



December 13, 2021

U.S. Department of Veterans Affairs
Education Service
810 Vermont Avenue NW
Washington, DC 20420
Via electronic submission

Re: State Approving Agency Jurisdiction Rule, RIN 2900-AQ89

Dear Sir or Madam,

Thank you for the opportunity to comment on the Department of Veterans Affairs' (VA) [proposed](#) rule regarding State Approving Agency (SAA) jurisdiction. Veterans Education Success is a nonprofit organization that works on a bipartisan basis to advance higher education success for veterans, service members, and military families, and to protect the integrity and promise of the GI Bill® and other federal postsecondary education programs. We also provide free counseling and legal assistance to students using their GI Bill and military benefits.

We appreciate VA's interest in addressing stakeholder concerns regarding oversight of distance education and SAA approval and disapproval authority. Given the experiences of the last few years under the COVID pandemic and the subsequent shift to virtual learning for so many students, recent changes necessitate stronger rules around the quality of online education, as we testified before Congress.¹

We have learned from many student veterans that the quality of education they have received during COVID is significantly diminished, especially true in cases where the education is primarily or exclusively online. It is imperative that VA and SAAs improve oversight of distance education given the current higher education landscape.

Adding Online Distance Learning under the Definition of Independent Study

Within the framework of current law, we support VA's proposed amendment to explicitly include "online distance learning" under 38 CFR § 21.4250(a)(3) as part of independent study. VA currently classifies online learning under independent study; as the VA states in the notice, there has been some uncertainty from stakeholders since online distance learning previously was not mentioned in the regulation explicitly.

However, we strongly suggest that VA work with Congress to determine whether the continued use of independent study is the appropriate framework to regulate online education, as the terminology is antiquated and has caused confusion. Modernizing the statute and regulations would address these concerns and also improve the oversight of distance education programs.

¹ See Written Testimony of Veterans Education Success, House Committee on Veterans Affairs Economic Opportunity Subcommittee Hearing on Congressional and Administrative Priorities for the next Congress (Dec. 8, 2020), <https://vetsedsuccess.org/our-written-testimony-for-the-house-veterans-affairs-economic-opportunity-subcommittee-hearing-on-2021-legislative-priorities/>.

Specifically, we believe that as an alternative delivery mode to in-person instruction, proper distance education programs must include regular and substantive interactions with qualified faculty.

Full-Time Online Learning vs. Hybrid Learning

We support VA's attempt to further distinguish online programs from hybrid learning programs that include in-person instruction by adding the qualifier "solely" to 38 CFR § 21.4250(a)(3). However, we believe that VA's definition of hybrid training² is overly broad. For example, if a degree program requires only one in-person class, it would be classified as hybrid even though the majority of the program is online distance education. This definition would encourage institutions to offer such so-called "hybrid" learning programs with only one residential class, which would then qualify beneficiaries for the full housing allowance.³

Suggestions to Improve Distance Education Regulation

As defined in [38 CFR § 21.4266](#), the main campus of an institution means the location where the primary teaching facilities of an educational institution are located. If an educational institution has only one teaching location, that location is its main campus. But this measure may no longer work, given the reality today of large multi-state college chains. As we point out in our November 2017 report, the selection of a main campus for institutions with large or entirely online programs is less clear.⁴

In the case of schools that exist entirely online, there are no residential or physical campuses where teaching occurs; operations are dispersed across multiple administrative offices; and the faculty is scattered around the country. Even in cases where an institution may have a physical footprint in one state, it may, as some already do, have vastly greater enrollments in other states through its distance education programs. An SAA of one state with small enrollments, but designated as the physical footprint, would not have the resources to oversee enrollments and school practices nationwide and would not investigate institutional conduct in other states.

At the same time, VA would not want to create a loophole for bad-actor schools to engage in "forum-shopping" through the act of seeking out a state offering the most lax oversight as its "main campus," as Ashford University did in 2017 when it could not achieve California approval and short-circuited the Arizona approval process (and even misled both Arizona and VA about its corporate headquarters) -- as exposed by the *Chronicle of Higher Education*.⁵

At a minimum, we propose VA consider redefining "main campus" as the location where an institution had its **largest enrollments in a prior year** (to allow time to seek new approvals due to possible enrollment shifts), or to require dual approval from both the state where the main physical campus is located as well as the state where it has the largest enrollments.

