UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STUDENT MEMBERS OF SAME (STUDENT/FACULTY ALLIANCE FOR MILITARY EQUALITY), a Yale Law School student organization, and OUTLAWS, a Yale Law School student organization,	3:03CV 1867 (JCH)
plaintiffs,	
- against -	July 13, 2004
DONALD H. RUMSFELD, in his capacity as U.S. Secretary of Defense,	
defendant.	

PLAINTIFFS' SUPPLEMENTAL REPLY BRIEF IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT

For the Plaintiffs:

Stuart M. Katz (CT-12088)
Stewart I. Edelstein (CT-06021)
Cohen and Wolf, PC
1115 Broad Street
Bridgeport, Connecticut 06604
Telephone: (203) 368-0211
Fax: (203) 394-9901

Carmine D. Boccuzzi (CT-25488)
Catharine M. Clark (CT-25689)
Joseph Landau (CT-25810)
Jennifer L. Burns (CT-25811)
Cleary Gottlieb Steen & Hamilton
One Liberty Plaza
New York, New York, 10006
Telephone: (212) 225-2000
Fax: (212) 225-3999

PRELIMINARY STATEMENT

This Court recently ruled that plaintiffs have asserted a justiciable claim that defendant has misinterpreted and misapplied the Solomon Amendment (the "Amendment") in connection with the Yale Law School. See Ruling on Defendant's Rule 12(b)(1) Motion to Dismiss dated June 9, 2004 ("Ruling") at 2, 4, 18. Defendant now argues that, under the Amendment, Yale Law School must allow the military to participate in its official recruiting functions. The Amendment, however, requires no such thing – its plain terms (the sole basis for the analysis) prohibit schools from denying "entry to campuses or access to students." The Yale Law School, indisputably, does neither. Defendant does not seek mere access; rather, it demands the right, afforded no other employer, to participate in the off-campus spring and fall interview programs[1] even though it fails to comply with the law school's nondiscrimination policy.

Because the statute is unambiguous, and because defendant's interpretation of the Amendment exceeds any reasonable interpretation, this Court should grant plaintiffs summary judgment on their claim that defendant's interpretation and enforcement of the statute violates the law. Indeed, rejecting defendant's unduly expansive reading of the Solomon Amendment – and deciding the case on statutory grounds in plaintiffs' favor – is required further by the principle that statutes be interpreted so as to avoid constitutional deficiencies like those identified in plaintiffs' opening briefs. See Chamber of Commerce v. Fed. Election Comm'n, 69 F.3d 600, 605 (D.C. Cir. 1995) (a statute must be construed "to avoid constitutional difficulties if such a construction is not plainly contrary to the intent of Congress") (citing Edward J. DeBartolo Corp.

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[1] Unless otherwise indicated, defined terms have the same meaning ascribed to them in the Memorandum Of Law In Support Of Plaintiffs' Motion For Summary Judgment, dated April 8, 2004 ("Opening Mem.") and Plaintiffs' Reply Brief In Further Support Of Motion For Summary Judgment, dated May 20, 2004 ("Reply Mem.").

v. Constr. Gulf Coast Bldgs. & Constr. Trades Council, 485 U.S. 568, 575 (1988)); Opening Mem. at 16-22, 27-34; Reply Mem. at 1-4, 5-8.

ARGUMENT

POINT I

YALE LAW SCHOOL'S NONDISCRIMINATION POLICY DOES NOT PREVENT DEFENDANT FROM ENTERING CAMPUS OR ACCESSING STUDENTS

The plain language of the Solomon Amendment prohibits universities from adopting "a policy or practice . . . that either prohibits, or in effect prevents" recruiters "from gaining entry to campuses, or access to students" for the purpose of military recruiting. 10 U.S.C. § 983(b)(1). Yale Law School has never had a policy that prohibits or in effect prevents military recruiters from gaining access to students. Rather, Yale Law School has provided access of the two types expressly enumerated in the text of the statute: "entry to campuses or access to students . . . on campuses," id., and "access by military recruiters for purposes of military recruiting to . . . information pertaining to students." Id. § 983(b)(2). It is axiomatic that when Congress enumerates specific categories, it implicitly excludes all others. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 513 (2002) (where Fed. R. Civ. P. 9(b) enumerates actions that must be pled with particularity, any action not listed, such as employment discrimination, is subject to notice pleading only). The Yale Law School has fully complied with the specific categories of access mandated by the text of the Amendment – it is required to do no more.

The access that Yale Law School has provided was recognized in the Court's June 9 ruling, which identified the open access long afforded defendant, both to campus and students:

> [T]he law school has offered military recruiters open access to classrooms and other meeting spaces on campus for informational sessions and other recruiting activities, including interviews, at the invitation of a student organization; open access to any student or

student group to reserve a classroom or other meeting space for such meeting at any time; and open access to student contact information.

