

Policy Advisory: Providing Records to the Department of Veterans Affairs (VA or Department) and State Approving Agencies (SAAs) for the Purpose of Compliance Surveys

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Purpose: Education Service (EDU) is clarifying VA regulation Section 21.4209, title 38, Code of Federal Regulations, “*Examination of records*,” which provides that education and training institutions approved for receipt of GI Bill benefits must make certain records “available” for examination by individuals performing compliance surveys on behalf of the Department. EDU confirms, through this advisory, that “make available” includes providing copies of records that can be removed from site and retained by VA and SAAs for the period legally necessary to support the compliance activity.

Issue: 38 CFR 21.4209, Examination of records, provides that an educational institution must make the following records and accounts, among others, available to authorized Government representatives (i.e., employees of the State approving agency who perform oversight duty as part of a contract with the U.S. Department of Veterans Affairs in accordance with 38 U.S.C. § 3673(d) and employees of the United States U.S. Department of Veterans Affairs); examination will be limited to that needed for auditing purposes regarding appropriate administration of U.S. Department of Veterans Affairs’ educational assistance benefits programs:

Records and accounts pertaining to veterans or eligible persons who received educational assistance under 10 U.S.C. chapter 1606 or 38 U.S.C. chapter 30, 32, 33, 35, or 36 . . . [and o]ther students' records necessary for the Department of Veterans Affairs to ascertain institutional compliance with the requirements of these chapters . . . (38 CFR 21.4209(a)(1)–(2))

“The authority for these regulations is codified in statute (10 U.S.C. § 16136; 38 U.S.C. §§ 3034, 3241, 3323(a), 3689, and 3690). More specifically, 38 U.S.C. § 3690b(3)(A) states that the Secretary of VA may suspend educational assistance to eligible veterans and may disapprove the enrollment or reenrollment of any eligible veteran if the educational institution offering such course has violated one or more of the recordkeeping or reporting requirements of this chapter or chapter 30, 32, 33, 34, or 35 of this title. This statute is implemented by VA regulation at 38 CFR 21.4209. Specifically, 38 CFR 21.4209(e) states that a school’s refusal to provide student records “will be grounds for discontinuing the payment of educational assistance allowance or special training allowance.”

We are aware that certain SAAs have been reluctant to insist that records collected during a compliance survey be copied and/or removed from the school for the express purpose of the compliance activity. They have suggested that non-title 38 statutes and non-VA regulations support a decision *not* to require schools to copy records pertinent

to the compliance survey and allow transfer of said copies despite the requirement that records be available to SAA and VA compliance survey specialists.

Discussion/Answer: VA has no legal reason to believe that any non-Title 38 statutes or other agency regulations supersede 38 U.S.C. § 3690, as codified in 38 CFR 21.4209(e) such as the Family Educational Rights and Privacy Act (FERPA) codified in statute at 20 U.S.C. § 1232g, which protects the privacy of students' education records. To the contrary, VA Office of the General Counsel and the U.S. Department of Education both opine that 38 U.S.C. § 3690(c) would likely supersede FERPA to whatever extent that the records are not otherwise available to these duly "authorized representatives of the Government" under FERPA *and* the Secretary of VA determines that they are necessary to ascertain institutional compliance with the requirements of chapters 31, 32, 34, 35, or 36 of title 38. This opinion is supported by the opening language of 38 U.S.C. § 3690(c) which reads, "[n]otwithstanding any other provision of law . . .," indicating that Congress intended this law to supersede preceding laws and this VA statutory provision above was enacted originally in 1976 (as part of Pub. L. 94–502, § 510), following FERPA's enactment in 1974. Further, not only is this practice consistent with governing law, but it also preserves evidence of the VA finding. Without complete and accurate copies of relevant student records, our "quality control," which consists of a spectrum of EDU oversight activities including review and referral of compliance survey results, Education Quality Control team audits, evaluation of SAA performances, etc. would be materially compromised. Additionally, VA could not withstand the financial and/or legal scrutiny of the Government Accountability Office, Office of the Inspector General, or possibly plaintiffs in litigation. For all of these reasons, VA and SAA compliance personnel must follow VA requirements and, during the course of a compliance survey, obtain copies of examined records from the surveyed educational institution/training facility.

VA does not opine on whether schools must amend their internal policies to explicitly allow the student records to be copied and transferred to compliance survey specialists working for VA or an SAA. However, VA's expectation pursuant to statute, and VA regulation as clarified by this guidance, is that SAAs should encourage schools to develop policies increasing their comfort about releasing copies of records for the sole purpose of ensuring the appropriate administration of VA educational assistance benefits.

In sum, EDU's policy remains what it has always been—student records that are examined in the course of a compliance survey must be copied and retained by EDU and SAAs for the period of time necessary for compliance and auditing purposes. VA continues to expect that all individuals conducting compliance surveys collect copies of these records. Finally, VA EDU maintains the policy that SAAs take lawful measures to suspend the school, pursuant to VA regulation 38 CFR 21.4209(e), should schools be unable or unwilling to make their records available for copying and VA and SAA retention.

Effective Date: September 02, 2020

Questions: If you have any questions, please direct them to the Education Service Policy & Regulations Team via email at POLPROC.VBACO@va.gov.