



NATIONAL DEFENSE COMMITTEE

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March 1, 2024

The Honorable Denis McDonough
Secretary of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC, 20420

Dear Secretary McDonough,

Summary

We strongly oppose the recent VA Final Rule published January 15, 2024, “85/15 Rule Calculations, Waiver Criteria, and Reports.”¹ Specifically, we oppose removing the four exemption categories, for removing those exemptions will reduce the educational opportunities of veterans and cause needless and dilatory burdens on the higher education partners those veterans choose to attend. Therefore, we request you rescind this Final Rule and either reinitiate the Notice of Proposed Rulemaking Process or start a Negotiated Rulemaking Committee to adjudicate this issue.

Background

While we believe the very concept of many of the Department of Veterans Affairs’ (VA) and Department of Education’s (DoEd) restrictions on military personnel and veteran’s use of their educational benefits are rich with a sense of condescension towards those veterans (believing they are incapable of making rational educational decisions with their earned educational benefits and are therefore somehow in need of VA’s and DoEd’s paternalistic oversight), we understand the requirements of 38 U.S. Code §3680A(d)(1) to have some form of limit. But we also note that subparagraph (2) authorizes you, as Secretary, to use the very waivers this Final Rule eliminates, and, therefore, we find it difficult to understand how eschewing this waiver authority is “in the interest of the eligible veteran”² when Congress clearly passed this law with these two sections next to each, and the expectation the Department would provide for such waivers because Congress understood such waivers would be necessary.

Discussion

The fact is restrictive rules such as VA’s 85/15 Rule or the DoEd’s 90/10 Rule do not slow the rise in tuition costs. In fact, they accelerate those tuition increases. As the *Hechinger Report* details, before the 90/10 Rule was introduced, colleges now subject to it “charged tuition that was less than the maximum students were allowed to receive in federal financial aid.” But because of the foreseeable effects of the 90/10 Rule, colleges were forced to increase tuition “about 20 percent above the maximum amount students could receive in federal financial aid”³ so as to arbitrarily stay within the 90/10 ratios by forcing students to either increase their out of pocket tuition payments or to take additional loans so as to increase the payments that would fall under the “10%” portion of the 90/10 Rule. Similarly, eliminating the waivers under the 85/15 Rule will have the same effect: market forces will no longer drive college costs. Instead, compliance with a “stiffened” 85/15 Rule will, and the effect will be for schools to raise tuition so as to drive students into greater student debt in order to avoid breaching the 85% threshold.

¹ Department of Veterans Affairs. January 16, 2024. “85/15 Rule Calculations, Waiver Criteria, and Reports.” *Federal Register* 89 FR 2493, RIN 2900-AR56 (Washington, DC: National Archives and Records Administration): 2493-2502. <https://www.federalregister.gov/documents/2024/01/16/2024-00629/8515-rule-calculations-waiver-criteria-and-reports>.

² 38 U.S.C. §3680A(d)(2).

³ Clark, Billy L. 2021 “Opinion: Profits Grew While Students Were Hurt by a Law Intended to Protect Them: The “90/10” Rule Should be Abolished.” *Hechinger Report*. <https://hechingerreport.org/opinion-profits-grew-while-students-were-hurt-by-a-lawintended-to-protect-them/>.

That is not in the interest of military and veteran students, and the only people who will benefit are the servicers of student loans, as military and veteran students take out loans they otherwise would not but for this unsound regulatory ruling by your Department. Such doctrinaire usage and compliance with this new VA Rule is not rational, and places the reduction of workload for VA educational benefit bureaucrats above the confusing and inflationary impact this new Rule will have on the military and veteran students the Department was established to serve.

Second, the new 85/15 Rule will have the perverse effect of reducing financial aid and scholarships offered by subject colleges and universities, because any such financial aid offered will count against the school's 85% threshold. The generosity schools show in providing military and veteran student aid should not be discouraged, nor should military and veteran students be effectively prohibited to pursue valuable programs otherwise unaffordable to them because some illogical bureaucratic drive to ease the administrative burden on VA employees at the expense of veteran educational opportunity—a drive which will now put those educational programs out of reach.

Third, VA argues eliminating the waivers will “clarify requirements for schools, thereby making it easier for schools operating in good faith to remain in compliance” and remove “ambiguity about the appropriate classification of students in receipt of aid.”⁴ However, the experience of the schools subject to the previous iteration of this Rule is that national standardization does not happen; regardless of what VA Central Office publishes as national policy, the different VA regional offices still interpret such rules completely independently and differently, eliminating any benefits of perceived national consistency. For example, many colleges were suspended by a regional office only to be reinstated far later after that regional office's interpretations were admitted to be flawed by VA Central Office policy staff.

Recommendation

We commend the Department for acknowledging they have not yet issued the Rule for implementing the *Ensuring Best Schools for Veterans Act* (P.L. 117-114), passed in 2022, a law which will have a direct impact on the execution of this very Rule, and likely require the Department to go through another round of regulatory rulemaking. Given that, it is premature for the VA to revise the 85/15 Rule without the benefit of the new law's Rule being in place.

Therefore, we strongly oppose the removal of these exemptions from the 85/15 Rule because it will negatively impact higher education partners who are currently in compliance and drive out veterans benefiting in current high demand programs. And while this can justifiably be viewed as sarcastic analysis on our part, we do see how the impact of the new Rule will make compliance easier for the schools involved: with no students enrolled in these schools' programs, 85% of \$0 expended will still be zero. For the VA bureaucrats who wrote this counterproductive Rule, problem solved; just kill the programs.

We stand ready to work with your Department and with Congress to make this program work, but we must insist that this new Rule will not contribute to any veteran educational success. It will simply eliminate them. Therefore, **we implore you to rescind this Final Rule and restart the Notice of Proposed Rulemaking Process for the 85/15 Rule after the issuance of the Final Rule implementing the *Ensuring Best Schools for Veterans Act*, or better yet, initiate a Negotiated Rulemaking Committee for a new 85/15 Rule, and fully engage the stakeholders who will have to live with the VA's regulatory powers.**

Very Respectfully,

/s/

Bob “Shoebob” Carey
CAPT, USN (Ret)
Chief Bottle Washer
National Defense Committee

⁴ Department of Veterans Affairs. “85/15 Rule Calculations.” Supra note 1: 2495.