² 38 CFR § 21.7520(b)(12).

³ See Walter Ochinko, *VA and States Should Act on Early Warning Signs When Risks to GI Bill Beneficiaries and Taxpayers Emerge at Participating Schools*, Veterans Education Success (Oct. 2019), <https://vetsedsuccess.org/va-and-saas-should-act-on-early-warning-signs-when-risks-to-gi-bill-beneficiaries-and-taxpayers-emerge-at-participating-schools/>.

⁴ Walter Ochinko, *Ashford's Fight to Maintain GI Bill Access Raises Questions about the Enforcement and the Adequacy of Statutory Requirements*, Veterans Education Success (Nov. 2017), <https://vetsedsuccess.org/wp-content/uploads/2018/12/ashford-fight-gi-bill-access.pdf>.

⁵ Michael Vasquez, *Inside the Scramble to Save Ashford U.*, The Chronicle of Higher Education (Nov. 10, 2017), <https://www.chronicle.com/article/inside-the-scramble-to-save-ashford-u/>, <https://vetsedsuccess.org/wp-content/uploads/2018/11/inside-scramble-to-save-ashford-university-for-profit-school-scam.pdf>.

At the least, this would ensure that the state with the largest enrollment could best protect its student-residents. Even better would be a new broader approach of requiring multi-state schools to obtain the approval of the SAA in any state where the school had a **significant enrollment presence** in a prior year.

Every state where an institution is enrolling large numbers of students should have the ability to ensure that its residents are properly served and adequately protected from potentially predatory practices by that school. Given that the school is delivering services into that state, the state should have the right to investigate the school and determine if the school is good enough for the state's residents. To minimize administrative burdens for SAAs and institutions, we propose that institutions only be required to obtain additional approvals from states where they **serve more than 15% of their enrollments**.

We Urge VA to Amend its Proposal to Remove the SAA Failure to Act Exception

We propose an important amendment to VA's proposal to remove SAAs' ability to issue notices of intention not to act under 38 CFR § 21.4250(b)(3). VA's proposal is likely in response to two 2018 notices by the California State Approving Agency (CSAAVE) of "intention not to act" under § 21.4250(b)(3) on the application of Ashford University as detailed in our 2019 [report](#).^{6, 7} In January 2019, VA [notified](#) CSAAVE that its "intention not to act" was not an option, and that its cooperative agreement with VA permitted only approval or disapproval of a degree program that is not currently approved.⁸

Furthermore, VA warned, "...continued inaction on Ashford's application may provide sufficient grounds to terminate the current agreement for Fiscal Year 2019 and/or take other actions." In September 2019, VA declined to renew the CSAAVE's contract and assumed its responsibilities in the state. VA [approved](#) Ashford's application in February 2020 while acting as the SAA for the State of California.⁹

However, it is critical to recognize CSAAVE filed notices of intention not to act because California believed it lacked the statutory authority to act under 38 USC 3696.¹⁰ Specifically, CSAAVE's notice was accompanied by a direct appeal to VA to disapprove Ashford under 3696 because CSAAVE believed it lacked statutory authority to act under 3696 and only the Secretary could act under 3696, given that the statute specified, "the Secretary shall..." in this instance.

CSAAVE also explained its lawyers believed it could not disapprove a program it had never approved. Given that Iowa had originally approved Ashford, CSAAVE felt its hands were technically tied, under the wording of the statute. VA should anticipate the possibility of future instances where a state's lawyers disagree with VA's lawyers about whether or not an SAA lacks statutory authority to act.

⁶ California State Approving Agency for Veterans Education (CSAAVE), Notice of Intention Not to Act on Ashford University (Feb. 21, 2018), <https://static1.squarespace.com/static/556718b2e4b02e470eb1b186/t/5a8e2580419202db3237db9b/1519265152485/CA+SAA+Denial+Ashford.21Feb2018.pdf>; California State Approving Agency for Veterans Education, Second Notice of Intention Not to Act on Ashford University (Dec. 14, 2018), <https://drive.google.com/file/d/1DgkkWpyiXU1A1eQp4Pkh0yqdueBCbG2R/view>.

