

**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

APPELLANT'S REPLY BRIEF

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ARGUMENT

When Congress passed 38 U.S.C. § 101(4), the intent was to ensure that students above 18 years old who were completing their high school and post-secondary education remained classified as “children” for the purposes of receiving benefits. Congress used the term “educational institution” to further ensure that the children were actually receiving an education, not simply enrolling in some fly-by-night post-secondary organization for the purposes of defrauding the Veterans Administration.

However, because of the VA’s new interpretation of the statute to exclude home schoolers, there is a small window of time that students are not classified as “children.” Specifically, if a home schooler is 17 years old and in 12th grade, he is a child. When he is 19 years old and in college, he is likewise classified as a child. But for the amount of time that he is 18 years old and still in 12th grade, he is suddenly not a “child,” and the VA refuses to grant benefits. This is not what Congress intended. This case involves the narrow issue of whether Congress intended to deny benefits to those veterans whose 18-year-old children who are still in a state-sanctioned, home-based education high school program.

I. The Respondent’s Position Regarding “Institution” Is Not A Reasonable Interpretation.

The term “educational institution” contained in 38 U.S.C. §§ 101(4)(A) and 104 is ambiguous in regards to home schooling. “Ambiguity” as defined by Webster’s means “doubtfulness or uncertainty, particularly as to the signification of language, arising from its admitting of more than one meaning.”¹ “Educational institution” is ambiguous, because it can have more than one meaning, and there is uncertainty as to its meaning in this context. In fact,

¹ Webster’s Third New International Dictionary 627 (6th ed. 1990).

had there not been this ambiguity, the VA would not have had to issue a General Counsel's opinion interpreting the term.

The Supreme Court's decision in *Brown v. Gardner*,² as cited by Respondent, held that "[a]mbiguity is a creature not of definitional possibilities but of statutory context." In this situation, defining home schooling as an educational institution is not simply a definitional possibility. It is mandatory under the statutory context.

The Supreme Court has held "If there is ambiguity in the statute 'interpretive doubt is to be resolved in the veteran's favor.'"³ (Emphasis added). Respondent's position that home schooling is not an educational institution is an unreasonable interpretation of the statute using the very case that Respondent cited on this point, *Smith v. Brown*.⁴ *Brown* holds that a "statute's meaning must be discerned by reference to 'the whole statute...and the objects and policy of the law, as indicated by its various provisions.'"⁵ (Emphasis added).

As Appellant argued extensively in his principal brief to this court, the Supreme Court has long recognized that "the character of the veterans' statutes is strongly and uniquely pro-claimant."⁶ Thus, under *Brown*, in interpreting the statute relating to what qualifies as an educational institution, the court must look to "the objects and policy of the law." The object and policy of the statute is "pro-claimant," and the Veteran's Administration should have resolved the ambiguity in the veteran's favor, as required by previous case law.⁷ Instead, it has adopted a cramped and restrictive interpretation to deny Appellant the benefits he deserves. Appellant therefore asks this Court to overturn the decision of the Veteran's Administration.

² 513 U.S. 115 (1994).

³ *McKnight v. Gober*, 13 F.3d 1483, 1485 (Fed. Cir. 1997) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

⁴ 35 F.3d 1516 (Fed.Cir. 1994)

⁵ Resp. Brf. at 6; *Smith* at 1523 (Fed.Cir. 1994) (quoting *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974)).

⁶ *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

⁷ *McKnight* at 1485.

A. The VA should interpret existing law to include home schooling.

When Congress first passed 38 U.S.C. § 101(4), home schooling was not even a fringe movement. State laws did not even contemplate the issue; with the exceptions of Utah and Nevada, no state had a law on the books governing “home schooling” specifically until the early 1980s. Thus, Congress could not have intended to exclude an 18-year-old high school student enrolled in a home-based educational program from receiving benefits.

Respondent argues that because home schooling was “illegal” in most states prior to 1980, this “speaks volumes as to the intent of Congress.”⁸ This is incorrect.

When Congress enacted this portion of the law, there were two existing “educational institutions” for completing a high school education: public schools and private schools. Now there are three: home schooling has become the choice of over 2 percent of students. Home schooling has become a universally accepted educational institution since Congress adopted the statute. Because Congress did not-- indeed could not-- have intended to exclude home schooling from the approved list of educational institutions, the question now is this: Would Congress have specifically intended to deny benefits for the last few months of high school when students are enrolled in state-sanctioned home-based education programs? The answer is no.

Congress used the term “educational institution,” signifying that it realized such a term could expand in the future to include paradigms of education as yet unforeseen. Such a paradigm has now arisen, and is now recognized in all fifty states as a legitimate educational institution.

Faced with a statute that does not specifically mention “home schooling,” the VA has decided that home schools are not educational institutions, thus cutting off an entire class of perfectly legitimate students from being eligible for the purposes of veterans’ benefits. The Court should not allow it to discriminate in this manner.

