Department of Veterans Affairs — Memorandum

Date: August 24, 1999 VAOPGCPREC 10-1999

From: General Counsel (021)

Subj: Mitigating Circumstances—Six Semester Hour Exemption

To: Under Secretary for Benefits (225B)

QUESTION PRESENTED:

Should the accelerated course measurement provisions of 38 C.F.R. § 21.4272(g) be used in determining the total number of credit hours for which mitigating circumstances are presumed pursuant to 38 U.S.C. § 3680(a)(3)(B) and 10 U.S.C § 16136(b)? (Note: For convenience, this opinion discusses the regulation's application to 38 U.S.C. § 3680(a)(3)(B) and does not further reference 10 U.S.C. § 16136(b) since the latter statute merely requires that the former will apply to persons eligible under the chapter 1606, title 10, program.)

DISCUSSION:

1. As originally enacted by Public Law 94-502 (October 15, 1976), section 3680(a)(4) [currently, section 3680(a)(3)] of title 38, United States Code, provided that no educational assistance allowance "shall be paid to an eligible veteran for a course for which the grade assigned is not used in computing the requirements for graduation including a course from which a student withdraws unless the Secretary finds there are mitigating circumstances…."

2. The purpose of this statute was to preclude individuals from receiving benefit payments for courses they did not actively pursue. Such resulting course outcomes as an "incomplete" or other nonpunitive grade, including course withdrawal, generally did not count against the individual's grade point average. Moreover, Congress was concerned that schools were maintaining students in a fully matriculated status even when students displayed a pattern of such failure to complete courses. This allowed such individuals to continue to draw education benefits even when they were making no progress toward their educational goals. Accordingly, Congress sought to remedy this by enacting the mentioned bar to payment for nonpunitive grades. *See*, S. Rep. No. 1234, 94th Cong., 2d Sess. 119-121 (1976).

3. As indicated, the original provision barring payment made an exception for cases in which the student could demonstrate mitigating circumstances for receipt of a grade not used in computing requirements for graduation. In its application, however, the exemption proved too cumbersome to administer. Accordingly, Congress amended section 3680(a)(4) in 1988 to include the following additional exception:

> except that, in the first instance of withdrawal by an eligible veteran or person for a course or courses with respect to which such veteran or person has been paid assistance under this title, mitigating circumstances shall be considered to exist with respect to courses totaling not more than *six semester hours or the equivalent thereof.*

Pub. L. No. 100-689, § 121(a) (1988) (emphasis added). (This exception currently is found in 38 U.S.C. § 3680(a)(3)(B).)

4. The question posed concerns the meaning of the phrase "equivalent thereof" in the context of determining the number of credit hours subject to the above exception when course withdrawal occurs during a nonstandard term. We understand the "equivalent credit-hour" formula set forth in 38 C.F.R. § 21.4272(g) currently is being used for this purpose. However, as discussed below, we find that regulation inapplicable here.

5. The subject VA regulation, 38 C.F.R. § 21.4272(g), implements section 3688(b) of title 38, United States Code, which authorizes the Secretary to determine, for purposes of benefit payment, what constitutes full- and part-time training for courses pursued on other than a standard quarter- or semester-hour basis. The regulation provides a formula for this purpose that equates the number of semester or quarter hours pursued on an accelerated basis during a short nonstandard term with the number of credit hours corresponding to pursuit at the same rate during a standard semester or quarter. The result, expressed in "equivalent credit hours," is used to measure training time. For instance, a student enrolled for a semester in two courses totaling 6 semester hours would be considered training at one-half time. A student pursuing the same courses on an accelerated basis over an 8-week term would, by application of the cited regulation, be pursuing slightly more than 13 "equivalent semester hours" – usually considered full-time training.

6. As indicated, the accelerated measurement regulation is a means for VA to determine comparable full- and part-time training status when the same course credits (e.g., semester hours) are pursued during different length terms. However, we note that the regulation establishes merely an artificial credit-hour equivalency by which to measure accelerated course pursuit for benefit payment purposes. Moreover, by its nature, that equivalency represents a total number of course credits beyond the actual number for which the student enrolled. That result, in our view, renders its application in

determining mitigating circumstances under section 3680(a)(3)(B) suspect since using equivalent credit hours for such purpose could deny an individual the full benefit of the course-withdrawal exemption.

7. The section 3680(a)(3)(B) exception provides that, in the first instance of course withdrawal, mitigating circumstances will be considered to exist ”with respect to *courses totaling* not more than six semester hours or the equivalent thereof.” (Emphasis added.) In our view, this language should be construed as referring to the total actual credit hours designated by the school for the courses involved, not to the total equivalent credit hours ascribed by VA regulation to those courses when pursued over a nonstandard term. Not only does this interpretation more closely follow the statutory language, but it also avoids the dubious logic that an individual’s withdrawal from courses totaling six credit hours scheduled during an 8-week term, for instance, translates to a loss of 13 credit hours toward graduation. (That logic, we note, would inescapably flow from measuring course withdrawal in terms of equivalent credit hours under 38 C.F.R. § 21.4272(g).)

8. Moreover, our interpretation squares with the legislative purpose in limiting payment for nonpunitive grades. As previously mentioned, Congress was concerned that individuals not be paid benefits for course withdrawals for which such grades are received and no progress is made toward graduation. Therefore, we perceive that only the credit hours the school assigned to the course(s) from which a student withdraws are relevant to this concern since only those assigned credit hours are used in calculating the student’s grade point average and count toward meeting his or her graduation requirements – the express focus of the section 3680(a)(3) restriction.

9. It reasonably follows that the section 3680(a)(3)(B) language “or the equivalent,” as used in the phrase “six semester hours or the equivalent,” was intended simply to address the situation where a school assigns course credit on other than a semester-hour basis. For instance, when the student’s school operates on a quarter-hour basis and its requirements for graduation are measured in those units of credit, the mitigating circumstances provision would apply to courses totaling not more than the quarter-hour equivalent of six semester hours.

[10].[Paragraph number correction on published version] In sum, although the artificial credit-hour “equivalency” established by the regulation in question is appropriate for determining the commensurate rate of benefit payment for an individual’s accelerated training time over a nonstandard term, it does not reflect the amount of course credits actually assigned by the school and applicable toward meeting graduation requirements. Accordingly, we find it inappropriate to use equivalent credit hours, as determined pursuant to 38 C.F.R. § 21.4272(g), for purposes of implementing the mitigating-circumstances exception in section 3680(a)(3)(B).

HELD:

VA regulation, 38 C.F.R. § 21.4272(g), which provides a basis (i.e., “equivalent credit hours”) for measuring training time when courses are pursued during nonstandard terms, is inapplicable to, and should not be used in determining whether nonpunitive course withdrawals exceed the equivalent of six semester hours for purposes of applying the mitigating circumstances exception under 38 U.S.C. § 3680(a)(3)(B).

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