

THE ASSOCIATION
FOR LEGAL CAREER
PROFESSIONALS™

2007-2008 BOARD OF DIRECTORS

President

Gihan Fernando
Georgetown University Law Center

Vice-President

Gayle P. Englert
Cole, Schotz, Meisel, Forman & Leonard, P.A.

Treasurer

David A. Montoya
The University of Texas School of Law

President-Elect

Michael R. Gotham
Heller Ehrman LLP

Directors

Donna Davis-Gregory
Chapman University School of Law

Jean A. Durling

Fox Rothschild LLP

Arthur F. Fama, Jr.

Benjamin N. Cardozo School of Law

Terrence J. Galligan

University of California, Berkeley School
of Law (Boalt Hall)

Mina Jones Jefferson

University of Cincinnati College of Law

Tammy Patterson

Gardere Wynne Sewell LLP

Eszher G. Rodriguez

Holland & Knight LLP

Tony Waller

University of Illinois College of Law

Lisa M. Watson

Sommer Barnard PC

Immediate Past President

Lisa M. Dickinson

Kirkland & Ellis LLP

Executive Director

James G. Leibold

June 29, 2007

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

RE: Department of Defense
Office of the Secretary
32 CFR Part 216
[DoD-2006-OS-0136]
RIN 0790-A115
Military Recruiting and Reserve Officer Training Corps Program
Access to Institutions of Higher Education
AGENCY: Department of Defense
ACTION: Proposed Rule

Dear Sir or Madam:

NALP, the Association for Legal Career Professionals, was founded in 1971 as the National Association for Law Placement. It is a membership organization dedicated to facilitating legal career counseling and planning, recruitment, and retention, and to the professional development of law students and lawyers. Its membership includes approximately 200 law schools (among them virtually every ABA-accredited law school) and more than 950 public and private sector legal employers (including law firms large and small, as well as many branches of local, state, and federal government).

NALP has an unequivocal and longstanding non-discrimination policy that includes sexual orientation, and insists upon adherence to fair and non-discriminatory access in legal recruitment. NALP also has a strong interest in the fair and professional administration of career services at all law schools and for all law students, including the fair and professional administration of the on campus interview process that is a central feature of the legal hiring process for law students. Finally, NALP has a strong interest in helping law school career services professionals retain the freedom to perform their jobs in accordance with the values that are central to the schools they serve, the chief of which is equal access to employment opportunities for all students.

In the course of administering their recruitment programs, law school career services offices provide an enormous amount of assistance, of various sorts, to a wide variety of employers. Chief among these is providing access to its campus and its students. Law schools provide a forum for employers of all kinds to meet with their students in a variety of settings. In the course of a recruiting season, through their career services offices, law schools provide facilities for employers to conduct on campus interviewing of individual students, to participate in group information sessions, employer panel presentations, and even receptions, and to participate in job fairs.

Suite 1110
1025 Connecticut Avenue NW
Washington, DC 20036-5413
(202) 835-1001
Fax (202) 835-1112
Email: info@nalp.org
Web: www.nalp.org

In order to accommodate the needs of many students and many employers in a busy and limited season, law school career services professionals must exercise their professional discretion in allocating finite physical, financial and human resources in order to ensure the maximum access for students to the maximum number of employers.

These proposed regulations interfere with the professional discretion of law school career services professionals to allocate resources by insisting on access for military recruiters that is equal in quality and scope to the access provided to the non-military recruiter receiving the most favorable access. 10 U.S.C. 983(b) insists only on access that is equal in quality and scope to the access that other recruiters receive. The proposed regulations broadly expand the carefully proscribed statutory mandate by requiring not only access that is "at least equal in quality and scope" but, in addition, access that is "most favorable." This assertion of most favored recruiter status impermissibly interferes with law schools' ability to exercise professional judgment in allocating finite resources within the law school, and interferes with the law school career services office primary mission to provide equal access to all employers for all students. Specifically, the proposed regulations, which are broader in scope than the statute requires, are problematic for the following three reasons.

First, the vagueness of the standard creates great uncertainty for law schools in their efforts to comply with the Solomon Amendment. Second, insistence on the "most favored" recruiter status may actually create conditions that are unfavorable to the military. And third, the proposed "most-favored" standard would impede the ability of career services professionals to exercise their best professional judgment in tailoring their programs to address the needs of all employers and the students the programs are intended to serve.

1. The vagueness of the "most favorable" standard poses great risk to law schools

In addition to going beyond the express terms of the Solomon Amendment, "most favorable access" is so vague a term that compliance is impossible to determine with certainty. "Most favorable access" has no uniform, objective meaning in the on-campus recruiting process, and therefore can provide no real guidance to law schools. With no known scope of "most favorable access," a law school risks violating the proposed regulation whenever it treats military recruiters differently from other employers. Yet, it necessarily has to treat each employer differently since they cannot be all in the same place at the same time meeting the same students. Furthermore, what is most desirable for one employer is not necessarily so for another: a time schedule or location that might work best for one employer may not help another gain additional or better access to students. Recruiting programs require a multitude of decisions and accommodations, and having to weigh each one against a vague "most favorable" standard would cause an unreasonable strain on law school career services offices.