B. The decision of the Wisconsin Supreme Court to include home schoolers is applicable to this case.

Respondent argues that the Wisconsin Supreme Court case of *State v. Popanz*⁹ is inapplicable. However, this argument is unconvincing. *Popanz* is applicable because it deals with precisely the same issue, which can be seen by looking at the action taken.

In both cases, an administrative agency is interpreting a statute to exclude home schoolers. In *Popanz*, the Wisconsin Superintendent provided a post hoc definition for “private school” where none was provided in the statute. The definition excluded home schooling. The VA has done the very same with “educational institution.”

In making this exclusionary definition, the Wisconsin Superintendent used very similar terminology to the General Counsel’s opinion, as seen below:

Wisconsin Superintendent definition of “private school”	Veterans Administration definition of “educational institution”
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“continuing or perpetual”	“a degree of permanency”
would “continue[] to hold [their] doors open to new students who will take the place of those who graduate or otherwise leave the school...” ¹¹	“offers its services to other students who meet its enrollment criteria.” ¹⁰

The wording and reasoning used by the Wisconsin Superintendent and the Veterans Administration are almost exactly the same. The Court in *Popanz* concluded that the restrictive interpretation of the statute to exclude home schools was not commanded by the text. Likewise in this case, the text does not command the conclusion reached by the VA. Taken together with the interpretive tool that VA statutes are to be construed in favor of benefits, the exclusion of a small subset of high school seniors who are enrolled in legitimate home-based education

⁸ Resp. Brf. at 8.

⁹ 332 N.W.2d 750 (Wis. 1983).

¹⁰ Resp. Brf. at 27.

programs is irrational—and not what Congress intended. Legitimate, state-sanctioned home-based education programs are educational institutions in every sense of the word and this Court should reverse.

C. *Chevron v. Natural Resources Defense Council* is not applicable.

Respondent relies on *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*¹² to state that its interpretation of the statute should be given deference. The Supreme Court in *Chevron* held that “considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.”¹³ However, this part of *Chevron* is inapposite in this case.

Before the Court's holding regarding the weight to give to administrative interpretations, it implemented a two-part test for courts in reviewing an agency's construction of a statute. First, if Congress has directly addressed the precise question, the agency must hold to that interpretation. Second, if Congress has not specifically given an answer, the court must examine “whether the agency's answer is based on a permissible construction of the statute.”¹⁴

This means that the agency's construction must be in line with Congressional intent. The VA's interpretation of “educational institution” fails this test.

As already cited above, *McKnight* states that the intent of Congress is that VA statutes are to be interpreted liberally, toward the giving of benefits. In this situation, the VA has instead interpreted an ambiguous statute away from the giving of benefits, which violates Congressional intent. Thus, this court has every right to overturn the VA's interpretation of “educational

¹¹ *Popanz* at 755.

¹² 467 U.S. 837 (1984).

¹³ *Chevron* at 844.

¹⁴ *Id.* at 843

institution,” since it is a constricted interpretation that leans away from giving benefits and impinges on Appellant’s fundamental right to home school his son.

II. The Validity of the Statute As Applied Must Be Evaluated Under Strict Judicial Scrutiny.

Respondent suggests that its interpretation of the statute does not prohibit a person from choosing to home school their children, and therefore the court should use a “rational basis” test, rather than the “strict scrutiny” test proposed by Appellant. While Respondent is correct that home schooling is not prohibited, Appellant’s fundamental right to make this decision is being impinged upon in order to accept a government benefit. And under *Thorpe v. Housing Authority of Durham*,¹⁵ this is impermissible.

In *Thorpe*, the Court held that conditioning the receipt of a government benefit upon the giving up of a constitutional right was unlawful. In this case, if Appellant had sent his son to public or private school, thus giving up his constitutional right to home school him, he could have received the benefits. Because he chose to home school, he no longer received the benefits. This is precisely the result that *Thorpe* is designed to prevent.

The Supreme Court held in *Troxel v. Granville*¹⁶ that parents’ rights are fundamental. “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.”¹⁷ This court should view with extreme suspicion any attempt to infringe on that liberty. Yet that is precisely what the VA is doing with its restrictive interpretation of § 101(4).

¹⁵ 386 U.S. 670 (1967).

¹⁶ 530 U.S. 57 (2000)

¹⁷ *Troxel* at 65.

Respondent claims that the interpretation “does not infringe upon Appellant’s right to direct the education of his child.”¹⁸ This is simply untrue. By claiming that home schooling is not an educational institution, the VA is forcing Appellant to choose between exercising his constitutional rights and receiving benefits to which he is entitled as a military veteran. What more is needed to show an infringement of his rights?

A. *Hooks v. Clark County School District* is not applicable.

*Hooks v. Clark County School District*¹⁹ was a case dealing with the interpretation of the Individuals with Disabilities in Education Act (IDEA). In examining whether home schools constituted a “private school or facility,” the court stated, “The common meaning of those words – their plain language – does not require that exempted home education qualify as a ‘private school or facility.’” *Id.* at 1040 (emphasis added). By ruling that home education was not a “private school” as defined in IDEA, the court found that students enrolled in home schools were not eligible for special education funding.

