

**IN THE UNITED STATES COURT OF  
APPEALS FOR VETERANS CLAIMS**

GEORGE R. THEISS, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 ANTHONY J. PRINCIPI, )  
 Secretary of Veterans Affairs, )  
 )  
 Appellee. )

Vet. App. No. 01-0906  
VA File No. C 25 192 765

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**APPELLANT'S OPENING BRIEF**

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## STATEMENT OF ISSUES

The issue in this appeal is whether a disabled Vietnam veteran should receive “additional compensation for dependents” for his 18-year-old son, who continued to pursue a course of instruction in a state-sanctioned, home-based private educational program after his eighteenth birthday.

## STATEMENT OF THE CASE

### Facts

George R. Theiss served on active duty in the United States Marine Corps from 1967 to 1969 achieving the final rank of Spec.4.<sup>1</sup> He later served in the Reserves, and he was honorably discharged on December 30, 1977.<sup>2</sup> Theiss is disabled due to his service in Vietnam, including exposure to Agent Orange and shrapnel wounds.<sup>3</sup> Therefore, Theiss is eligible to receive veterans’ benefits for his dependents under 38 U.S.C. § 1115.

Theiss home schooled his son, J.P.T., in full compliance with the Wisconsin compulsory attendance law.<sup>4</sup> His decision to do so was motivated by his sincerely held religious belief.<sup>5</sup> Theiss received benefits for J.P. as a dependent child.<sup>6</sup> J.P. turned 18 on November 24, 1999.<sup>7</sup> At this point, J.P. no longer fit the definition of “child” in 38 U.S.C. § 101(4)(A)(i), which defines a child as “unmarried and who is under the age of eighteen years.”

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<sup>1</sup> Board of Veterans Affairs Decision, R-2.

<sup>2</sup> DD 214, Record of Honorable Discharge, R-9.

<sup>3</sup> Dept. of Veterans Affairs Rating Decision, R-19 – R-22.

<sup>4</sup> Wisconsin Statutes Annotated 118.15(1)(a) Except as provided under pars. (b) to (d) and sub. (4), unless the child is excused under sub. (3) or has graduated from high school, any person having under control a child who is between the ages of 6 and 18 years shall cause the child to attend school regularly during the full period and hours, religious holidays excepted, that the public or private school in which the child should be enrolled is in session until the end of the school term, quarter or semester of the school year in which the child becomes 18 years of age.

Wisc. Stat. Ann. 118.15(4) Instruction in a home-based private educational program that meets all of the criteria under s. 118.165(1) may be substituted for attendance at a public or private school.

<sup>5</sup> Request for Approval of School Attendance, R-32.

<sup>6</sup> BVA Decision, R-3.

In order for Theiss to continue being eligible for benefits based on his son, 38 U.S.C. § 101(4)(A) (iii) states that the child must be “pursuing a course of instruction at an approved educational institution.”

On September 15, 1999, Theiss submitted a Request for Approval of School Attendance to the Department of Veterans Affairs Regional Office, explaining that he was home schooling J.P.<sup>8</sup>

### **Procedural History**

On October 13, 1999, the Regional Office wrote Theiss stating that the benefits he was receiving because of J.P. would be terminated when J.P. turned 18.<sup>9</sup> Theiss appealed the denial of his benefits on November 16, 1999.<sup>10</sup> The Board of Veterans Affairs (“BVA”) affirmed the decision of the Regional Office on April 6, 2001.<sup>11</sup>

This affirmation was principally based on an opinion by the General Counsel of the Veterans Administration dated March 19, 1998 (VAOPGCPREC 3-98) which distinguished between schools and home schools, and stated that home schooling was not an “educational institution” under 38 U.S.C. 101(4)(A)(iii).<sup>12</sup> The regulation interpreting 38 U.S.C. 101(4)(A)(iii), 38 CFR § 3.57, was amended after this case arose, to specifically exclude home schools from the definition of “educational institutions.”<sup>13</sup> The BVA’s affirmation has been appealed to the Court of Appeals for Veterans.

