ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

16 MAY 1980

HEALTH AFFAIRS

FINAL DECISION: [redacted] Appeal

USAF, Appealing Party
OASD(HA) Case File No. 13-79

The Hearing File of Record, the tape of the oral testimony presented at the hearing (along with the Memorandum of Concurrence from the Director, OCHAMPUS), on OASD(HA) Appeal Case No. 13-79 have been reviewed. The estimated amount in dispute in this case is $3,150. It was the Hearing Officer's recommendation that the OCHAMPUS initial determination to deny the appealing party's Request for Authorization under the Program for the Handicapped be upheld--i.e., the request for special education at a private residential school for handicapped girls for the 1977/1978 school year. It was his finding that although it was concluded that the child's muliple physical handicaps (together with her mild retardation) qualified her under the Program for the Handicapped, appropriate and adequate public programs and facilities were available in the state where the active duty father was assigned and therefore no CHAMPUS PFTH benefits were payable.

After due consideration and review, the Principal Deputy Assistant Secretary of Defense (Health Affairs), acting as the authorized designee for the Assistant Secretary, although in general agreement with the Hearing Officer's review of the evidence, rationale and application of proper regulation provisions, hereby chooses not to accept the RECOMMENDED DECISION. This FINAL DECISION is therefore based on the facts contained in the Hearing File of Record and as presented in oral testimony, and REVERSES the inital denial of the Request for Authorization of Progam for the Handicapped special education benefits for the 1977/1978 school year.

PRIMARY ISSUE(S)

The primary issues in dispute in this case are whether the appealing party's daughter qualifies as handicapped--i.e., whether the child is at least moderately retarded, whether she has multiple physical conditions, the aggregate of which are of such severity as to delimit activities, and/or whether the state to which the active duty parent is assigned could provide adequate and appropriate special education for the child.

FINAL DECISION:
OASD(HA) 13-79

The CHAMPUS Program for the Handicapped (PFTH) is established by law and provides two (and only two) bases upon which an active duty dependent may be determined eligible for the PFTH. First is because of an intellectual deficit--i.e., moderate or severe mental retardation. The second category set forth by Congress is a serious physical handicap. There is no provision in the law for eligiblity based on mild retardation or learning disabilities, or for less than a serious physical handicap. Mental and emotional disabilities or social problems are also not recognized for purposes of determining eligibility for the PFTH.

The applicable regulation further defines what constitutes moderate and severe retardation and a serious physical handicap. The intelligence standards used to indicate the degree of retardation which qualifies an individual for consideration under the PFTH are those developed by the professional community. Moderate mental retardation is listed as "IQ 36-51." (Reference: CHAPTER II, Subsection B. 106 and CHAPTER V, Section D., Paragraph 1.a.) As to a physical handicap, the regulation first establishes general criteria for duration and extent in order to permit a determination that a handicap does, in fact, exist. (Reference: CHAMPUS Regualtion DoD 6010.8-R, CHAPTER I, Subsection B.133 and CHAPTER V, Section E. Paragraphs 1.a. and 1.b.) In addition to several specific categories of physical handicaps, the regulation also provides for qualifying due to multiple physical conditions stating, "In some instances, there are two or more multiple conditions involving separate body systems, neither condition in itself serously handicapping, but which in combination, are of such severity as to delimit activities in a seriously handicapping manner and have resulted in the individual requiring assistance to support the activities of daily living. Each multiple condition case will be reviewed on its own merits." (Reference: CHAMPUS Regulation DoD 6010.8-R, Chapter V, Section E, Paragraph 2.p.)

When use of other than public facilities is being requested, the applicable regulation also states, "...a statement is required from a cognizant public official certifying to the fact that public facilities are or are not available or are or are not adequate to meet the needs of the handicapped individual, and that public funds are or are not made available for support of the needs of the handicapped individual in alternative facilities deemed adequate." (Reference: CHAMPUS Regulation DoD 6010.8-R, CHAPTER V, Section F, Paragraph 2.b.) The regulation further states, "To qualify for benefits under the Program for the Handicapped, public facilities and/or state funds must be

used to the maximum extent they are available and adequate." (Reference: CHAMPUS Regulation DoD 6010.8-R, CHAPTER V, Section G.) It also stipulates, "For dependents for whom [PFTH] educational benefits are requested, the sponsor must submit a statement ...that an adequate educational opportunity is or is not available for the individual either in the public schools or through public resources..." and "...a certified statement by a congnizant public official that a public facility or service is or is not adequate to meet the needs of the handicapped spouse or child is prima facia evidence of the facts stated. The Director, OCHAMPUS (or a Designee), has final authority in determining whether a facility is available and adequate." (References: CHAMPUS Regulation DoD 6010.8-R, CHAPTER V, Subsections G.1. and G.2.)