Respondent relies on *Hooks* as persuasive and argues that this court should adopt a similar interpretation, rather than following the Wisconsin Supreme Court’s reasoning in *Popanz*. However, respondent’s reliance is misplaced.

First, *Hooks* was decided before the landmark case of *Troxel v. Granville*.²⁰ In *Troxel*, as briefed extensively in Appellant’s previous brief, the Supreme Court reiterated that parents’ rights are fundamental rights. This is especially true when the right is exercised in conjunction with freedom of religion²¹ and educational choice,²² as is the case here. Appellant is choosing to

¹⁸ Resp. Brf. At 17.

¹⁹ 228 F.3d 1036 (9th Cir. 2000), *cert. den.* 532 U.S. 971 (2001)

²⁰ 530 U.S. 57 (2000)

²¹ See *U.S. Employment Division v. Smith*, 494 U.S. 872, 881 (1990).

²² See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

exercise his fundamental right to home school based on his religious beliefs. The Ninth Circuit Court of Appeals was incorrect in its *Hooks* decision, and this court should not follow its lead.

Secondly, as discussed above, the standard in this case is totally different. According to *McKnight*, the VA is not supposed to determine that a certain interpretation is “not required” and thus deny benefits. Instead, the VA is supposed to resolve ambiguities in favor of distributing benefits. Thus, the restrictive finding of *Hooks* does not govern the outcome of this case because the same presumption in favor of benefits does not exist in cases under IDEA.

B. The statute as applied is unconstitutional even under the rational basis test.

Even if this court were to examine the denial of benefits using the “rational basis” test, the exclusion would fail. It is fundamentally unfair to deny benefits to a veteran who is exercising his constitutional right to home school, and doing so in full compliance with state compulsory attendance law.

Respondent argues that excluding home schoolers is constitutional as viewed under the rational basis test for two reasons: first, Congress was concerned about the integrity of the education and the veracity of those claiming to attend school, and second, budgetary concerns could have motivated such an exclusion.²³ Even under the rational basis test, however, these arguments do not stand.

Home schooling is legal under Wisconsin law.²⁴ In fact, home-based private education is considered to be equivalent to public and private schools in satisfying the state’s compulsory attendance statute. Home schoolers are required to submit an annual statement of enrollment to the state department of education, indicating that they will comply with the requirements of state law in operating their home-based private educational program. These requirements include at

²³ Resp. Brf. at 21-22.

²⁴ Wis. Stat. Ann. § 118.15(4), § 118.165(1).

least 875 hours of instruction using a sequentially progressive curriculum.²⁵ The state's interest in ensuring that children receive an education is satisfied by this annual reporting. Congress' interest in the validity of the educational institution is similarly satisfied when the state sanctions a public, private or home school. Where high school is concerned, an 18-year-old's benefits should not be suspended so long as the child is enrolled in a state-sanctioned, home-based education program.

The budgetary concerns argument is flawed as well. Interpreting the statute to include home schoolers is not opening the federal till to a whole new class of claimants. Instead, it is following the intent of Congress to provide benefits on behalf of students who are completing their high school education.

There is a very small window of time where children who have previously been eligible turn 18, finish high school, and move on to college. Before the 18th birthday, they are classified as children; once they enroll in college, they continue to meet the eligibility requirements. But between their 18th birthday and graduation, the Veterans Administration, through a restrictive interpretation, has created and exploited a loophole, which results in not paying out benefits to students that Congress clearly intended to include—those 18-year-olds who stay in high school. The fact that now there are three viable options for completing high school, while there were only two when the statute was adopted, does not add one dime to the federal deficit. If anything is irrational, it is the VA's insistence to deny a few hundred dollars of benefits to otherwise eligible veterans who have elected to follow a perfectly legal, universally accepted, often superior educational option for their high school aged children based on an unreasonable concern for the public fisc. The Supreme Court has rejected just this kind of parsimony where veterans

²⁵ WSA § 118.165(1).

are concerned. Accordingly, even the two reasons the Secretary advances in support of rational basis review must fail.

This Court should reverse the BVA's decision to deny Appellant the benefits he is entitled to.

III. Allowing Home Schooling to Qualify as an Educational Institution Would Not Render § 101(4)(a)(iii) Superfluous.

Respondent argues that adopting Appellant's interpretation of the statute would render the phrase "is pursuing a course of instruction at an approved educational institution" superfluous. This is incorrect. Appellant is not arguing that all students who have turned 18 should get benefits. He simply argues that children who are completing high school by home schooling, a perfectly legal option under the compulsory attendance laws of every single state, should be considered to be enrolled in an approved educational institution under the terms of the statute, and therefore he should receive benefits for his son.

CONCLUSION

The VA's interpretation of "educational institution" is not reasonable given the Congressional intent to liberally grant benefits to veterans. The court should not grant the Administration's opinion deference since it goes against Congress' intent; instead it should apply strict scrutiny to the discriminatory interpretation and overturn the decision of the lower court. The VA should grant Appellant the benefits, in accordance with the intent of Congress.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On August 9, 2002, a copy of the foregoing 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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