

Date: March 19, 1998

VAOPGCPREC 3-98

From: Acting General Counsel (022)

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

To: Director, Compensation and Pension Service (21)

**QUESTION PRESENTED:**

Whether a person who is between 18 and 23 years of age and is pursuing a high school education in a home-school program is pursuing a course of instruction at an educational institution for purposes of 38 U.S.C. § 101(4) (A) (iii).

**COMMENTS:**

1. This question arises in the context of the veteran's claim for additional compensation based on his contention that his son, who became 19 years old on March 14, 1998, is a "child" pursuant to section 101(4) (A) (iii) of title 38, United States Code, because he is pursuing his high school education through a home-school program. A veteran who is entitled to compensation pursuant to 38 U.S.C. §§ 1114 or 1134 is also entitled to additional compensation for dependents, including a child. A child is defined in section 101(4) (A) (iii) to include a person who is unmarried, and "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." See also 38 C.F.R. § 3.57(a) (1) (iii). Section 104(a) of title 38, United States Code, provides:

For the purpose of determining whether or not benefits are payable under this title (except chapter 35 of this title) for a child over the age of eighteen years and under the age of twenty-three years who is attending a school, college, academy, seminary, technical institute, university, or other educational institution, the Secretary may approve or disapprove such educational institutions.

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2. We believe that resolution of the question presented depends upon the meaning of the term "institution" in 38 U.S.C. §§ 101(4)(A)(iii) and 104(a). The Supreme Court has instructed that "[t]he starting point in interpreting a statute is its language, for 'if the intent of Congress is clear, that is the end of the matter.'" *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993) (alteration omitted) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). In determining the plain meaning of statutory language, "'legislative purpose is expressed by the ordinary meaning of the words used.'" *Ardestani v. Immigration & Naturalization Serv.*, 502 U.S. 129, 135 (1991) (quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)); *Jones v. Brown*, 41 F.3d 634, 638 (Fed. Cir. 1994). Webster's Ninth New Collegiate Dictionary 627 (1990), defines an "institution" as an "established organization or corporation (as a college or university) esp. of a public character." See also Black's Law Dictionary 800 (6th ed. 1990). The word "established" implies a degree of permanency. Black's Law Dictionary at 546. According to Webster's Third New International Dictionary 1590 (1976), an organization involves a "group of people that has a more or less constant membership, a body of officers, and purpose, and usu[ally] a set of regulations." The duration of a home-school program, however, is the length of time necessary to educate a particular child. The program terminates when the child completes his or her course of instruction or withdraws and does not have an ongoing enrollment. An educational institution also offers its services to other students who meet its enrollment criteria. A home-school program, on the other hand, is operated for the sole purpose of serving the needs of a particular student. We therefore conclude that a person who is receiving instruction in a home-school program is not pursuing a course of instruction at an "educational institution" and therefore does not qualify as a "child" within the meaning of 38 U.S.C. § 101(4)(A)(iii).

3. Our conclusion is also supported by the language of 38 U.S.C. § 104(a). The words "other educational institution" in section 104(a) are relatively broad and the phrase must be construed in context. Under the rule of statutory construction of ejusdem generis, "[w]here general words

follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A Sutherland Statutory Construction § 47.17. For purposes of approval of educational

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institutions, section 104(a) refers to "a school, college, academy, seminary, technical institute, university, or other educational institution." The term "educational institution" should be interpreted as including only institutions which are similar in type to the institutions specifically enumerated in section 104(a). A home-school program differs from the institutions enumerated in section 104(a) because, as discussed above, the program is not offered to other students, but rather is created to serve the needs of a particular student. Also, it is not a permanent organization but rather disbands at completion of the student's program or withdrawal of the student. Because we conclude that a home-school program is not an institution, we need not address your request for suggested criteria for determining whether a home-school program constitutes "a course of instruction at an approved educational institution."

4. We note that in Wisconsin, the state in which the veteran resides, the requirement for compulsory attendance at a private or public school may be satisfied by instruction in a home-based private educational program which meets the statutory criteria for a "private school." Wis. Stat. Ann. §§ 118.15(4), 118.165(1)(a)-(f). However, while a home-based educational program may satisfy the Wisconsin compulsory attendance requirement, it would not qualify as a "private school" because, according to the applicable Wisconsin statute, a private school is an "[a]n institution" whose educational program meets certain criteria, Wis. Stat. Ann. § 118.165(1), and as discussed above, we do not believe that a home-based educational program qualifies as an "institution."

5. The request for an opinion references the Veterans Benefits Administration Adjudication Procedure Manual M21-1, part IV, para. 14.06, which states that benefits should not be awarded based on school attendance unless the course of instruction or training is "offered by an institution recognized as standard and accredited for such course" by a State authority responsible for determining educational standards, a State authority or institution recognized by

the Department of Veterans Affairs (VA) as being equally competent to determine such standards, or the VA Regional Office adjudication division where the institution is located. We believe that these provisions in M21-1 represent a substantive rule because they establish criteria for entitlement to compensation. See VAOPGCPREC 7-92 (O.G.C. Prec. 7-92), para. 9. We further conclude that there would be a

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legal basis for this substantive rule. Section 104(a) of title 38, United States Code, grants the Secretary of Veterans Affairs broad authority to "approve or disapprove such educational institutions." We recommend that VA promulgate a regulation in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 552(a)(1) and 553, and 38 U.S.C. § 501 which specifies the criteria for an educational institution which would satisfy the requirements of 38 U.S.C. §§ 101(4)(A)(iii) and 104(a).

**HELD:**

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. Therefore, a person who is between 18 and 23 years of age and is being educated in a home-school program is not a child for purposes of 38 U.S.C. § 101(4)(A)(iii) because he or she is not pursuing a course of instruction at an educational institution.

Robert E. Coy