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<sup>7</sup> Birth Certificate of J.P.T, R-15.

<sup>8</sup> Request for Approval of School Attendance, R-32.

<sup>9</sup> Letter from Dept. of Veterans Affairs, R-35.

<sup>10</sup> Letter from George Theiss, R-44.

<sup>11</sup> BVA Decision, R-1 to R-7.

<sup>12</sup> BVA Decision, R-4 to R-5.

<sup>13</sup> 65 FR 12116, March 8, 2000.

## **ARGUMENT**

### **Summary of Argument**

The statutory phrase “educational institution” is ambiguous. It is susceptible to multiple definitions, one of which is favorable to veterans. The Department has contradicted Congress’s intent by interpreting the applicable statutes to deny disabled veterans additional compensation for dependents when their 18-year-old children are still lawfully pursuing a course of high school instruction in a state-sanctioned home-based educational program. Veterans’ statutes are to be liberally construed in favor of providing benefits. Contrary to this rule of construction, the Department has imposed a cramped, literal interpretation in a General Counsel opinion and regulation, and has thwarted the legislative intent. The Department’s construction is erroneous and should be reversed.

If the Department’s construction of the statute is correct, the statute, the Department’s implementing regulation, and the General Counsel’s opinion are unconstitutional as applied to those disabled veterans whose 18-year-old children remain in a state-sanctioned home-based educational program to complete high school. The Due Process Clause and Equal Protection component of the Fifth Amendment and the Free Exercise Clause of the First Amendment protect the rights of parents who lawfully choose to educate their own children. These parents should be free from official discrimination that excludes them from benefits to which they would otherwise be entitled.

Directing the education and upbringing of a child is a fundamental liberty. Equal protection of the laws is violated by denying veterans’ benefits to those parents who exercise that liberty in accordance with state law to educate their 18-year-old children in a home-based private

educational program while allowing benefits to those whose children are enrolled in public schools.

Furthermore, where the exercise of parental rights to direct the education of children is motivated by sincerely held religious belief, federal statutes and Supreme Court cases require that courts use strict judicial scrutiny. Denying benefits to those veterans who are motivated by sincerely held religious belief to educate their own children while allowing benefits to those whose children are enrolled in public schools does not survive strict scrutiny and is unconstitutional.

**I. The Department’s Interpretation of the Veterans’ Statutes Is Contrary to Legislative Intent.**

The issue in this case is principally one of statutory interpretation. The object of all federal statutory interpretation is to ascertain the intent of Congress. When interpreting veterans’ statutes, the Supreme Court and the Court of Appeals for the Federal Circuit “have long recognized that the character of the veterans’ statutes is strongly and uniquely pro-claimant.” *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998). Additionally, as the Court of Appeals for the Federal Circuit has held, “*Certainly*, if there is ambiguity in the statute ‘interpretive doubt is to be resolved in the veteran’s favor.’” *McKnight v. Gober*, 131 F.3d 1483, 1485 (Fed. Cir. 1997) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (emphasis added)). With these rules in mind, the Department’s interpretation is contrary to Congress’s intent to provide benefits to disabled veterans whose 18-year-old children remain in a legally established high school program (including Wisconsin’s home-based private educational program) until the end of the school year.

The analysis in this case begins with 38 U.S.C. § 1115, “Additional Compensation for Dependents,” the statute under which Mr. Theiss applied for benefits and was denied. Congress enacted this section to compensate disabled veterans *and their families* for decreased earning capacity. *Rose v. Rose*, 481 U.S. 619, 630 (1987). Specifically, “[s]uch additional benefits relate to the family responsibilities of disabled veterans.” *Lombard v. United States*, 690 F.2d 215, 232, n. 15 (Fed. Cir. 1982). This section clearly represents a legislative intent to provide additional compensation to disabled veterans with dependent family members.

In § 1115(F), Congress determined that disabled veterans would be eligible for additional benefits if their children over 18 years old continued to pursue a course of instruction at an approved educational institution. The term “child” is further defined in 38 U.S.C. § 101(4)(A). It provides, in relevant part: “a person who is unmarried and – . . . (iii) who, after attaining the age of eighteen years and until completion of education or training (but not after attaining the age of twenty-three years), is pursuing a course of instruction at an approved educational institution[.]”

