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REDACTED COPY

Matter of: Survivor Benefit Plan Annuity - [REDACTED]

File: Department of Defense General Counsel Opinion:
DoD/GC #97-4

Date: March 11, 1997

DECISION

The Director, Defense Finance and Accounting Service (DFAS), has requested an advance decision under 31 U.S.C. § 3529 on the claim for annuity benefits under the Survivor Benefit Plan (SBP) of [REDACTED], the dependent child of a deceased Air Force Reserve member. The specific issue involved is whether an unmarried child between the ages of 18 and 22 who is pursuing an alternative form of schooling, such as through home study or correspondence courses, meets the statutory definition of "dependent child" so as to be entitled to receive annuity benefits under the SBP. The request was submitted to the General Accounting Office (GAO) on April 1, 1996; however, as a result of the transfer of functions from GAO to the executive branch mandated by Public Law No. 104-316, and in accordance with subsequent delegations, the matter has been transferred to this office for resolution. For the reasons set forth below, we conclude that the claim of [REDACTED] should be denied.

FACTS

[REDACTED], an Air Force Reserve member, died on February 22, 1989, after having completed the years of service necessary to qualify for Reserve retirement under the provisions of 10 U.S.C. § 12731 (formerly § 1331). Subsequent to his death, an SBP annuity was paid to his three dependent children. One of those children, [REDACTED], was born on November 12, 1977, and reached the age of 18 on November 12, 1995.

According to information provided by the annuitant and his mother, [REDACTED], [REDACTED] is currently being schooled at home through enrollment in a 4-year, general high school correspondence course of instruction provided by the American School in Chicago, Illinois. An October 19, 1995, letter from the Winchester, Virginia, Public Schools indicates that the Virginia State Code requires that parents who provide home instruction present evidence to an appropriate school official that the child is achieving at an adequate level of educational growth and progress. That letter further indicates that [REDACTED] has chosen an alternate form of the standardized



achievement test as the means of documenting her son's achievement.

LAW

Under the SBP, a member's dependent children may be eligible annuity beneficiaries if certain specified conditions are met. For unmarried children between the ages of 18 and 22, the statute requires that they be "pursuing a full-time course of study or training in a high school, trade school, technical or vocational institute, junior college, college, university, or comparable recognized educational institution." (10 U.S.C. § 1447(5).) DoD regulations implementing the SBP do not provide any further guidance concerning the educational requirement.

ANALYSIS

As DFAS notes in its submission, the SBP statutory language does not specifically address whether the pursuit of training through correspondence courses or home study qualifies an individual as an eligible annuity beneficiary. It also appears that no previous court or Comptroller General decisions have ever specifically discussed the educational requirements of the SBP statute. However, at least two Federal courts have addressed the issue in connection with a somewhat similar entitlement to social security benefits.

In order to qualify for social security child's insurance benefits under title 42 of the United States Code, a child between the ages of 18 and 22 must be in full-time attendance as a student at an elementary or secondary school. (42 U.S.C. § 402(d)(7)(A).) The pertinent implementing social security regulations define full-time student as one who is enrolled in a "noncorrespondence course" carrying a full-time subject load. (20 C.F.R. § 404.367(b).) On the basis of the wording of the social security statute and its implementing regulations, courts have upheld the denial of child's insurance benefits to claimants who were enrolled in correspondence courses. For example, in Miller v. Richardson, 320 F. Supp. 313 (S.D.W.V. 1970), a case involving a claimant who was also taking a correspondence course from the American School in Chicago, the court concluded that the exclusion of correspondence courses in the agency regulations was reasonable. (See also Therrien v. Schweiker, 795 F.2d 2 (2d Cir. 1986) (upholding denial of child's insurance benefits to prisoner who wished to enroll in Western Illinois University, a correspondence school).)

Although the above cases provide some insight into how the courts view correspondence study, they are not dispositive of the present issue, since the statutory language in the social security statute is different from that in the SBP law. In addition, the social security regulations specifically address correspondence courses, whereas the SBP implementing regulations offer no guidance on determining qualifying school attendance for

annuity benefits. We note, however, that the language in the SBP statute states that the course of study or training must be "in a" school or institution, which implies actual physical attendance at an educational facility. In the absence of any implementing regulations addressing the schooling requirement, we believe that the most reasonable interpretation of the statutory language is that study at home or through a correspondence course does not entitle an individual over the age of 18 to receive dependent child benefits under the SBP.

In its submission, DFAS also asked for guidance on a number of other issues if it was determined that correspondence study is qualifying schooling for SBP purposes. In view of our conclusion that [redacted] is not entitled to SBP benefits as a result of his correspondence study, we do not need to address those additional issues.

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