



June 21, 2023

Joseph L. Garcia, Executive Director
Education Service
Veterans Benefits Administration
Via email

Re: Marine Corps Excess Leave Program Policy

Dear Director Garcia,

We write to advise the Department of Veterans Affairs that its sudden change in policy with respect to the Marine Corps Excess Leave Program (Law) (“ELP(L)”) will cause substantial financial harm to service members using their GI Bill benefits to attend law school under the program.¹ We urge VA to exempt service members already attending school under the ELP. We hope you will agree from the below information that this would be a fair and reasonable solution for all service members currently affected by the change in policy.²

As mentioned in our meeting on May 24, 2023, we have been contacted by a U.S. Marine attending law school pursuant to the ELP(L). He enrolled in law school in August 2022 in reliance on the VA education benefits, including the monthly housing allowance, that have always been available to the ELP participants eligible to receive the GI Bill. According to a VA Office of General Counsel Memorandum, for almost 60 years – since at least 1967³ – service members participating in an Excess Leave Program have been regarded as *not* on active duty for Department of Veterans’ Affairs purposes, entitling them to the GI Bill monthly housing allowance (MHA) under 38 U.S.C. § 3313(c). Service members have relied on this eligibility when they choose to enroll in law school under the program.

Recently, however, the VA’s Office of General Counsel changed its longstanding interpretation to conclude that participants in the ELP(L) are now considered by VA to be on “active duty” and

¹ According to the applicable U.S. Marine Corps Manual, regarding the ELP(L) program, “Pursuant to 37 U.S.C. 502(b), commissioned officers of the Marine Corps may be permitted leave without pay and allowances in excess of that authorized by 10 U.S.C. § 701(b), to attend ABA accredited law schools located in the United States at no expenses to the Government for education leading to the degree of Juris Doctor or Bachelor of Law.” Marine Corps Manual For Legal Administration, p. 19-3.

² While this issue has come to our attention in the context of the US Marine Corps Excess Leave Program (L), we urge VA to consider how the change in policy may be impacting service members who are participating in other excess leave programs and/or with other branches of the Armed Services.

³ See VA Office of General Counsel analysis of whether ELP(L) participants are considered to be on “active duty” for purposes of GI Bill benefits (“A 1967 opinion of the Department of Veterans Affairs (VA) Office of General Counsel (OGC) (but not designated as precedent) had concluded that service members attending school while on excess leave are not on ‘active duty’ for VA purposes.”)

therefore not entitled to the MHA. The service members continue to be eligible for payment of tuition, fees, and books under 38 U.S.C. § 3313(e), but not the cost of housing.^{4 5}

The Marine who contacted us was not told of this change in interpretation until he received a letter dated December 22, 2022, attached hereto, informing him that due to this change in interpretation:

The VA . . .will no longer pay the Monthly Housing Allowance (MHA) to impacted individuals effective August 1, 2023....The decision to treat ELP(L) participants as on active duty and therefore not eligible for the MHA will be effective immediately for all new applicants. However, since your education is in progress, VA is making an exception to allow current ELP(L) participants to receive the appropriate MHA payment...until August 1, 2023.

VA's decision to postpone the effective date for these students until August 1, 2023, demonstrates VA's correct understanding that current ELP participants acted in reliance on the prior longstanding interpretation and that VA's change in policy will cause undue hardship to these service members. There is no explanation, however, for why VA determined that delaying until just August 1, 2023, avoids causing harm to the service members. The Marine who contacted us, for instance, does not graduate until 2025, and will be unfairly forced to incur thousands of dollars in unreimbursed housing expenses over the next two years.

Indeed, the VA Office of General Counsel reportedly recognizes that this *new interpretation creates a "gap in the law"* where service members considered on "active duty" by VA under the Excess Leave Program cannot receive the VA MHA and also are not eligible to receive any housing payments from the Department of Defense.⁶ Ordinarily, service members who are on "active duty" have their housing costs covered by DOD; but, in the instance of participants in the Excess Leave Program, their housing costs are not covered.

⁴ 38 U.S.C. § 3313(a) directs payment for the amounts specified in subsection (c) for tuition, fees, and other educational costs to individuals entitled to educational assistance, except for programs covered in subsection (e). Subsection (c)(1)(B) includes the amounts for a monthly housing allowance. Subsection (e), *Programs of Education Leading to a Degree Pursued on Active Duty for a Period of More than 30 Days on More than Half-Time Basis*, does not include provisions for payment of a monthly housing allowance.

⁵ It appears that the Office of General Counsel has concluded that, because GI Bill benefits are available to individuals who are on "active duty" or have been "discharged or released" from service (38 U.S.C. § 3311(b)), participants in an ELP must be considered on "active duty" because they have not been "discharged or released" from service as those terms are defined in 38 U.S.C. § 3311(c). The consequence of designating participants in an ELP as on "active duty" is that they are subject to the GI Bill pay provisions in 38 U.S.C. § 3313(e), which do not include amounts for a monthly housing allowance.

⁶ See VA Office of General Counsel analysis of whether ELP(L) participants are considered to be on "active duty" for purposes of GI Bill benefits (attached), concluding: "There appears to be a gap in the law insofar as the members do not receive housing payments from the service department and are not eligible for housing payments from VA.... Addressing that gap would require a legislative change."

DOD does not cover any expenses or pay the students while they attend law school under the program, which is why VA had considered participants in the ELP *not* on active duty and therefore entitled to the MHA. However, with VA's new interpretation, service members who relied on the availability of the MHA to enroll in school under the Excess Leave Program will be left without adequate funding to cover their housing expenses.

Further, service members are unlikely to have the funds available to cover the unreimbursed cost, and would need to take on significant debt to meet their housing costs. The service members could not even choose to avoid incurring the cost and debt by leaving school because withdrawing from school would have serious consequences for their military career. Withdrawing from school would waste the GI Bill benefits they already expended to attend school under the Excess Leave Program. Even if they withdraw, they are still obligated to additional years of service based on their length of time in school.

While we may have questions about the legal interpretation of the Office of General Counsel, our immediate concern is to ensure that service members who are currently participating in the ELP are treated fairly. Clearly, delaying implementation just until August 1, 2023, is not a sufficient remedy for service members whose enrollment will be continuing after that date. These service members enrolled in law school in reliance on VA's decades-long policy entitling ELP participants to the monthly housing allowance. Applying the new interpretation to these service members will cause them substantial harm, and, in our view, is an unfair exercise of VA's authority affecting the service members' existing rights.

For all the foregoing reasons, we urge VA **to act immediately to exempt** currently enrolled service members in the ELP from the new interpretation.

Also, we respectfully suggest that VA should generally delay its implementation of this new interpretation, and instead work with the Congressional Veterans Affairs Committees to put forward a legislative fix for whatever concern the Office of General Counsel has identified.

Respectfully,

A handwritten signature in blue ink that reads "Will Hubbard". The signature is written in a cursive, flowing style.

William Hubbard
Vice President for Veterans & Military Policy