The applicable regulation, in that portion speaking to Double Coverage, sets forth the policy, "If a handicapped CHAMPUS beneficiary is eligible for other Federal, state and/or local assistance to the same extent as any other resident or citizen, CHAMPUS [PFTH] benefits are not payable. The sponsor does not have the option of waiving available Federal, state, and/or local assistance in favor of using CHAMPUS benefits." (Reference: CHAMPUS Regulation DoD 6010.8-R, Chapter VII Section I.)

In this case, the sponsor/parent, acting on behalf of the minor daughter, physicians and other professionals, public school officials and the director of the private residential school, all submitted statements and/or testimony detailing the factors which in their view supported the position that the private institutional setting was necessary and that the public school facilities available in the state where the sponsor was assigned were not equivalent to those of the private residential school in meeting needs of the child. Although not accepting the Hearing Officer's RECOMMENDED DECISION as the FINAL DECISION in this case, in order to be sure the appealing party fully understands the bases of the initial denial and subsequent appeal decisions confirming the denial, each of the points at issue are addressed in this FINAL DECISION, as well as the rationale for the reversal.

In any determination as to the availability of benefits under the CHAMPUS Program for the Handicapped, certain conditions must be met. First, the beneficiary must be a dependent of an active duty member. Next it must be found that the beneficiary is handicapped--i.e., qualifies as moderately or severely retarded or seriously physically handicapped. Last, it must be determined that an adequate state or local program is not available. All these conditions must be met in order for PFTH benefits to be available.

1. Active Duty Dependent. The Hearing File of Record clearly establishes that the beneficiary in this case was a dependent of an active duty mumber at the time the application for PFTH benefits for the 1977/78 school year was initially submitted. The record also substantiates that the sponsor/parent, who is also the appealing party in this case, was still on active duty at the time of the hearing. Actually, that the child in this case was an active duty dependent was never at issue. (Reference: CHAMPUS Regulation DoD 6010.8-R, CHAPTER V, Section A, Subparagraph 4.a.(1))

2. Moderate or Severe Mental Retardation. In June 1977 the sponsor/parent submitted a Request for Authorization for benefits under the Program for the Handicapped. The primary basis for that request was that his daughter was mentally retarded and required special education.

   o Degree of Intellectual Deficit. It was claimed that the child qualified as mentally retarded and thus was eligible for benefits under the PFTH. A review of the clinical information in the Hearing File of Record indicates that over the years various professionals, both medical and educational, have determined the child to be in the mildly retarded to dull/normal range, with sufficient intellectual capacity to be educable. The evidence submitted indicated that various tests to determine the child's intelligence quotient had been administered since 1967. The test results ranged from IQ scores of 56 to 81. At age six Peabody and Leiter IQ tests indicated a score of 76. The same test instruments indicated some improvement in 1969, reporting the Leiter results of 81 and Peabody testing at 79. Wechsler testing conducted in 1973 indicated a full scale IQ of 68. The same test administered in 1975 showed a full scale IQ of 56. The last reported intelligence study was conducted in 1978 and indicated that verbal performance on the Wechsler Adult Intelligence Scale was 64, overall performance was 72 and full scale IQ was 65. These scores confirm that the child is educable and is in the mildly retarded to dull normal range. They do not support a finding that the child's intellectual deficit was sufficiently severe to qualify as moderately retarded (i.e., an IQ range from 36 through 51)--the minimum level permitted

for consideration under the Program for the Handicapped. (Reference: CHAMPUS Regulation DoD 6010.8-R, CHAPER II, Subsection B. 106 and CHAPTER V, Section D, Paragraph 1.a.)