⁷ *Supra* note 3 at 14-17.

⁸ Letter from the Department of Veterans Affairs to the California State Approving Agency (Jan. 3, 2019), <https://vetsedsuccess.org/wp-content/uploads/2019/08/01.02.19-response-to-Keith-Boylard-DD-Veterans-Services-Cali-Dept-of-VA.pdf>.

⁹ Approval Letter from the Department of Veterans Affairs to Ashford University (Feb. 14, 2020), <https://vetsedsuccess.org/wp-content/uploads/2020/02/VAs-Ashford-University-Approval-Letter-020720.pdf>.

¹⁰ *Supra* note 6.

Indeed, given the lack of clarity in statutes (discussed below), one could well imagine future cases where an SAA believes a school must be disapproved but believes it lacks statutory authority to do so.

VA, therefore, should provide an avenue for situations where a state technically lacks -- or believes it lacks -- statutory authority to disapprove and yet has identified a serious deficiency about the school necessitating disapproval. Specifically, VA should require SAAs to take one of three actions:

1. Approve
2. Disapprove
3. Recommend to the Secretary that a program be disapproved -- in situations where the SAA believes that only the Secretary has the statutory authority to disapprove. The regulations should specify that, in such a case, if the Secretary chooses not to follow the SAA's advice to disapprove, then the Secretary shall publish a clear and compelling rationale for why the program is not disapproved.

We also urge VA to consider this suggested amendment to the failure to act exception as VA examines and makes conforming changes to the language it has proposed in § 21.4259.

We Urge VA to Work with Congress to Clarify SAA Approval and Disapproval Statutes .

One problem that became clear for policymakers in the California SAA's intention not to act is that some provisions of Title 38 grant authority to act to the "SAA or the Secretary when acting in the role of the SAA," while others grant authority only to "the Secretary," and still others are vague. We listed out all the inconsistencies in our 2019 report¹¹, and noted that confusion and disagreement over the specific roles of SAAs vis-a-vis the Secretary has existed since the 1950s. Inconsistencies in the assignment of those authorities has created ambiguity and led to tensions between VA and SAAs and between VA and VA's Office of Inspector General.¹²

Historically, both SAAs and VA have had approval and disapproval authorities. In 2011 and 2016, however, the statutory language describing those authorities was amended. The 2011 changes, made in the context of a significant restructuring of SAAs' day-to-day responsibilities, undermined the primacy of SAAs' approval and disapproval authority.

The 2016 changes were intended to restore SAA's approval authority primacy. Although the intent of the 2016 changes was clear, the changes were piecemeal rather than comprehensive. Therefore, we recommend that VA work with Congress to clearly and explicitly recognize circumstances in which VA has an appropriate role in both approvals and disapprovals, even if that role is secondary to that of SAAs.

¹¹ Walter Ochinko, *VA and SAA Approval and Disapproval Authority Should Be Clarified*, Veterans Education Success (Sept. 2019), <https://vetsedsuccess.org/va-and-saa-approval-and-disapproval-authority-should-be-clarified/>.

¹² Department of Veterans Affairs Office of Inspector General, *VA's Oversight of State Approving Agency Program Monitoring for Post-9/11 GI Bill Students* (Dec. 3, 2018), <https://www.va.gov/oig/pubs/VAOIG-16-00862-179.pdf> (VA stated that it had a limited role in approving or disapproving degree programs, a responsibility delegated by statute to SAAs, which VA is prohibited from supervising. The OIG pointed out that VA's argument was contradicted by statute and by VA's prior actions against schools).

VA Needs to Fix Several VA Regulations that are Inconsistent with Statute

Additionally, we urge VA to look into the following inconsistencies between approval statutes and their corresponding regulations in our [2019 report](#).¹³