#### **A. The Statutory Phrase “Educational Institution” Is Ambiguous.**

The BVA denied Mr. Theiss’s application, relying on VAOPGPREC 3-98, in which the Acting General Counsel relied on a standard dictionary definition and held that a home-based educational program is not an “institution” for purposes of the veterans’ statutes.<sup>14</sup> The

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<sup>14</sup> The BVA also relied on the regulation promulgated after the General Counsel Opinion, 38 C.F.R. § 3.57(a)(1)(iii), which expressly excludes home schools; it provides: “Child. (a) General. (1) Except as provided in paragraphs (a)(2) and (3) of this section, the term child of the veteran means an unmarried person who is a legitimate child, a child legally adopted before the age of 18 years, a stepchild who acquired that status before the age of 18 years and who is a member of the veteran’s household or was a member of the veteran’s household at the time of the veteran’s death, or an illegitimate child; and (i) Who is under the age of 18 years; or (ii) Who, before reaching the age of 18 years, became permanently incapable of self-support; or (iii) Who, after reaching the age of 18 years and until completion of education or training (but not after reaching the age of 23 years) is pursuing a course of instruction at an approved educational institution. For the purposes of this section and Sec. 3.667, the term ‘educational

dictionary used by the Acting General Counsel, however, defines “institution” in a more confining way than other dictionaries that define the same word—to the detriment of allowing disabled veterans to receive benefits. These differing definitions create an ambiguity that should be resolved in favor of the veteran. As the Supreme Court said in *Brown*, “Ambiguity is a creature not of definitional possibilities but of statutory context.” *Brown*, 513 U.S. at 118. In other words, in a statutory context that favors the provision of benefits, the Acting General Counsel and the Department should not strain to find the dictionary with the most restrictive definitional possibility; rather, they should have adopted the definition most in keeping with Congress’s intent to provide benefits. Significantly, the Supreme Court in *Brown* rejected the Department’s dueling dictionary definition argument (which would have denied benefits), *Id.*, and interpreted the statute at issue favorably to the veteran.

Contrary to the well-established general rules of statutory interpretation in the context of veterans’ benefits, the General Counsel’s opinion cited only one dictionary and relied on that dictionary’s unfavorable definition. *Webster’s Third New International Dictionary*, 627 (6<sup>th</sup> ed. 1990) defines “institution” as “an established organization or corporation (as a college or university) esp. of a public character.” The General Counsel further opined that “‘established’ implies a degree of permanency.” R. at 25. Based on this definitional chain, the opinion concluded that an institution must be a permanent organization that both precedes and succeeds an individual student. *Id.*

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institution’ means a permanent organization that offers courses of instruction to a group of students who meet its enrollment criteria. The term includes schools, colleges, academies, seminaries, technical institutes, and universities, but does not include home-school programs. (Authority: 38 U.S.C. 101(4)(A), 104(a))”

A favorable ruling of this Court would necessarily result in invalidation of the last two sentences of the regulation. See *Meeks v. West*, 216 F.3d 1363, 1365-66 (Fed. Cir. 2000).

Resorting to a different, equally reputable dictionary yields a different result, favoring the veteran. According to the *Random House Webster's College Dictionary*, 698 (McGraw Hill ed. 1991), an "institution" is "an organization or establishment devoted to the promotion of a cause or program, esp. one of a public, educational, or charitable character." It further defines "establishment" as "a household; place of residence including its furnishings, grounds, etc." *Id.* at 457. Following this equally plausible definitional chain leads to the conclusion that a *household* devoted to the promotion of an educational *program* is an educational institution. Provision of benefits to severely disabled veterans should not depend on which dictionary is on the desk of the General Counsel.