- o Tolerance on IQ Scores. It was further claimed by the sponsor/parent that it is an accepted principle in psychological testing that the accurancy and reliability of IQ scores will vary between 5 and 10 points--i.e., in effect having a reliability coefficient of .90. This may be true (depending on the specific case) when reviewing the results of only one intelligence test. However, in this case there were several sets of test results to review--performed at different stages of the child's life. With the one exception of the 56 IQ reported on a Wechsler in 1975, all other test results have been well above the 51 IQ minimum required to qualify as moderately retarded. Further, the professional assessments contained in the Hearing File of Record primarily categorized the child as dull normal. While there is no dispute that an intellectual deficit exists, the evidence submitted did not support a finding of moderate retardation despite the one somewhat lower IQ score. Application of sufficient tolerances in IQ scores to qualify the child as moderately retarded is not indicated. (Reference: CHAMPUS Regulation DoD 6010.8-R, CHAPTER II, Subsection B. 106 and CHAPTER V, Section D, Paragraph 1.a.)

- o Other Factors Affecting Intellectual Deficit. It was also claimed that the applicable regulation required that other factors (i.e., other than IQ scores) should be evaluated in determining whether the degree of intellectual deficit is sufficiently severe to qualify under the Program for the Handicapped. This is Program policy, with particular attention given to situations where the intelligence scores are consistently borderline. A review of the documentation in the Hearing File of Record indicates the child was variously described as immature and anxious. A Rorschach test conducted in 1971 indicated anxiety and emotional instability. (Apparently a psychiatric consultation was recommended at that time but no evidence was presented confirming that either the consult or any therapy was conducted.)

There were indications at other times that the child was generally immature. One comment stated that her test results reflected, "...a slower rate of growth in those areas requiring comprehensive judgement and reasoning..." It would appear that while anxiety and immaturity were present, the degree was not beyond that which could reasonably be expected in a child with a borderline intellectual deficit who had been relatively sheltered during her life. Taking tests, answering questions, trying to function in a new or even mildly competitive environment, could be expected to be threatening and result in anxiety. Her life experiences have not prepared her for the social variables she has and will encounter. To some extent this immaturity in terms of peers can be expected to increase not decrease as she reaches adulthood. However, the evidence presented is not sufficiently compelling to permit a conclusion that despite the consistently higher IQ scores, the child is sufficiently unstable or socially immature to permit her to be qualified as moderately retarded. (Reference: CHAMPUS Regulation DoD 6010.8-R, CHAPTER V, "NOTE" under Subsection D.1.)

3. Serious Physical Handicap. During the prehearing review process the OCHAMPUS staff became aware of the possibility that the child might also have physical disabilities.

a. Application of General Tests. The Hearing File of Record includes the results of a CHAMPUS-initiated comprehensive physical examination which confirmed the presence of visual deficits and neurological problems as well as genetic deficiencies. These physical deficits meet the duration test since they are permanent. When viewed separately, no single physical deficit meets the test of extent. However, when considered in the aggregate, a "multiple conditions" situation emerges, indicating the presence of a synergistic effect that appears to meet the test of extent. (Reference: CHAMPUS Regulation DoD 6010.8-R, CHAPTER V, Section E, Paragraph 1.a. and 1.b.)

b. Multiple Conditions. The CHAMPUS Regulation recognizes that in some instances an individual will have two or more less than serious physical defects involving

separate body systems. While each such physical defect may not be seriously handicapping, in combination they can be of such severity as to qualify as a serious physical handicap. A review of the Hearing File of Record (particularly the results of the comprehensive physical examination performed on the child just prior to going to hearing) indicates the following:

- Visual Defects. In early childhood it was determined that the child had vision problems which included severe myopia, strabismus and amblyopia, plus failure to develop integrated eye function to the point where vision was not a dominant sense. The evidence indicates the child had a significant visual sensory deprivation in early childhood. Orthoptic intervention was provided and corrective lenses prescribed. Although there has been some improvement, myopia and amblyopia are still present resulting in continued perceptual difficulty. This history of significant vision impairment most certainly contributed to the child's inability to function in certain areas, even though at present the vision defect, in itself, does not qualify as a seriously handicapping condition.

- Neurological Problems. The Hearing File of Record also indicates a history of some motor impairment. The most recent physical examination indicated mild incoordination and mild ataxia. These conditions result in somewhat impaired fine motor as well as gross motor movements, requiring physical training of an exact nature in order to produce any improvement. However, the neurological deficits, in and of them themselves, are not so extensive as to produce a significant physical disability.