- *Designation* (§ 3671 and § 21.4150). Section 3671 of 38 U.S.C. addresses the designation of an SAA by the governor of each state. When a state fails to designate an SAA, § 3671 authorizes all references to an SAA to be deemed to refer to the Secretary because the Secretary would be acting as the SAA. However, subsection (b)(2) also states that “Except as otherwise provided in this chapter, in the case of courses subject to approval by the Secretary under section 3672 of this title, the provisions of this chapter which refer to the State approving agency shall be deemed to refer to the Secretary.” This exception language was added by P.L. 111-377 in 2011. The “except” clause reflects the fact that § 3676 reserves to SAAs the authority to approve nonaccredited programs. The implementing regulation, 38 C.F.R. § 21.4150, was not changed in 2011 and it limits VA approval, disapproval, or suspension authority to just a few enumerated program types— apprenticeship programs, courses offered by another federal agency, etc. These limited authorities are inconsistent with the Secretary’s broader authorities referenced in § 3671.
- *Disapproval of enrollment in certain courses* (§ 3680A and § 21.4252). Section 3680A gives the Secretary the authority to not approve avocational and recreational courses, but § 21.4252 leaves the authority unassigned.
- *Licensure and Certification Tests* (§ 3672 and § 3689 and § 21.4259). Section 3672 gives VA approval authority over programs at public and nonprofit institutions of higher learning and over licensure and certification tests. Section 3689 authorizes the Secretary to delegate licensure and certification test approval to SAAs. However, subsection (c) of § 21.4259 [suspension or disapproval] states that “The Department of Veterans Affairs will suspend approval for or disapproval of courses or licensing or certification tests under conditions specified in paragraph (a) of this section where it functions for the State approving agency.” The language in the implementing regulation reflects the 2016 changes but is in conflict with § 3672 (a) and (b)(1), which give the Secretary approval authority. Section 21.4259 appears to have been last updated in 2007.

VA Should Strengthen Existing Regulations on Program Approval

Finally, VA has the authority to clarify the program approval requirements in 38 USC § 3676 (regulation § 21.4254) using regulatory action. While only Congress can strengthen program approval in 38 USC § 3672 and 3675, VA has the authority to clarify the currently undefined terms in 38 USC § 3676 (approval of nonaccredited courses). This is needed because clearly predatory institutions such as Retail Ready and FastTrain College were approved for GI Bill benefits only to later be subject to law enforcement actions for defrauding veterans.¹⁴ We urge VA to clarify some of these terms through regulation, including:

¹³ *Supra* note 11.

¹⁴ Carli Teproff, *Now defunct for-profit college must pay the government \$20 million, a court rules*, *Miami Herald* (Feb. 21, 2017), <https://www.miamiherald.com/news/local/education/article134161714.html>; Department of Justice Press Release, *For-Profit Trade School Owner Charged with Defrauding VA, Student Veterans* (Nov. 23, 2020), <https://www.justice.gov/usao-ndtx/pr/profit-trade-school-owner-charged-defrauding-va-student-veterans>.

- *Quality.* The definition of “quality” in (c)(1) should incorporate clear student outcome metrics that ED already requires schools to report, such as student graduation, debt, default, and licensure pass rates; the percent of tuition dedicated to instruction; and earnings after leaving school. If the majority of a school’s graduates do not earn more than a high school graduate, the school did not provide sufficient return on investment;¹⁵
- *Teacher Qualifications.* The definition of teacher qualifications in (c)(4) should be clarified to ensure that programs employ teachers who have the appropriate advanced degree in the area they are teaching (such as a law degree if teaching law or a PhD or MA if teaching the humanities). Teachers of certificate programs should have relevant field experience and licensure. Teachers in licensed occupations (such as nursing) must have that license and experience;
- *Financially Sound.* The definition of “financially sound” in (c)(9) should be defined in reference to ED standards;
- *Deceptive Advertising.* The ban on deceptive advertising in (c)(10) should be clarified to prohibit the participation of any school that has faced legal or regulatory concerns over its advertising in the prior 5 years; and;
- *Good Character.* The definition of “good character” in (c)(12) should be clarified to ban administrators and teachers who have faced legal or regulatory action or any action from a licensing board.

Thank you for the opportunity to comment on this proposed rule. Please reach out if you have any questions.

Sincerely,



William Hubbard
Vice President for Veterans & Military Policy



James Haynes
Federal Policy Manager

¹⁵ See Veterans Education Success, *Should College Spend the GI Bill on Veterans’ Education or Late Night TV Ads?* April 2019, <https://vetsedsuccess.org/should-colleges-spend-the-gi-bill-on-veterans-education-or-late-night-tv-ads-and-which-colleges-offer-the-best-instructional-bang-for-the-gi-bill-buck/>.