

## MEMORANDUM

TO: The Honorable Joshua Jacobs, U.S. Department of Veterans Affairs

CC: The Honorable James Kvaal, U.S. Department of Education  
The Honorable Terri Tanielian, White House Domestic Policy Council  
Mr. Joe Garcia, Education Service, Veterans Benefits Administration  
Ms. Faye Fernandes, Senate Committee on Veterans' Affairs  
Ms. Kesley Baron, Senate Committee on Veterans' Affairs  
Ms. Katy Flynn, House Committee on Veterans' Affairs  
Mr. Justin Vogt, House Committee on Veterans' Affairs

FROM: Veterans Education Success

DATE: February 6, 2024

RE: Proposed Regulatory Changes Opening up GI Bill to Unaccredited Online Programs

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The U.S. Department of Veterans Affairs (VA) has proposed a major change that would open the GI Bill to unaccredited online programs and online programs that do not lead to a college degree or certificate meeting certain criteria (hereinafter non-college degrees, or “NCDs”). The proposed rule change is currently being done *without public comment*, and would revise the definition of “independent study” and “distance education.” The effect of this will be to remove online programs from the requirements of [38 U.S.C. § 3680A](#), a statutory authority which requires accreditation and that programs lead to a degree/certificate.

VA should abandon its efforts to extend GI Bill approval to unaccredited online programs and online programs that do not lead to a degree/certificate, and open up any substantive regulatory changes to public comment in accordance with the Administrative Procedures Act.

### **Background**

Congress set forth the requirements for an Independent Study program in 38 U.S.C. 3680A(a), which has long been understood to include online programs.<sup>1</sup> [38 U.S.C. § 3680A\(a\)](#) provides:

“The Secretary shall not approve the enrollment of an eligible veteran in any of the following:

...

**(4)** Any independent study program except an independent study program (including such a program taken over open circuit television) that—

**(A)** is accredited by an accrediting agency or association recognized by the Secretary of Education under subpart 2 of part H of title IV of the Higher Education Act of 1965 ([20 U.S.C. 1099b](#));

**(B)** leads to—

**(i)** a standard college degree;

**(ii)** a certificate that reflects educational attainment offered by an institution of higher learning; or

**(iii)** a certificate that reflects completion of a course of study offered by [an area career and technical school or a postsecondary vocational institution]...; and

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<sup>1</sup> See also 38 U.S.C. § 3523(a)(4)(Dependents' Educational Assistance funds may not be used for an independent study program (including open circuit television) unless it is an accredited program leading to a standard college degree) and 38 U.S.C. § 3676(e)(prohibiting unaccredited course of education in whole or in part by independent study).

(C) in the case of a program described in subparagraph (B)(iii)--provides training aligned with the requirements of employers....

The statute expressly provides that programs offered over open circuit television fall under the definition of independent study and must be accredited and lead to a degree/certificate in order to receive GI Bill funds. Open circuit television was the technological precursor to programs offered online.

In 2021, VA published a proposed rule to address the confusion of some SAAs about which state has jurisdiction over online programs.<sup>2</sup> VA reported that stakeholders had erroneously concluded that the regulation governing SAA jurisdiction for independent study programs does not address which state has jurisdiction for online programs. In the [2021 notice of proposed rulemaking](#) ("NPRM"), VA explained the longstanding status quo of interpreting independent study to also include online programs:

"VA views online distance learning as a subset of courses offered through independent study and, therefore, views current § 21.4250(a)(3) as controlling which SAA has jurisdiction to approve a course offered via online distance learning...