- Borderline Auditory Deficit: Speech and Language Problems. The Hearing File of Record indicates that at one point in her history the child was diagnosed as having a borderline auditory deficit. It was concluded at that time that the child's significant speech and language deficits could be attributable to this lack in auditory sensory input from an early age. Her history indicates

speech and language problems were present in early childhood and continue to the present. The child was only able to speak two or three word phrases even at age five. While poor speech and language development could reasonably be expected due to the child's intellectual level, the degree of verbal deficit appeared to be excessive in relation to the degree of intellectual deficit. At the time the comprehensive physical examination was performed in 1978, it was noted that the child's recall of spoken language was only at a three and one-half (3½) year old level, while comprehension of spoken information has progressed to the nine and one half (9½) year old level. There appeared to be a general concensus among the professionals that this area of development was significally lower than it should be. This could be attributable to two factors--the early borderline auditory problems and impaired oral musculation which is often associated with even mild retardation. Therefore, while in most circumstances speech and language difficulties fall within the category of learning disabilities which are not considered in qualifying an individual under the PFTH, it does appear that in this case, in addition to the mild retardation, physical deficits (albiet borderline) were and are contributing factors to the speech and language problems. However, the possible borderline auditory deficit and related speech and language problems would not, in and of themselves, qualify as a serious physical handicap.

o Genetic Defects: Congenital Anomolies. The Hearing File of Record supports the conclusion that a dysmorphic syndrome is present in the child. Various physical examinations revealed a dysmorphic appearance (first noted while an infant) on the basis of epicanthal folds, flat facial profile, auricular dysplasia and extremity abnormalities. A pectus carinatum was also found to be present (i.e., undue prominence of the sternum), as well as prominent, low-set, cupped ears. Examination of the extremities revealed a small left fifth digit

and metacarpel. However, again the presence of the various congenital anamolies would not, of themselves, qualify as serious physical disabilities.

- o Aggregate Effect: Synergistic Interaction. Notwithstanding the fact that each of the physical deficits standing alone would not qualify as a serious physical handicap, it is the finding of the Principal Deputy Assistant Secretary of Defense (Health Affairs) that when viewed in combination, the physical deficits (which do involve separate body systems) present a situation of sufficient severity to substantially delimit the activities of the child, thus meeting the intent of the "muliple conditions" provision. The findings further indicate the synergistic effect of the disabilities, one to the other, results in a situation whereby "one plus one equals ten" rather than that the usual two--i.e., a phenomenon where the total is greater than the sum of its parts. This interaction which intensifies each physical disability due to the presence of the others, supports a determination that the dependent child in this case qualifies as seriously physically handicapped. (Reference: CHAMPUS Regulation DoD 6010.8-R, CHAPTER V, Section E, Paragraph 2.p.) And while not controlling in the determination of the presence of a serious physical handicap, when the multiple physical deficits are further viewed in conjuction with the the mild retardation, the evidence is even more compelling that the child qualifies as handicapped.

4. Request to Use Private Educational Facility. It was claimed by the sponsor/parent that the state to which he had been assigned could not provide his daughter with a special education to meet her requirements. It was his position that she should remain at the private residential school she had attended for four years and that the CHAMPUS Program for the Handicapped should extend financial assistance.

- o Public Facility/Funds. The sponsor/parent claimed that the public facilities in his current state of assignment could not provide equivalent and appropriate special education for his daughter. The Hearing File of Record contains two somewhat equivocal written statements from the cognizant public official in the resident state.

The first dated 24 June 1977 states, "...we do not have a program appropriate to meet [the child's] current needs." It further stated that, "we, however, are not in a position to fund her training at ...any other outside school." This statement not only failed to address the issue of an adequate program of special education, but also how the state was meeting the requirements of PL 94-142 (Education of the Handicapped Act) if no state program was adequate or funds available. In a second statement dated 5 January 1979, the public official further equivocates by stating, "We [the state] do not have an educational program equivalent to the one existing at [private school] and local public funds are simply not available to defray the cost of her present residential placement." [emphasis added] Again, because this statement still did not meet the requirements for a cognizant public official's statement, another statement was secured by OCHAMPUS. On this occasion the message is still contraditory, stating first, "Federal legislation, as applied in Michigan according to Public Law 94-142, requires a free and appropriate education for all handicapped students. Since [the child] has been diagnosed as a handicapped child (EMI) and lives in our school district, we much [sic] provide her with an appropriate and adequate educational program. "[emphasis added] Later, in the same statement, the official concludes,"...after reviewing all available programs, an adequate educational program equivalent to [private school] does not exist here..." [emphasis added] This last communication is internally contraditory--i.e., after stating that by law an adequate program must be provided by the state, it is then concluded that an adequate program is not available. In oral testimony at the hearing, prodded by questioning, the public officials did state unequivocably that their state's programs for children with handicaps similar to the dependent child in this case were adequate and appropriate even if not equivalent to the program the beneficiary was receiving at the private institution. It would appear that an effort was made by the cognizant public official(s) to frame their statements in such a manner as to gloss over the availability of adequate public programs, which in turn would encourage a finding of CHAMPUS responsibility. It took direct and aggressive ques-

