092081

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

40257

B-178966

December 6, 1973

The Honorable
The Secretary of Defense

Dear Mr. Secretary:

Further reference is made to a letter dated June 18, 1973, from the Acting Assistant Secretary of Defense (Comptroller) requesting a decision concerning the eligibility of several categories of otherwise dependent children of retired members, the children themselves being service members, to receive annuities under the provisions of the Survivor Benefit Plan, 10 U.S.C., 1447-1455, as added by Public Law 92-425. A copy of the Department of Defense Military Pay and Allowance Committee Action No. 481 setting forth and discussing the question was attached.

The question posed in the Committee Action is:

"Is the child of a deceased retired member, who is:

"a. Under age 18, and serving on active duty in a uniformed service; or

"b. under age 22, and serving as a cadet or midshipman at a service academy; or

"c. under age 22, and enrolled in an institute of higher learning under a military subsistence scholarship program;

a dependent eligible for payment of a Survivors Benefit Plan annuity, within the meaning of 10 U.S.C. 1447(5), as amended by P. L. 92-425."

The brief discussion of this question in the committee action points out that since persons of the categories delineated in the question are provided quarters and subsistence by the Government, doubt has been expressed as to whether Congress intended to include people in the above-mentioned categories as being considered eligible for Survivor Benefit annuities. However, the view was also expressed that if Congress had intended to preclude such persons from being considered eligible under Public Law 92-425, specific language to that effect would have been included in the statute.

[Eligibility of Dependent Children of Retired Service Members To Receive Annuities]

46315

PUBLISHED DECISION
53 Comp. Gen. .....

Section 1447(5), title 10, United States Code, provides in pertinent part that:

"'Dependent child'" means a person who is --

"(A) unmarried;

"(B) (i) under 18 years of age; (ii) at least 18, but under 22, years of age and 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; or (iii) incapable of supporting himself because of a mental or physical incapacity existing before his eighteenth birthday or incurred on or after that birthday, but before his twenty-second birthday, while pursuing such a full-time course of study or training; and

"(C) the child of a person to whom the Plan applies, including (i) an adopted child, and (ii) a stepchild, foster child, or recognized natural child who lived with that person in a regular parent-child relationship."

A review of the legislative history of the Survivor Benefit Plan shows that the act was the culmination of a long recognized need for the protection of military widows and dependent children. The Department of Defense originally proposed that the Plan make no specific provision for children, but instead suggested that those parents who desired to provide benefits for children, in addition to those available under social security, could do so through the insurable interest provision (10 U.S.C. 1448(b)). However, during consideration of the matter in the House of Representatives a specific children's benefit was added. Consequently, section 1450, title 10, United States Code, provides that when a member of the Plan dies a monthly annuity shall be paid to:

"(1) the eligible widow or widower;

"(2) the surviving dependent children in equal shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligible under this section; or

> "(3) the natural person designated under section 1448(b) of this title at the time the person to whom section 1448 applies became entitled to retired or retainer pay, if there is no eligible beneficiary under clause (1) or (2)."

This is the basic context in which the Committee's question concerning dependent eligibility should be framed. In this connection, there is nothing in the statute which requires, as a general proposition, a showing of actual dependency in all cases before allowing a retiree's child to qualify as a "dependent child" under the act. Only with regard to children who are incapable of supporting themselves because of a mental or physical incapacity existing before their eighteenth birthday or, in the event such children are attending school full time, before their twenty-second birthday and a foster child who, in order to qualify as a "dependent child" of a person to whom the Plan applies, must at the time of death of that person reside with and receive over one-half of his support from that person and not be cared for under a social agency contract, is there any limitation as to actual dependency.

Considering the clear and unambiguous language of section 1447(5) in defining a "dependent child", it is our view that, in the absence of a clear expression of legislative intent to the contrary, the only valid restrictions on dependent eligibility are those limitations specifically mentioned in this section. We therefore must conclude that Congress did not intend to prohibit those individuals in the categories mentioned, even though they may be provided quarters and subsistence by any of the uniformed services, from qualifying as eligible beneficiaries as dependent children and your question is answered accordingly.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States