

**DEPARTMENT OF VETERANS AFFAIRS**

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January 15, 2019

**SENT VIA E-MAIL & U.S. MAIL:**

Charmain Bogue, Acting Executive Director  
Department of Veterans Affairs  
Veterans Benefits Administration  
Education Service  
Washington, D.C. 20420

Dear Ms. Bogue:

The purpose of this letter is to provide a detailed response to your earlier correspondence received on January 2, 2019, regarding CSAAVE's election "not to act" with respect to the application of Ashford University for approval in California. Specifically, you raised concerns that the lack of a concrete approval or disapproval on the application by CSAAVE appeared to violate our Cooperative Agreement for Fiscal Year 2019 ("agreement"). Please note that compliance with the cooperative agreement as well as the federal statutes and regulations governing the administration of its program remains CSAAVE's primary focus. We therefore wish to explain the legal and policy rationales behind our decision with the hope that a compromise may be reached between our agencies that is in conformity with both the law and the agreement.

The "Failure to act" on a given application is expressly recognized in Title 38 of the Code of Federal Regulations. In 38 C.F.R. § 21.4250(b)(1)-(3), we find authority for state approving agencies to approve courses, suspend the approval of courses, disapprove courses, and "not intend to act on the application of a school," respectively. Where the state approving agency elects the last option, the school may "request approval by the Department of Veterans Affairs." (38 C.F.R. § 21.4250(b)(3).) Though the circumstances under which inaction is warranted are not specified in the regulations, it is generally understood that the option exists to prevent denial that might result from a rigid and perhaps premature application of the required standards of eligibility. More specifically, it provides the opportunity for a school to seek approval by the USDVA where further investigation may be more appropriately conducted by the USDVA or other outside entity.

Title 38 of the United States Code, Section 3696 limits the approval of enrollment of veterans where an institution utilizes advertising, sale, or enrollment practices of any type which are erroneous, deceptive, or misleading. In cases where such allegations exist, the State Approving Agency or the Secretary of the USDVA is required to investigate. In light of the pending litigation initiated by the Attorney General of California against Ashford for fraudulent business practices involving their advertisements (allegations which, if proven true, would violate Title 38), CSAAVE exercised the option not to act until such allegations are resolved by the courts or USDVA.

HONORING CALIFORNIA'S VETERANS

In our view, to act otherwise based on the allegations alone would be slovenly and inequitable, while issuing an approval with such grave legal allegations unresolved would amount to a dereliction of our duty to protect our veteran students. In either case, a decision on the merits of the application at this time would constitute an impermissible conflict of interest due to litigation being maintained against Ashford by CSAAVE's own legal advisor, the Attorney General of California, on issues germane to Ashford's application. CSAAVE's failure to act also allows Ashford the ability to exercise its right to seek approval by USDVA, as prescribed by law.

Although "failure to act" is supported in regulation, your letter indicates that CSAAVE's options for responding to an application are circumscribed by the terms of Article II of our agreement: "CSAAVE may only approve or disapprove (i.e. deny approval of) a program it has not currently approved according to the terms of the current agreement between VA and CSAAVE." However Title 38 limits "disapproval" to those courses previously approved and where the requirements for approval are not being met (38 U.S.C. 3672(a), 38 U.S.C. 3679, 38 C.F.R. 21.4259, 38 C.F.R. 21.4250(b)(2)). Since Ashford submitted an initial application for approval, CSAAVE is unable to disapprove courses not previously approved. More so, CSAAVE finds no authority within Title 38 to "deny" approval.

It is the position of CSAAVE that our agreement did not purport to curtail legal options granted to state approving agencies in the Code of Regulations. Rather, the agreement serves to facilitate implementation of those governing regulations. This view finds support in the opening line of Article II, section 1 of the agreement, which recognizes the incorporation of all governing laws found in Title 38 by providing: "Except to the extent otherwise provided by law. . ."

If it is the position of the USDVA that the option to refrain from action on an application under 38 C.F.R. § 21.4250(b)(3) has been eliminated by the agreement, please issue CSAAVE a written advisory so that we may eliminate any further misunderstanding.

CSAAVE appreciates your prompt referral of this matter to our attention and stands ready to work toward a mutually agreeable position that will guide our decisions on future applications. I look forward to successful collaboration in this new year.

Sincerely,

KEITH BOYLAN  
Deputy Secretary, Veterans Services Division  
California Department of Veterans Affairs