**B. Home-based Private Educational Programs Are Equal to Public and Private Schools.**

Moreover, Wisconsin's education statutes track closely with the favorable *Random House* definitions, further supporting the proposition that home-based private educational programs satisfy the veterans' statutes' "educational institution" requirement. According to Wisc. Stat. Ann. § 115.001(3g):

"Home-based private educational program" means a program of educational instruction provided to a child by the child's parent or guardian or by a person designated by the parent or guardian. An instructional program provided to more than one family unit does not constitute a home-based private educational program.

The only material difference in Wisconsin law between a home-based private educational program and a private school is that the former is focused on the children of one family. Indeed, a home-based educational program must teach the same subjects for the same number of hours as private schools. See Wisc. Stat. Ann § 118.15(4) ("Instruction in a home-based private

educational program that meets all of the criteria under s. 118.165(1)<sup>15</sup> may be substituted for attendance at a public or private school.”). In other words, home-based private education is sanctioned in Wisconsin law and is considered to be equivalent to public and private schools in satisfying the state’s compulsory attendance statute.

### **C. The Wisconsin Supreme Court Rejected the General Counsel’s Definition.**

Furthermore, the Supreme Court of Wisconsin expressly rejected the argument made in the General Counsel’s opinion when the State Superintendent of Public Instruction made a similar argument attempting to prosecute a parent for truancy when he taught his own children at home. The Superintendent in that case relied on dictionary definitions and argued that educational institutions, to be *bona fide*, must be “continuing or perpetual rather than limited in duration to only the educational careers of specific persons now receiving instruction,” and must “continue[] to hold [their] doors open to new students who will take the place of those who graduate or otherwise leave the school . . . .” In response to this specific argument, the Supreme Court of Wisconsin held, “We are not convinced that these definitions are the only ones a citizen, an administrator, or a court using dictionary definitions, court decisions and the statutes could deduce.” *State v. Popanz*, 332 N.W. 2d 750, 755 (Wisc. 1983) (striking down predecessor

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<sup>15</sup> Section 118.165(1) provides:

- (1) An institution is a private school if its educational program meets all of the following criteria:
  - (a) The primary purpose of the program is to provide private or religious-based education.
  - (b) The program is privately controlled.
  - (c) The program provides at least 875 hours of instruction each school year.
  - (d) The program provides a sequentially progressive curriculum of fundamental instruction in reading, language arts, mathematics, social studies, science and health. This subsection does not require the program to include in its curriculum any concept, topic or practice in conflict with the program’s religious doctrines or to exclude from its curriculum any concept, topic or practice consistent with the program’s religious doctrines.
  - (e) The program is not operated or instituted for the purpose of avoiding or circumventing the compulsory school attendance requirement under s. 118.15(1)(a).
  - (f) The pupils in the institution’s educational program, in the ordinary course of events, return

statutory definition of “private school” as unconstitutionally vague). The Supreme Court of Wisconsin has already responded to an argument similar to the General Counsel’s by determining that the text of the statute does not command a particular definition. Therefore, an unquestionable ambiguity exists.

The reasoning of the General Counsel’s opinion in this case is flawed in the same fundamental way as the Superintendent’s argument in *Popanz*. It uses select, unfavorable dictionary definitions and holds:

A home-school program does not constitute an institution within the meaning 38 U.S.C. § 101(4)(A)(iii) and 104(a) because the program terminates when the child completes his or her course of instruction or withdraw, does not have an ongoing enrollment, and is operated for the sole purpose of serving the needs of a particular student.

R. at 27.

Just as the Supreme Court of Wisconsin rejected this faulty reasoning in *Popanz*, this Court should reject the reasoning in VAOPGPREC 3-98 and resolve the ambiguity in favor of providing the disabled veteran with additional compensation for dependents.

#### **D. The General Counsel’s Opinion Is Logically Flawed.**

Additionally, the General Counsel’s opinion employs a logically flawed syllogism in interpreting Wisconsin statutes. It wrongly reasons under Wisconsin law (1) that private schools are defined in part as being “institutions”; (2) home-based educational programs are not private schools; (3) therefore, home-based educational programs are not institutions. VAOPGPREC 3-98, R. at 26. The logical flaw is revealed by substituting “public school” for “home-based private educational program.” Like home-based private educational programs, public schools are not private schools, but it can scarcely be argued that they are not educational institutions.

