



December 12, 2022

Cheryl Amitay  
Chief, Policy and Regulation Development Staff (225B)  
Chief of Policy & Regulations  
Education Service,  
Department of Veterans Affairs  
810 Vermont Avenue, NW.,  
Washington, DC 20420

RE: Amendments to 85/15 Rule Calculations, Waiver Criteria, and Reports  
VA Docket: VA-2022-VBA-0022  
RIN: 2900-AR56-(P)

Dear Ms. Amitay,

We write to submit comments on the Department's Notice of Proposed Rulemaking (NPRM) on the above-referenced 85/15 Rule published in the October 12, 2022 issue of the *Federal Register*.

### **The NPRM's Treatment of Institutional Aid Is Consistent with the Federal Statute**

As the preamble to the NPRM correctly states, 38 U.S.C. 3680A(d)(1) has generally prohibited the approval of benefits for new students in courses where the percentage of students who have all or part of their tuition, fees, or other charges paid to or for them by the Department *or by the educational institution* exceeds 85 percent of total enrollments in such courses. The fact that this same general prohibition is reiterated *verbatim* in the amendment to that provision in Section 2(a) of the recently enacted "Ensuring the Best Schools for Veterans Act of 2022" leaves little doubt that Congress intends and the law requires the inclusion of institutionally aided students, along with VA-funded students.

### **The Statute Authorizes Secretarial Waivers**

To ensure against unintended consequences, the statute authorizes the Secretary to waive the restriction on new student veteran enrollments if such a waiver would be in the best interest of the eligible veteran and the federal government. The proper framing of the criteria for waivers can address any lingering concerns about the rare possibility of a quality program losing eligibility to enroll new VA-assisted students due to 85/15 non-compliance. We view the waiver authority to be both more consistent with the statute and more prudent as a practical matter than having the Department violate the black letter of the statutory provision by creating exceptions to its correct definition of "supported student" in the NPRM.

## Waiver Criteria

In articulating the waiver criteria, the NPRM modifies the current language of 38 CFR 21.4201(h) by removing paragraphs (2) and (3) while retaining paragraphs (1) and (4) which focus on the availability of comparable educational facilities and the effectiveness of programs.

We support the NPRM's elimination of the criteria in paragraph (2) of the current regulation for the reasons stated in the preamble to the NPRM, and would further point out that the enactment of "Ensuring the Best Schools for Veterans Act" effectively exempts institutions receiving the grants subsumed in that subsection from 85/15 reporting and compliance because they qualify for the 35 percent exemption under that law.

We also support the NPRM's retention and expansion of the substantive criteria listed in paragraph (4), with the *proviso*, discussed below, that such criteria shall apply only to institutions that are not subject to actions triggering risk-based surveys described in 38 USC 3673(e)(3).

We respectfully disagree with the Department, however, in its retention of the criterion in paragraph (1) and its elimination of the criterion in paragraph (3).

Regarding the NPRM's proposed retention of paragraph (1), we believe that the mere unavailability of another similar program in the vicinity of a non-compliant one is not an indicator of the latter's quality or outcomes. Indeed, barring other evidence of defensible outcomes, the fact that a noncompliant program is the only one of its kind in a given area tends to support the opposite conclusion. In any case, the fact of being the sole noncompliant program of its kind is not dispositive and should not be used as grounds for a waiver.

Regarding the NPRM's elimination of paragraph (3), we urge the Department to retain and amend the language in paragraph (3) with regard to past compliance of an institution. While the Department suggests in the NPRM that an institution's past compliance is not, as a practical matter, considered by the Department, we urge the Department to consider the importance of ensuring that any program requesting a waiver carefully follows all applicable rules and statutes.

We recommend amending paragraph (3) to refer to past *performance*—rather than past *compliance*—of the institution. Specifically, to protect veterans from predatory programs that have already triggered statutory criteria for a risk-based survey, we propose that institutions subject to any of the actions described in 38 USC 3673(e)(3) should be ineligible to receive a waiver from the 85/15 Rule unless a risk-based survey clears them. We strongly believe that the combination of having certain risk attributes *and* violating 85/15 is a dangerous marker of problematic institutional characteristics that can be extremely detrimental to veterans.

## Reporting Requirements

Finally, we respectfully disagree with the NPRM's amendment of 38 CFR 21.4201(f)(1) and (f)(2)(ii) to require more frequent reporting by schools operating with non-standard terms to report 85/15 reports and waiver justifications within 30 days of the start of each non-standard term instead of on a quarterly basis, as is the requirement under the current regulation. While the logic of monitoring real-time compliance is certainly understandable, we are concerned about the enormous amount of additional compliance burden on institutions and the Department as a result of this change.

We believe the current quarterly reporting system by non-standard-term programs provides an adequate safeguard for veterans and would propose modifying the provision to indicate that the Secretary may require additional reports on a case-by-case basis. This would preserve the unilateral right of the Department to seek more information without mandating universal over-reporting by all affected schools.

We thank you in advance for your consideration and appreciate the Department's efforts to protect veterans while preserving the broadest set of educational opportunities for them.

Sincerely,



William Hubbard  
Vice President for Veterans & Military Policy