPREC 3-98, we held that a home-school program does not constitute an "institution" within the meaning of 38 U.S.C. §§ 101(4)(A)(iii) and 104(a). The March 2000 amendment to section 3.57(a)(1)(iii) reflected that holding. We disagree with the Veterans Court's holding that the opinion and regulatory amendment are substantive rules rather than interpretive rules. However, based on our understanding that your office plans to reconsider the question of whether a home-school program may be considered an "institution" under the relevant statutes, we will not pursue further judicial review in Theiss. We are therefore withdrawing VAOPGCPREC 3-98.

2. Section 101(4)(A)(iii) of title 38, United States Code, defines the term "child" to include a person who is unmarried, and "who, after attaining the age of eighteen years and until completion of education or training (but not after attaining the age of twenty-three years), is pursuing a course of instruction at an approved educational institution." Pursuant to 38 U.S.C. § 104(a), VA is authorized to approve or disapprove such "educational institutions." VAOPGCPREC 3-98 held that a home-school program does not constitute an "institution" within the meaning of 38 U.S.C. §§ 101(4)(A)(iii) and 104(a) because the program terminates when the child completes his or her course of instruction or withdraws, does not have an ongoing enrollment, and is operated for the sole purpose of serving the needs of a particular student. The holding of the General Counsel opinion was based upon the definitions of "institution" in Webster's Ninth New Collegiate Dictionary 627 (1990), as well as definitions of other terms in Black's Law Dictionary 546 (6th ed. 1990), and Webster's Third New International Dictionary 1590 (1976). The Veterans Court, however, indicated, based upon a review of other dictionary definitions, that the term "educational institution" is subject to differing interpretations and that there may be a reasonable basis for construing that term

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to encompass home-school programs. Theiss, 18 Vet. App. at 210-11. We would be happy to assist you in any future rulemaking regarding the definition of the term "educational institution" in 38 U.S.C. § 101(4)(A)(iii).

Tim S. McClain