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annually to the homes of their parents or guardians for not less than two months of summer vacation, or the institution is licensed as a child welfare agency under s. 48.60(1).

This Court should reverse the BVA's decision and strike down the last two sentences of 38 C.F.R. § 3.57(a)(1)(iii).

**E. Home-Based Private Education Is an “Educational Institution.”**

There is another sense in which the Department's cramped definition is flawed. In a larger sense, home-based private education has become a recognized educational institution, sanctioned in law and respected as a viable—and in some cases even preferable—educational alternative.

At the time these veterans' statutes were first enacted, home schooling did not exist in any measurable way. In fact, until 1980, it was illegal in most states. However, in the last 20 years, home schooling has exploded across the country until now it is legal in every state.

Each of the United States recognizes home schooling as part of its educational framework. In Wisconsin, home schools were classified as “home-based private educational programs,” in a statute enacted in 1984 in response to the *Popanz* case. Home-based private educational programs are recognized as an equivalent alternative to public and private schools and as a way of fully complying with the compulsory attendance statute.

The rapid success of home schooling is a nationally recognized phenomenon. Estimates of the number of home schooled students range from one to two million.<sup>16</sup> Home schoolers have demonstrated in numerous studies that they score 20 to 30 percentile points higher on standardized tests than public school students.<sup>17</sup> At national competitions such as the Scripps-Howard Spelling Bee and the National Geography Bee, home schoolers have excelled, winning

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<sup>16</sup> *Home Schoolers Making Headlines*, (June 22, 2000) <<http://www.hslda.org/docs/nche/000002/00000254.asp>> (1.7 million home schoolers); *Estimated Number of Homeschooled Students in the United States*, (visited January 24, 2002) <<http://nces.ed.gov/pubs2001/HomeSchool/estimate.asp>> (850,000 home schoolers).

the Spelling Bee in 1997 and 2000 and the Geography Bee in 1999.<sup>18</sup> Although at most two percent of America's school-age children are home schooled, upwards of 10 percent of the Bee participants are home schoolers.<sup>19</sup>

One of the major benefits of home schooling is that programs can be adapted to fit the needs of an individual student, instead of being locked in to providing a "one size fits all" program. Self-sufficiency is one of the goals of education, and home schooled children mature quickly because they spend more time with adults.

*TIME* magazine's cover article on August 19, 2001, recognized that home schoolers are "diverse parents who are getting results." *Id.* at 46. Many colleges agree and now actively recruit home schooled students, recognizing them as independent and self-motivated learners.<sup>20</sup> Home school graduates can be found in every military academy and every branch of the service, as well as in colleges from Ivy League to community level.<sup>21</sup>

The Department's cramped interpretation of the veterans' statutes fails to account for this new, innovative, and highly effective educational institution. As previously discussed, the text of the statute does not compel such an interpretation. Even though home-based education was not specifically contemplated by Congress in 1924, when the statutes were first enacted, the phrase is broad enough to encompass those veterans who provide their children a home-based

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<sup>17</sup> *Class of Their Own*, Wall St. J., February 11, 2000 at A1; *Home Schooling Works!* (visited January 24, 2002) <<http://www.hslda.org/docs/study/rudner1999/default.asp>>

<sup>18</sup> *Home Schoolers Making Headlines*, (June 22, 2000) <<http://www.hslda.org/docs/nche/000002/00000254.asp>>

<sup>19</sup> *Home Schoolers Win First, Second, and Third at National Spelling Bee*, (June 1, 2000) <<http://www.hslda.org/docs/news/hslda/200006010.asp>>

<sup>20</sup> *Home Schoolers in Ivy League Universities* (May 3, 2000) <<http://www.hslda.org/docs/nche/000002/00000234.asp>>

<sup>21</sup> *U.S. Service Academies Accepting Home Schoolers*, (November 4, 1998) <<http://www.hslda.org/docs/nche/000002/00000240.asp>>

private educational program in compliance with state compulsory attendance laws from the child's eighteenth birthday through the completion of high school.