tioning at the hearing itself to fully clarify the situation. Notwithstanding, the difficulty encountered by CHAMPUS in obtaining a full and complete response as to the availability of state programs, it is apparent that the state of residence does, in fact, have an adequate program of special education as is required to be in compliance with Public Law 94-142, the Education for the Handicapped Act. It is therefore the finding of the Principal Deputy Assistant Secretary of Defense (Heath Affairs) that despite the fact the child was deemed to have a serious physical handicap under the "multiple conditions" provision, CHAMPUS PFTH benefits were correctly denied because an adequate public education was available in the state of residence. (Reference: CHAMPUS Regualtion DoD 6010.8-R, CHAPTER V, Section F, Paragraph 2.b. and Subsection G.1 and G.2.)

o Public Facilities not "Equivalent." It was strongly asserted by the sponsor/parent that because the public special education program in the state of residence was not "equivalent" to that offered by the private residential school his daughter had been attending, that it was then not "adequate." First, the Hearing File of Record is silent on exactly how the state program was not equivalent to that offered by the private residential school. However, this is a moot point because neither Public Law 94-142 nor the CHAMPUS regulation speak to "equivalent" programs. Public law 94-142 provides that public education must provide a free and appropriate education for all handicapped children. The CHAMPUS Regulation requires that the cognizant public official of the local school district determine whether or not an adequate program/facility is available. Such a determination by a public official may be accepted as prima facia evidence of the facts stated. It is the CHAMPUS position that if a special education program/facility for the handicapped meets the requirements of PL 94-142, it is "adequate" within the intent of CHAMPUS. If the sponsor/parent in this case disagreed with the determination that the public program was adequate, he could have appealed that decision under the provisions of PL 94-142. Whether the state's public program is adequate and appropriate is not a subject for, nor within the jurisdiction of, the CHAMPUS administrative appeal system. Further, the sponsor/parent always has

the choice of seeking out an alternative private school education which he believes to be better than the "adequate" public programs, but in so doing is then personally responsible for financing such private school. However, such a decision on a part of a sponsor/parent would not change the fact that the CHAMPUS Program for the Handicapped is available only to the extent an adequate public program/facility is not provided to the same extent as any other resident or citizen--i.e., "equivalency" is not a factor in that decision. (Reference: CHAMPUS Regulation DoD 6010.8-R, CHAPTER V, Subsection G.1. and G.2. and CHAPTER VIII, Section I.)

5. Review of Denial Decisions: Summary. Therefore, based on the controlling laws and applicable regulations, it is the finding of the Principal Deputy Assistant Secretary of Defense (Health Affairs) that the initial determination to deny was correct as were the subsequent appeal decisions that supported the initial denial. Even though the child in this case is a dependent of an active duty member and subsequently found to be seriously physically handicapped by virtue of multiple conditions, the fact that the local public school system in the state of residence had an adequate and appropriate special education program available as required under PL 94-142, made the CHAMPUS denial decision a proper one. (Reference: CHAMPUS Regulation DoD 6010.8-R, Chapter V, Subsection 6.1. and 6.2. and Chapter VIII, Section I.)

6. Reversal Decision. Notwithstanding the above findings, it is the further judgement of the Principle Deputy Assistant Secretary of Defense (Health Affairs) that the circumstances of this case are unique.

- The Hearing File of Record indicates that the initial request for approval of PFTH benefits for the 1977/1978 school year was based on the dependent child's intellectual deficit and that the initial denial was based on the fact she did not qualify as moderately retarded. Because of the basis of this decision, no further effort was made to investigate the availability of public programs/funding.