In addition, the "most favored" standard forces schools into the position of having to provide inordinate accommodations to military recruiters, for fear of being found out of compliance. Because the meaning of the term is unclear, and the financial consequences of non-compliance are so great, commanding that law schools treat no employer recruiter better than military recruiters in its interview programs will require that they essentially give military recruiters better treatment than all other employers. For example, a school may provide a physically disabled recruiter with more accessible space (perhaps a larger, ground floor room). Under the proposed regulations as written, a law school risks losing its federal funding – on a university-wide basis – unless it assigns a more accessible room to a military recruiter.

2. The proposed regulation could unintentionally undermine the military's recruitment efforts

In their concern for complying with the proposed regulations, schools may find themselves forced into making decisions and taking actions which, ironically, have results which are unfavorable to military recruiters. For example, one way in which a law school may treat employers differently – without disadvantaging them – is to hold separate recruiting events for different categories of employers. The school may hold an early interview week exclusively for private law firms who tend to recruit early and compete against one another for students. A few weeks later, the school may hold a separate interview program for all government employers, which would include the military. The reason for separating them is not to treat the government or the military less favorably, or to interfere with their recruiting efforts. To the contrary, it is to enhance their access to students. Having a separate public sector interview program highlights the public sector alternative to private practice in students' minds and prevents government employers from being crowded out by the presence of private sector law firms, who tend to participate in interview programs in much larger numbers.¹

Under the proposed regulations, a law school with two programs could not be sure it was in compliance if it placed the military recruiters in the public sector program because it is possible that the military would view the earlier, private sector program, as “most favorable access.” Ironically, however, placing the military in the earlier, private sector program would likely result in the impairment of the military's recruiting efforts.

3. The proposed regulation unnecessarily impedes law schools' administration of recruitment programs

The “most favorable” formulation would also interfere with career services professionals' ability to balance the interests of all their students and employer recruiters in organizing their recruiting programs. Some schools have hundreds of student participants and hundreds of employer participants whose interests often compete and certainly shift from year to year. In exercising their best professional judgment to achieve the delicate balancing necessary to maximize employment opportunities for students and maintain lasting productive relationships with all employers, law school professionals take into account, among other things, such factors as:

- 1) how early/late in the OCI process an employer registers
- 2) the number of interviewers the employer plans to send to campus
- 3) technical requirements of the employer (video links, etc.)
- 4) desire to make a positive first impression on an employer new to the OCI process
- 5) desire to promote good will or foster a positive institutional relationship with an employer who typically hires many students, or who is a donor or alumnus.

Interview room, time and date assignments based on these factors are made without any intent to cause disadvantage (and without any resulting disadvantage) to other employers' recruiting abilities. We believe these are all legitimate reasons for scheduling an employer for an earlier date or a larger or more accessible room than that assigned to military recruiters. However, basing decisions on these

¹ In many on campus interview (OCI) programs, students submit bids for interview slots with employers. Commonly, limits are placed on the number of bids students can submit and the number of interviews they can receive. Their ability to receive an interview can also be affected by timing conflicts with previously scheduled employer interviews. In schools without a separate public sector program, students have to decide how to allocate their limited bids among both private and public sector employers. Students at schools with a separate public sector interview program would not be limited in the same way, which would increase the number of bids public sector employers would receive.

June 29, 2007

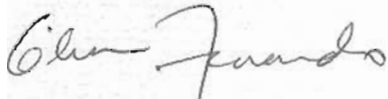
factors would place a law school at risk of being held in violation of the proposed regulation because they would result in another employer receiving what might be considered by the military recruiter to be a more favorable date, time or location than that assigned to the military.

For all of these reasons, the proposed regulation needs to be changed to comport with the Solomon Amendment's equal – not special – access requirements.

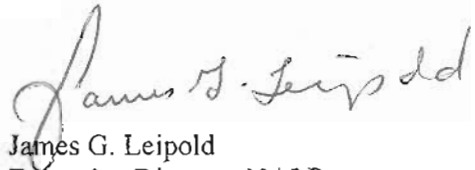
Conclusion

The proposed regulations should be revised to reflect the language and purpose of the statute—that is, the regulations should require campus access for military recruiters that is equal in quality and scope to the access received by other employers rather than the most favored recruiter access that is currently proposed. For all of the reasons outlined above, the most favored recruiter access standard will be problematic to implement for law schools and will lead to absurd and unintended consequences for military recruiters.

Respectfully Submitted,



Gihan Fernando
President, NALP



James G. Leipold
Executive Director, NALP