The English language is flexible enough to accommodate unanticipated phenomena. For example, the First Amendment protects the freedom of "the press." At the time of ratification, the press consisted of the print medium only. Employing the General Counsel's methodology, the "press" today would include only "printed publications collectively, esp. newspapers and periodicals." *Random House Webster's College Dictionary*, 1068 (McGraw Hill ed. 1991). Of course, the freedom of the press today extends to the unanticipated innovations of radio, television and the Internet. As these new technologies developed, the language expanded to accommodate them. The "press" today is commonly understood to include "all the media and agencies that print, broadcast, or gather and transmit news." *Id.* Likewise, the fact that home-based private educational programs are a relatively recent innovation does not preclude this Court from recognizing them as educational institutions.

Courts should not adopt a literal interpretation of an ambiguous statute if to do so would thwart the legislative purpose behind the statute. *Reid v. Dep't of Commerce*, 793 F.2d 277, 281-82 (Fed. Cir. 1986). It is apparent on the face of the statutes that Congress intended to help disabled veterans provide for the education of their children.

The Veterans' Administration has consistently held the view that the Government should provide benefits for the period in the child's life when, if the father were living, he might be expected to contribute to the child's support. That view is equally applicable to a situation wherein the veteran is alive but severely disabled. In this connection, it seems generally recognized that the need for advanced education and training to prepare children to take their place in society has increased. More and more young people are attending college. Greater efforts are being made by more and more of our citizens to afford their children the opportunity of a college education, and appreciable assistance toward this goal has been extended by Federal, State, and local governments.

Departmental Report, Veterans' Administration, 1965 U.S.C.C.A.N. 3925, 3935. Indeed, because of Congress's intent to help disabled veterans further their children's education, the 89<sup>th</sup> Congress extended the upper limit of the definition of "child" from 21 to 23, to accommodate veterans whose children pursue a 4-year college program. See *Id.* Surely Congress did not intend to interrupt benefits to those veterans whose 18-year-old children were completing their high school education in a state-sanctioned home-based educational program before attending college.

For all of these reasons, this Court should hold that the statutory phrase "educational institution" is broad enough to encompass those 18-year-old children who pursue a course of high school instruction in a state-sanctioned, home-based private educational program.

## **II. If the General Counsel's Interpretation Is Correct, the Veterans' Statutes Are Unconstitutional.**

An ambiguous statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score. *Almendarez-Torres v. United States*, 523 U.S. 524, 538 (1998). See also *Miller v. United States*, 620 F.2d 812, 838 (Fed. Cir. 1980) ("We therefore apply the settled principle that, whenever possible, a statute should be construed so as to avoid serious constitutional doubts."). "This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). Resolving the ambiguity in the veterans' statute in favor of the General Counsel's opinion would render the statutes unconstitutional.

**A. The Validity of the Statute as Applied Must be Evaluated Under Strict Judicial Scrutiny.**

“There is a well-established equal protection component to the Fifth Amendment Due Process Clause applicable to the federal government. See *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954).” *Skelly v. INS*, 168 F.3d 88, 91 (2<sup>nd</sup> Cir. 1999). Thus, the Congress and the Department of Veterans Affairs are bound by the provisions of Equal Protection under the Due Process Clause of the Fifth Amendment. Whenever a classification disadvantages a suspect class or impinges a fundamental right, it is subject to a higher level of scrutiny than mere “rational relationship.” *Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). Strict scrutiny is required where the classification drawn impermissibly interferes with a plaintiff’s exercise of his fundamental right. *Disabled American Veterans v. U.S. Dept. of Veterans Affairs*, 962 F.2d 136 (2<sup>nd</sup> Cir.1992). Though home school students are not a suspect classification, strict scrutiny applies because the policy infringes on a fundamental right protected by the Constitution: the right of parents to choose between lawful forms of education.