- In its Reconsideration and Formal Review decisions, the agency (OCHAMPUS) upheld the initial denial, still basing its finding on the absence of a sufficiently severe mental deficit to qualify as moderately retarded.

And again there was no further investigation as to the availability of adequate public facilities since it was moot at that point.

- When the case was considered at prehearing review, the OCHAMPUS staff recognized the possible presence of several less than serious physical defects which might, in the aggregate, permit qualification for benefits under the "multiple conditions" provision. Apparently at that time it was assumed the issue of the availability of an adequate public program had been fully investigated because this was not pursued. Instead, in an effort to provide every assistance for the sponsor and his daughter, OCHAMPUS exercised its right to request a physical examination in order that a determination under the Multiple Conditions provision could be made. The sponsor/ parent agreed and the physical examination was performed in September 1978. (Reference: CHAMPUS Regulation DoD 6010.8-R, CHAPTER V, Subsection A.1.)

- Subsequent to the receipt of the reports from the comprehensive physical examination (on which the determination of the presence of a serious physical handicap was primarily based), OCHAMPUS discovered that the cognizant public official's statement which had been submitted with the initial request for approval for PFTH benefits was inadequate and did not provide the information required to make a decision as to the availability of an adequate public program. Had this been recognized earlier, the decision to request a comprehensive physical examination would not have been necessary, because an adequate and appropriate public special education prgram was found to be available in the state of residence.

Under most circumstances an error, either of commission or omission, is in no way binding on the Program--each case is determined on its own merits in keeping with the law and applicable regulations. However, it is the judgement of the Principal Deputy Assistant Secretary of Defense (Health Affairs) that exercise of the Program's right to request a comprehensive physical examination should not have been proposed until it was ascertained that all technical requirements had been resolved. Requiring a comprehensive physical examination is perfectly acceptable when complex

medical issues are involved, but should be used only as a last resort since it does involve a very real intrusion to the patient's life and privacy. The Hearing File of Record indicates the child was apprehensive about, and nervous during, the physical examination--a significant stress situation to which she was subjected that turned out to be unnecessary. It is on the basis of this unique set of circumstances that the REVERSAL DECISION is made. It is further noted the reversal is issued with the full recognition that the OCHAMPUS decision to request a physical examination was done in the best interest of the child and the Military family involved in this case and, conversely, that the Hearing File of Record indicates the sponsor/parent and school officials were less than candid concerning the availability of an adequate public program of special education.

This REVERSAL DECISION applies only to the request for financial assistance under the PFTH for the 1977/1978 school year and does not in anyway commit the Program for any other service or time period than that in dispute in this appeal.

SECONDARY ISSUES

The appealing party raised several secondary issues during the course of his appeal. Although in and of themselves they failed to make a case for reversal of the decision to deny CHAMPUS benefits for the special education provided by the private residential school, they do not contra-indicate the consideration given to the unique aspect of this case.

1. Need for Consistency and Continuity. The appealing party, the cognizant public official from the state of residence and the director of the private residential school supported the position that considering the multiple handicapping features identified in this case, frequent changes in program were not beneficial. It was also cited that the adjustments necessary in such changes were most difficult during the teen age years--particularly since the child had been in the private residential training school since the 1974/1975 school year. (A local school district in another state had funded her special education until the 1977/1978 school year, when the sponsor/parent was reassigned to the current

state of residence.) That the mobility of a Military family can be a problem in the educational stability of dependent children is recognized, and that this can be even more difficult with a handicapped child is further noted. However, this is an element of Military life that is well known and must be assumed to have been considered and accepted when an individual enters and/or decides to remain in the Service. As a matter of fact, particularly for handicapped children, the regulatory provisions are specifically designed to require a sponsor/parent, upon reassignment within the United States, to seek appropriate public programs/facilities at the new location. The purpose of this provision is to preclude Program support of technical abandonment of handicapped children. Those parents that believe a change in special educational programs would adversely effect their child may choose not to use public programs/facilities but in so doing must be willing to personally finance the private programs. CHAMPUS requires that those local public programs determined to be adequate must be used. That parents personally choose not to do so for whatever reason, including "consistency and continuity" is not sufficient reason to make CHAMPUS PFTH benefits payable contrary to policy. (Reference: CHAMPUS Regulation DoD 6010.8-R, Chapter V, Section F, Subparagraph 2.f.(3) and Subsection G.1 and G.2, and CHAPTER VIII, Section I.)