The relationship between independent study and online distance learning is further clarified in [38 CFR 21.4267\(b\)](#). VA defines independent study in that section for the purposes of educational assistance programs as a program that 'consists of a prescribed program of study with provision for interaction between the student and [instructor] . . . through use of communications technology, including . . . videoconferencing, computer technology (to include electronic mail), and other electronic means' and is 'offered without any regularly scheduled, conventional classroom or laboratory sessions.' [38 CFR 21.4267\(b\)\(1\)\(i\)](#) and [\(ii\)](#). The definition provided for independent study encompasses distance learning in VA's view, which includes courses offered online. Therefore, online distance learning is currently classified as independent study for the purposes of VA educational assistance programs. Consequently, when current § 21.4250(a)(3) states that the SAA for the State where the educational institution's main campus is located is the SAA of jurisdiction for the approval of independent study program, it is likewise stating that such SAA is the SAA of jurisdiction for the approval of online distance learning programs.<sup>3</sup>

VA determined that "even though" the appropriate SAA jurisdiction for online programs is addressed under the rules for independent study, it proposed to explicitly include the term "online distance learning" in the jurisdictional regulation, stating, "Such an amendment would not substantively change the current definitions. Rather it is proposed to curtail confusion among some SAAs and educational institutions while maintaining the status quo."

Today, rather than adopting the clarifying rule proposed in 2021, VBA seeks to use that NPRM as the basis for adopting radical and substantive changes to the regulatory definitions of independent study and distance education so as to remove online programs as a subset of independent study.

While Congressional staff have posited suspicions about what is motivating VBA's change, we cannot comment on the possible motivations. VBA staff explained to us that the impetus for the rule change is that VBA staff have to answer unaccredited online schools that want GI Bill access. In their answer, they have to say that online schools fall within the definition of "independent study" and therefore cannot be approved if they are not accredited and lead to a

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<sup>2</sup> State Approving Agency Jurisdiction Rule, 86 FR 57904 (Oct. 14, 2021)

<https://www.federalregister.gov/documents/2021/10/14/2021-21496/state-approving-agency-jurisdiction-rule>

<sup>3</sup> Id. at 57095.

degree. The schools respond that they are not independent studies and then the VBA staff feel embarrassed that VA's definitions do not meet common-sense definitions and the schools' expectations.

## Impact

Sometimes even well-intentioned policies have egregious unintended effects, as this change would. While there may be logic in clarifying the definitions of independent study and online education, it is essential to look at the impact of definitionally removing the protections of 38 USC 3680A from online programs: Opening the GI Bill to unaccredited online programs and online programs that do not lead to a degree.

VBA's proposed change will eliminate the only existing barrier to unaccredited online programs to get GI Bill. VBA intends to leave it up to the State approving agencies (SAA) to approve or disapprove these programs, but SAA leadership has vociferously told VBA staff that this change will open the floodgates to low-quality online programs. VBA further confirmed it would not provide support to the SAAs when they get sued by a school over being denied over "low quality."

This is a highly consequential change, and the end result will be a massive influx of embarrassing low-quality programs eligible for GI Bill. VA has been embarrassed by past news stories about ridiculous programs approved for GI Bill (see, e.g., "[The GI Bill Pays for Unaccredited Sex, Bible, and Massage Schools](#)"<sup>4</sup>), and this new change will open the floodgates to more embarrassments for VA.

## Process Concerns

It is our understanding based on discussions with Education Service Staff that VBA intends to publish these final rules without providing an opportunity for public comment. This intention directly contradicts the Administrative Procedures Act. VBA claims that VA OGC alleges they can publish the definitions as a final rule without a public comment period because the rules are a "logical outgrowth" of VBA's 2021 proposed rule. This is definitely not a logical outgrowth of the proposed rule. A final rule is considered a logical outgrowth of a proposed rule only if interested parties should have anticipated that the change was possible, and thus "reasonably should have filed their comments on the subject during the notice-and-comment period," see [Veterans Justice Grp. v. Sec'y of Veteran Affairs](#), 818 F.3d 1336,1344 (Fed. Cir. 2016).