Additionally, Mr. Theiss was providing a state-sanctioned home-based private educational program to his son in accordance with his religious beliefs. Because the right of parents to direct the education of their children is fundamental, and because Mr. Theiss’s exercise of that right was reinforced by religious belief, this Court must apply strict scrutiny. See *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881 (1990); *People v. DeJonge*, 501 N.W. 127, 134-35 (Mich. 1993). In addition, strict scrutiny applies under the Religious Freedom Restoration Act (RFRA) (42 U.S.C. § 2000bb).<sup>22</sup> RFRA

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<sup>22</sup> 42 U.S.C. § 2000bb provides:  
(a) Findings  
The Congress finds that--

has been held unconstitutional only as it applies to *state* action;<sup>23</sup> it still applies the standard of strict scrutiny to federal governmental interference with the exercise of religious freedom.

This strict scrutiny is manifested in the “compelling interest” test, which is composed of five elements:

- (1) whether a defendant’s belief, or conduct motivated by belief, is sincerely held;
- (2) whether a defendant’s belief, or conduct motivated by belief, is religious in nature;
- (3) whether a state regulation imposes a burden on the exercise of such belief or conduct;
- (4) whether a compelling state interest justifies the burden imposed upon a defendant’s belief or conduct;
- (5) whether there is a less obtrusive form of regulation available to the state.

See *Wisconsin v. Yoder*, 406 U.S. 205, 214-230 (1972).

Because the Department cannot demonstrate a compelling interest in denying benefits to disabled veterans who provide their children with a state-sanctioned, home-based educational program, while providing benefits to those who send their children to a public or private school,

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- (1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
  - (2) laws “neutral” toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;
  - (3) governments should not substantially burden religious exercise without compelling justification;
  - (4) in *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and
  - (5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are--

- (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
- (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

<sup>23</sup> *Boerne v. Flores*, 117 S.Ct. 2157 (1997).

the statutes are unconstitutional as applied and 38 C.F.R. § 3.57(a)(1)(iii) is unconstitutional on its face.

**B. The General Counsel’s Interpretation Cannot Survive Strict Judicial Scrutiny.**

The purpose of 38 U.S.C. is to grant federal benefits to military veterans who have served their country. The specific purpose of 38 U.S.C. § 1115 is to grant benefits to severely disabled veterans whose children above eighteen are still receiving an education. This encourages veterans to keep their children in school, and also assists them in meeting financial needs while the children are still dependent on them.

It is undisputed that Mr. Theiss’s home education program was in full compliance with Wisconsin’s compulsory attendance law. Students enrolled in public and private schools in Wisconsin are also in compliance with Wisconsin’s compulsory attendance law. Thus, Mr. Theiss was similarly situated to these other families. However, Mr. Theiss was denied benefits under the General Counsel’s opinion and now under the new regulation 38 CFR 3.57, which was amended to specifically exclude home schoolers during the time Mr. Theiss was appealing the loss of his benefits.

**1. The right of parents to direct the education of their children is fundamental.**

The United States Supreme Court has repeatedly recognized that the right of parents to direct the upbringing of their children is among those higher-tiered constitutional rights that have been declared to be “fundamental.” Most recently, the High Court held that parental rights are among “the oldest of the fundamental liberty interests:”

The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court.

More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401, 67 L. Ed. 1042, 43 S. Ct. 625 (1923), we held that the “liberty” protected by the Due Process Clause includes the right of parents to “establish a home and bring up children” and “to control the education of their own.” Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535, 69 L. Ed. 1070, 45 S. Ct. 571 (1925), we again held that the “liberty of parents and guardians” includes the right “to direct the upbringing and education of children under their control.”

*Troxel v. Granville*, 530 U.S. 57, 65-66 (2000).

This right is grounded in the Due Process Clause’s protection of liberty. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In the early parents’ rights cases, the Court had not yet developed the specific “fundamental rights” doctrine, together with its required compelling interest—least restrictive means analysis. Nonetheless, the Court used powerful language to express its view that parents’ rights are to be zealously protected against government encroachment.

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right and the high duty, to recognize and prepare him for additional obligations.

*Pierce*, 268 U.S. at 525. See also, *Meyer v. Nebraska*, 262 U.S. 390 (1923).