2. Sponsor's Decision to Remain on Active Duty. The appealing party indicated that one of the deciding factors in his decision to continue in Military service was the availability of the Program for the Handicapped. It was his position that since his daughter's birth in 1961 he had been concerned with the long term responsibility associated with her handicap and that he has relied on CHAMPUS to assist in the cost of her special needs. From a review of the Hearing File of Record it would appear that the appealing party has, in the past, benefited substantially under CHAMPUS. However, a major change has occurred--i.e., passage of PL 94-142, "The Education for the Handicapped Act," requiring that all state and local public educational systems provide free and appropriate education (including required related special services such as speech therapy, etc) to all handicapped children. There are no residency requirements. Therefore, this now puts Military families on an equal footing with the civilian community in terms of special education. A major

element of that law was the formalization of public policy which encourages the use of public facilies and the "mainstreaming" of handicapped children in the least restrictive environment thus broadening their educational and social experiences as well as reinforcing familial relationships. This same policy is reflected in the regulatory provisions governing the CHAMPUS PFTH. Further, the CHAMPUS PFTH is a special program specifically designed by Congress to provide financial assistance to active duty families who could not qualify for state or local assistance because of the residency requirements then in effect. Public Law 94-142 no longer permits such residency requirements; Military families are now eligible for state and local special education and assistance programs to the same extent as any other resident. It would not appear that the appealing party is in anyway less protected because support for his daughter's special education needs now comes from the public schools rather than CHAMPUS. In fact, it would appear he is in a more advantageous position since PL 94-142 guarantees a free and appropriate education. Notwithstanding these observations, while it is recognized that benefits influence decisions to remain in Military Service, is it not reasonable to assume that because such a decision is made, it in anyway modifies the conditions under which a person is determined to qualify for benefits.

RELATED ISSUE

Additional Request for Approval of PFTH Benefits: 1978/1979 School Year. The Hearing File of Record indicates that the appealing party did make a personal choice to keep his daughter at the private residential school during her last two years of school (i.e., the 1977/1978 and 1978/1979 school years). The file contains a request for approval for PFTH benefits for the 1978/ 1979 school year--the one following the school period which is the primary subject of this appeal. As stated in the reversal paragraph of this FINAL DECISION, said reversal is an exception based on a unique circumstance and is limited to the 1977/1978 school year. If the circumstances of the application for the 1978/1979 timeframe are otherwise identical to the school year in dispute, CHAMPUS Program for the Handicapped benefits are not available because an adequate public program of special education has been found to be is available in the state to which the

sponsor is assigned. If the sponsor has again been reassigned (he indicated his tour would be relatively short), before CHAMPUS PFTH benefits could be approved, a new application and review would be required to determine whether the new state of assignment can provide an adequate public program of special education.

SUMMARY

This FINAL DECISION to reverse the initial denial and extend CHAMPUS Program for the Handicapped benefits to cover special education in a private residential school for the 1977/1978 school year in no way implies that the initial determination to deny was incorrect under the terms of the applicable regulation. Neither does it imply that subsequent appeal decisions, including the Hearing Officer's RECOMMENDED DECISION, were incorrect. It simply reflects special consideration of the unique situation represented by this case.

Further, it is again emphasized that this reversal applies specifically to the request for approval of PFTH benefits for special education in a private residential facility for the 1977/1978 school year only, and should not be construed as having any general application.

OCHAMPUS is directed to reimburse the appealing party for the Government's share of the special education costs incurred at the private residential school for the 1977/1978 school year. Because the cost for the schooling was presented as an estimated monthly cost only, the exact benefit payable cannot be determined. However, inasmuch as the appealing party was a Colonel (an 06) at the time the disputed application for PFTH benefits was received, and continued in that rank at least through the time of the hearing, he is responsible for the first seventy-five ($75.00) dollars for each month of the 1977/1978 school year. After such monthly cost sharing amount has been satisfied by the appealing party, CHAMPUS may extend PFTH benefits up to three hundred fifty ($350.00) dollars per month, not to exceed $3,150.00 for the school year (i.e., nine (9) month at $350.00).

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Issuance of this FINAL DECISION is the concluding step in the CHAMPUS appeal process. No further administrative appeal is available.

Vernon McKenzie
Principal Deputy Assistant
Secretary of Defense
(Health Affairs)