

Forum for Academic and Institutional Rights
Kent Greenfield, President

Society of American Law Teachers
Eileen Kaufman, Co-President
Tayyab Mahmud, Co-President

July 5, 2007

Federal Docket Management System Office
1160 Defense Pentagon
Washington, DC 20301-1160

**Re: Proposed Regulations Implementing 10 U.S.C. § 983, 32 C.F.R. Part 216
Docket No. DoD-2006-OS-0136, RIN 0790-AI15**

Dear Madam or Sir:

We write to submit comments on behalf of the Forum for Academic and Institutional Rights, Inc. (“FAIR”), a group of law schools and faculties, and the Society of American Law Teachers (“SALT”), an organization of law professors from law schools around the country, plaintiffs in the litigation concerning the constitutionality of 10 U.S.C. § 983 (the “Solomon Amendment”), the statute sought to be implemented through the proposed regulations. FAIR is a New Jersey membership corporation whose membership consists of nearly forty law schools and law faculties from around the country. It speaks on behalf of all of these law schools and faculties on matters relating to the Solomon Amendment and its implementation, including the proposed regulations at issue. SALT speaks on behalf of a group of law professors representing almost every ABA-accredited law school in the country.

FAIR and SALT have identified several components of the proposed regulation that impermissibly go beyond the scope of the statute and would interfere with law schools’ constitutional rights and/or institutional autonomy. They are:

- The provision defining “[e]qual in quality and scope” as “[t]he same access to campus and students on campus provided to the nonmilitary recruiter receiving the most favorable access.” Proposed § 216.3(e); *see also* Proposed § 216.1(b).
- The provision requiring schools to enforce “time, place, and manner policies ... such that the military recruiters [do not] experience an inferior ... recruiting climate.” Proposed § 216.4(a)(5).
- The provision forbidding schools from having “polic[ies] or practice[s] [that] in effect den[y] students permission to participate, or ha[ve] prevented students from participating in [military] recruiting activities.” Proposed § 216.4(a)(6).
- The provision requiring the government to investigate a school that “is unwilling to declare in writing, in response to an inquiry [from the military] that the covered school does not have a policy or practice of prohibiting, or in effect preventing, [military recruiters] from the same access to campuses or access to students on campuses

provided to the nonmilitary recruiter receiving the most favorable access”
Proposed § 216.4(d)(8).

The first of these provisions suffers from a degree of vagueness that would hobble schools in their efforts to over-accommodate military recruiters. The latter three go farther than needed to implement the Solomon Amendment, while trampling on schools’ First Amendment rights to protest the military’s discriminatory “don’t ask, don’t tell” policy and its implementation at their openly gay and lesbian students’ expense.

I. The “Most Favorable Access” Provisions

These provisions define the statutory term requiring schools receiving federal funds to accord military recruiters access to their students and campuses “in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.” 10 U.S.C. § 983(b)(1). By defining this somewhat vague statutory command to require “[t]he same access to campus and students on campus provided to the nonmilitary recruiter receiving the most favorable access,” the proposed regulations create more problems than they solve, and go beyond the permissible range of interpretation sanctioned by the statutory language. Specifically, they seem to require either an impossibly high level of access for military recruiters, or subject schools to unconstitutionally vague regulation, on pain of severe financial penalties.

Assume, for example, that a school has three offices used for recruiting interviews, and that one is larger than the other two. Must the school give military recruiters the largest office on penalty of a statutory violation? Or assume that a school organizes a special reception for an interviewing employer headed by a former faculty member or influential alumnus. Must the school organize a similar event for the military recruiters, or lose all its federal funding? Or even, assume that a particular employer is very popular with students at a school, and hundreds of students are interested in interviewing with this employer, so the school sets aside an entire day, or makes an exceptionally large facility available for these interviews. Must the school organize a similar event for military recruiters, even if there is sparse interest in military careers among the student body?

There are any number of similar practical dilemmas that could be faced by the well-meaning career-office employee seeking to comply with the proposed regulation. Must the visits of military recruiters be scheduled during private-sector recruiting events—and not public-sector events, where they would be most appropriate—if a school determines that the private-sector events are attended by more students? Or would students attending the private-sector event be less likely than their more civically oriented counterparts to be interested in military careers, and thus the schools would violate their duties by inviting the military to the private-sector recruiting event? (The comments to these regulations submitted on behalf of the National Association of Law Placement, an organization of law-school placement professionals, provide further detail as to the practical difficulties the proposed rule could engender.)

It does not matter that in many given situations the schools may be able to work out an appropriate accommodation with military recruiters. Vague laws may trap those who desire to be law-abiding by not providing fair notice of what is prohibited. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). They also provide opportunity for arbitrary and

discriminatory enforcement since those who apply the laws have no clear and explicit standards to guide them. See *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). Further, when a vague statute “abut[s] upon sensitive areas of First Amendment freedoms,” it “operates to inhibit the exercise of [those] freedoms.” Uncertain meanings inevitably lead citizens to “steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.” *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

If the proposed regulations are implemented as written, military recruiters will have unprecedented power to coerce school recruiting staff into giving them whatever assistance they desire, without regard to the expense, necessary resources, or reasonableness. They will be able to justify any such request on the grounds that some other employer, at some point, received a similar accommodation—without regard to whatever particular circumstances might have justified the particular accommodation at that time. Most school recruiting staff will not dare refuse the military recruiters any request, no matter how outrageous, for fear of placing their entire university at risk for losing vast sums of federal money. This is an untenable situation.