The 2021 proposed rule did not propose the changes contemplated today. Instead, it addressed clarification of SAA jurisdiction to approve online programs, proposing that the correct SAA would be in the state where a "main campus" was located. The proposed rule did not contemplate changes to the definitions of "independent study" and "online" education. Further, VBA's 2021 proposed rule **explicitly** and at length **reaffirmed** that online programs fall within the "independent study" requirements and **expressly assured** the public that the status quo would be maintained and that definitions were not being changed: "Such an amendment would **not substantively change the current definitions**. Rather, it is proposed to curtail confusion among some SAAs and educational institutions while **maintaining the status quo**."<sup>5</sup> The proposed rule sought only to address the question of which SAA has jurisdiction.

Today, VBA proposes a new rule that is not even on the topic of the NPRM. Rather than addressing the question of which state's SAA should control an online college, VBA today proposes to change the definitions, which is the opposite of the NPRM's reassurance that VBA

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<sup>4</sup> Aaron Glantz, The GI Bill Pays for Unaccredited Sex, Bible, and Massage Schools, Reveal (July 15, 2015) <https://revealnews.org/article/gi-bill-pays-for-unaccredited-sex-bible-and-massage-schools/>

<sup>5</sup> State Approving Agency Jurisdiction Rule, 86 FR 57904, 57905 (emphasis added).

“would not substantively change the current definitions,” but would “maintain the status quo.” What VBA is proposing today represents a significant substantive change in the definitions and dramatically upends the status quo for unaccredited online programs. There was no reasonable notice to the public and no way the public “should have anticipated this change was possible and reasonably should have filed their comments on the subject.”

### **Alternative Solution**

Instead of this proposed radical change, VBA should simply reiterate what they wrote in the 2021 notice of proposed rulemaking. Maintaining the status quo and longstanding definitions – as VBA pledged to do in the 2021 NPRM – is good for veterans and taxpayers because it ensures that online programs must meet the minimal standards required for independent study:

"VA views online distance learning as a subset of courses offered through independent study... Even though § 21.4250(a)(3) already addresses the appropriate SAA jurisdictional rules for independent study in VA's view, and § 21.4267(b)(1)(i) and (ii) appropriately classifies online distance learning as independent study for the purposes of VA educational assistance, VA proposes to amend § 21.4250(a)(3) to explicitly include the term 'online distance learning.' Such an amendment would not substantively change the current definitions. Rather, it is proposed to curtail confusion among some SAAs and educational institutions while maintaining the status quo."<sup>6</sup>

VBA should stick to this pledge in the 2021 NPRM not to disrupt the status quo. The rule change should go forward as proposed, addressing which state's SAA has jurisdiction over online programs.

Any change from the status quo must be properly noticed and the public must be provided the opportunity for public comment.

Separately, if VBA wants to do something to improve GI Bill quality, it could undertake rulemaking – with public notice and comment – to improve GI Bill program approval by defining the terms in title 38 U.S.C. § 3676 (approval of nonaccredited courses). This statute has key terms that remain undefined, rendering them basically meaningless and the SAAs don't enforce them. Specifically, VBA could define “quality” in 38 U.S.C. § 3676(c)(1); teacher “qualifications” in (c)(4); “financially sound” in (c)(9) (which could easily be defined by reference to ED standards); deceptive advertising in (c)(10); and “good character” in (c)(12) (which could be clarified to ban administrators and teachers who have faced legal or regulatory action or any action by a licensing board). The Department of Education could assist with all of these definitions.

### **Conclusion**

VBA must abandon the plan to remove online programs from the existing barriers set forth in § 3680A requiring accreditation and leading to a degree. VBA should instead stick to its 2021 pledge not to disrupt the definitions of “independent study” and “online” programs and to instead maintain the “status quo” on those definitions and to simply clarify which state's SAA has jurisdiction – as pledged in 2021. Furthermore, VBA should undertake rulemaking to improve GI Bill approval criteria to define the terms in § 3676, and should properly abide by the Administrative Procedures Act in seeking public comment on any proposed regulatory changes.

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<sup>6</sup> State Approving Agency Jurisdiction Rule, 86 FR 57904, 57905