The language of the *Pierce* Court is strong, but its holding was even stronger. The state of Oregon had made it illegal to send a child to any school other than a public school. Under the modern “rational relationship test,” that law would be found constitutional. After all, the state of Oregon has any number of legitimate reasons for wanting to educate all children in one efficient, effective public school system. Banning private schools is a very sound way to accomplish that goal. But the Supreme Court struck down the Oregon law in 1925.

The leading parents' rights case of the modern era is undoubtedly *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In *Yoder*, Amish families wanted their children to stay at home and learn farming rather than go to high school. They were prosecuted under Wisconsin's compulsory attendance law. The Supreme Court struck down the law, and clearly declared parents' rights to be of a fundamental nature. To do this, it imposed the strictest constitutional balancing test upon the interest of the government.

[T]his case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

406 U.S. at 232.

Thus a state's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children. . . .

*Id.* at 214.

The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can over-balance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that, however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests.

*Id.* at 215.

One cannot ignore *Yoder*. Although it was originally viewed as primarily a religious liberty case, the Supreme Court has recently explained that *Yoder* was primarily about parental rights, albeit a "hybrid" case conjoining parental rights and the free exercise of religion.

*Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881 (1990).

The burden of the Department’s policy on the right of Mr. Theiss to direct the education of his child is obvious. By electing to educate his son at home, Mr. Theiss has forfeited disability benefits that are available to the veteran parent of every traditionally schooled 18-year-old in Wisconsin. For Mr. Theiss to receive additional compensation for dependents, he was required to give up his right to choose that child’s form of education. This is a burden on a fundamental right that cannot withstand constitutional scrutiny.

**2. Conditioning government benefits on the sacrifice of a constitutional right does not survive strict scrutiny.**

The government may not condition the receipt of a benefit upon the giving up of a constitutional right. *Thorpe v. Housing Authority of Durham*, 386 U.S. 670 (1967) (Douglas, J., concurring).

The recipient of a government benefit, be it a tax exemption, unemployment compensation, public employment, a license to practice law, or a home in a public housing project, cannot be made to forfeit the benefit because he exercises a constitutional right.

*Id.* at 679. (Citations omitted.) To permit such a condition would allow the government to “produce a result which [it] could not command directly.” *Speiser v. Randall*, 357 U.S. 513, 526 (1958). “Such interference with constitutional rights is impermissible.” *Perry v. Sinderman*, 408 U.S. 593, 597 (1972). “[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.” *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

In this case, the end of ensuring that children are actually enrolled in school is easily achieved more narrowly. Theiss was providing a home-based educational program in compliance with the compulsory attendance law of Wisconsin, and therefore he should receive benefits.

Even if the court applies the “rational basis” test, Theiss should receive benefits. The purpose of the statute is to provide benefits to veterans whose children are still receiving an education after their eighteenth birthday. Home schooling is legal in every state as a means of complying with compulsory attendance. There is no rational reason to make a distinction between public schools, private schools, and home schools, since every state recognizes the right to home school as a legitimate educational option.

Therefore, the statute as applied and the regulation and General Counsel opinion on their faces violate Theiss’s rights under the First and Fifth Amendments.

## **CONCLUSION**

The statutory phrase “educational institution” is ambiguous. This Court should reject the General Counsel’s cramped definition of “institution” and adopt the equally acceptable definition that results in providing disabled veterans with additional compensation for their dependents. Furthermore, the General Counsel’s definition would render the statutes unconstitutional under the First and Fifth Amendments. For these reasons, this Court should hold that state-sanctioned home-based private educational programs are “educational institutions” within the meaning of 38

U.S.C. § § 101(4)(A)(iii) and 104(a) and that VAOPGCPREC 3-98 and the last two sentences of 38 C.F.R. § 3.57(a)(1)(iii) are invalid.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

On January 24, 2002, a copy of the foregoing principal brief was served via U.S. First Class Mail, postage pre-paid, to the party listed below. I declare under penalty of perjury, under the laws of the United States, that the foregoing is true and correct.

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