Because the purpose of the Solomon Amendment is to ensure that schools do not restrict the activities of military recruiters—despite their discrimination against openly gay and lesbian students in violation of the schools’ antidiscrimination policies—a simpler solution exists. The regulations could, for example, define the degree of required access as:

a degree of access to campuses and students on campus that is roughly equivalent to that received by similarly situated nonmilitary recruiters, without regard to their hiring practices.

This would assure that military recruiters received appropriate access to students without making unreasonable demands on school recruiting staff, and without subjecting schools to the fear of being found in violation of the statute with regard to every possible logistical decision relating to the visits of military recruiters.

II. The “Time, Place, and Manner Restrictions” Provision

Another provision at issue is the one requiring schools to enforce “time, place, and manner policies . . . such that the military recruiters [do not] experience an *inferior* or unsafe *recruiting climate*.” Proposed § 216.4(a)(5) (emphasis added). We absolutely agree that schools should ensure the safety of military recruiters and the students they interview. The “inferior . . . recruiting climate” provision, however, might overstep the bounds of the statute—and the Supreme Court’s opinion interpreting it.

In that opinion, a unanimous Court concluded that “[l]aw schools remain free under the statute to express whatever views they may have on the military’s congressionally mandated employment policy, all the while retaining eligibility for federal funds.” *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 126 S. Ct. 1297, 1307 (2006). More importantly, the Court cited with approval the Solicitor General’s acknowledgement that the statute allows schools to “put signs on the bulletin board next to the door” where military recruiting interviews are taking place, to “engage in speech” directed against the military’s recruiting policies, or to “help organize student protests”

against the presence of the recruiters and their policies. *See id.* (quoting Tr. of Oral Arg. 25). This distinction was essential for the Supreme Court’s conclusion that the Solomon Amendment “regulates conduct, not speech.” *Id.* (the statute “affects what law schools must do—afford equal access to military recruiters—not what they may or may not say”).

The proposed regulations threaten the schools’ right to protest against the military recruiters and their discriminatory recruiting policy, a right carefully safeguarded by the Supreme Court and acknowledged by the government. Military recruiters will undoubtedly claim that they “experience an inferior . . . recruiting climate” compared to non-discriminating employers, when a school-sponsored protest takes place on the day they come to campus, or “signs on the bulletin board next to the door” inform students that the military does not abide by the school’s antidiscrimination policy.

But if that is an “inferior” recruiting climate, it is precisely what the military must tolerate if schools and students are to be permitted to exercise their First Amendment rights to protest against their presence and discriminatory practices. The reference to an “inferior . . . recruiting climate” should thus be removed from the proposed regulation.

III. The “Prohibiting or Preventing” Provisions

The last two provisions identified above forbid schools from having “polic[ies] or practice[s] [that] in effect den[y] students permission to participate, or ha[ve] prevented students from participating in [military] recruiting activities,” Proposed § 216.4(a)(6), and require schools to aver in writing that they have no such policies, Proposed § 216.4(d)(8). These provisions are generally unobjectionable, except insofar as they could be read to forbid schools from expressing their disagreement with the military’s discriminatory recruiting policies, and to advocate these views to their students. Such a prohibition would not only go beyond the permissible scope of the statute, but it would interfere with the schools’ First Amendment rights.

While schools engaged in such public speech and advocacy would not “deny” their students permission to interview with military recruiters, some military recruiters might believe that it “in effect . . . prevented” certain students from “participating in recruiting activities”—in the sense that certain students might have initially been inclined to interview with the military, but decided against it once they learned from their school of the military’s discriminatory hiring policies.

Of course, any school would be well within its First Amendment rights, as discussed above, to have a policy of informing its students about the military’s policies towards openly gay and lesbian students. Indeed, it would even be permissible for a school actively to discourage its students from working for employers who discriminate. It remains, therefore, for these rules to be clarified to accommodate the constitutional requirements. The rule could be rewritten explicitly to permit schools to express their views about the military’s policies, or their moral opprobrium at those who choose to interview with employers that irrationally exclude a portion of the student body from the recruiting pool, so long as no tangible restrictions are placed on students’ participation in these interviews.

* * *

As you are undoubtedly aware, FAIR and SALT litigated against the constitutionality of the Solomon Amendment, and the statute was ultimately upheld by the Supreme Court. Our member schools are thus required to comply with the statute, and intend to do so fully, albeit reluctantly. But as the Supreme Court explicitly recognized, the Solomon Amendment is enforceable only insofar as it does not interfere with schools' constitutional right to protest against the military's discriminatory policies. Furthermore, schools cannot be placed at the whims of military recruiters whose every logistical demand is refused only at the schools' peril.

These provisions of the proposed regulations must be fixed.

Very truly yours,



Eileen Kaufman
Co-President,
Society of American Law Teachers
Touro College Jacob D. Fuchsberg Law Center
225 Eastview Drive
Central Islip, NY 11722



Kent Greenfield
President,
Forum for Academic and Institutional Rights
Boston College Law School
885 Centre Street
Newton, MA 02459



Tayyab Mahmud
Co-President,
Society of American Law Teachers
The John Marshall Law School
315 S. Plymouth Court
Chicago, IL 60604