Ruling at 2-3 (emphasis added). See also Def.'s Local Rule 56(a)(2) Statement at ¶¶ 21, 22. Defendant has not been denied access to the law school campus or students, and the law school is in compliance with what the statute requires. See Duncan v. Walker, 533 U.S. 167, 172 (2001) (court's task "is to construe what Congress has enacted, [which] begin[s], as always with the language of the statute"); Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) ("where the statutory language provides a clear answer, [the analysis] ends there as well").

Faced with the statute's plain language, and these indisputable facts, defendant offers a reading of the statute with no basis in the text of the Solomon Amendment, arguing that "the Solomon Amendment by its terms provides that *any* 'policy or practice' prohibiting access to students *in whatever manner* is sufficient to trigger a denial of funding."[2] Defendant's Amended Supplemental Memorandum Of Law In Response To Plaintiffs' Motion For Summary Judgment ("Def. Supp. Br.") at 3 (emphasis in original). These italicized words – "any" and "in whatever manner" – which are nowhere to be found in the statute, dramatically broaden the reach of the Amendment. Moreover, this interpretation would produce absurd results, mandating full participation in all university-sponsored interview programs and access to students without limitation "in whatever manner," even in circumstances that would greatly disrupt the educational process. For example, in defendant's view, a policy prohibiting recruitment activities during a student's first semester would violate the Solomon Amendment because it is

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[2] Given its extreme and unsubstantiated position, it is not surprising that defendant's brief is internally inconsistent and confused. For example, defendant asserts both that "it is irrelevant under the Solomon Amendment whether alternate means of access to students are provided by the institution of higher education," and that a university will be out of compliance where it does not afford military recruiters "a comparable alternate means of access." See Def. Supp. Br. at 4, 9 n.3.

"any" policy prohibiting access to students "in whatever manner." Raila v. U.S., 355 F.3d 118, 123 (2d Cir. 2004) ("[t]hese results are plainly absurd and caution against adoption of the government's interpretation of the statute").[3]

Neither has the law school "in effect" prevented the military's access to students. Defendant attempts to rely on the "me too" position that because other, differently situated employers participate in the fall and spring interview programs, defendant must as well, and that denial of participation in the fall and spring interview programs constitutes a policy that "in effect" prevents access to students. This colloquial approach to the language of the statute fails in light of the clear congressional purpose behind the Amendment, which was to prevent policies or practices that prohibit access to campus or students. As stated by Senator Nickels, the sponsor of the Amendment, the purpose of the bill was to "deny [DOD] research funds to universities that deny recruiters access to their campus." 140 Cong. Rec. S8159-01 (daily ed. July 1, 1994) (emphasis added);[4] see also 140 Cong. Rec. H3862 (daily ed. May 23, 1994) (statement of Rep. Solomon, the bill's proponent) (the Solomon Amendment was intended to "prevent any funds . . . from going to any institution which prevents military recruiting on campus") (emphasis added). Here, defendant's non-participation in the interview programs is and was unaccompanied by a denial of access to students and campus.

The Solomon Amendment does not grant military recruiters the same rights as those afforded employers that do not discriminate – indeed, such unique treatment of the military

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[3] See American Heritage College Dictionary 83 (3d ed. 2000) (defining "any" as "one, some, every or all without specification").

[4] Although the Court need not look beyond the plain language of the statute, legislative history may prove an additional source of information in interpreting Congress' intent. Babbitt v. Sweet Home Chapter of Cmtys. For A Great Or., 515 U.S. 687, 704 (1995) (finding legislative history "further support" for its construction of statute); ContiChem LPG v. Parsons Shipping Co., 229 F.3d 426, 432 (2d Cir. 2000) (concluding that "the legislative history of [the rule] supports the plain language of the statute").

would constitute special, not equal, access. The mere fact that, as defendant puts it, "military recruiters have been barred from gaining access to students through CDO interview programs," Def. Supp. Br. at 3 (emphasis added), does not mean that military recruiters have been denied access to students, which is all the Amendment requires.

POINT II

DEFENDANT'S INVOCATION OF THE REGULATION IS INAPPOSITE AND IS DUE NO DEFERENCE

Defendant otherwise relies on 32 C.F.R. § 216.4(c) to support its argument for "access equal in quality and scope" to that granted other employers. Def. Supp. Br. at 4-8. This reliance is misplaced – the regulations do not impose an "equality" requirement on schools; nor is defendant's attempt to create such a requirement due any deference under Chevron, U.S.A., Inc. v. Natural Res. Def. Counsel, Inc., 467 U.S. 837, 843 (1984).[5]

The regulation provides:

> The limitations established in paragraph (a) of this section, shall not apply to a covered school if the secretary of Defense determines that the covered school . . . [w]hen not providing requested access to campuses or to students on campus, certifies that all employers are similarly excluded from recruiting on the premises of the covered school, or presents evidence that the degree of access by military recruiters is at least equal in quality and scope to that afforded to other employers . . . .

32 C.F.R. § 216.4(c)(3). But the plain language of 32 C.F.R. § 216.4(c)(3) makes clear that this provision, a safe harbor, is triggered only after a university has been deemed out of compliance

[5] Indeed, the DOD's interpretation of this regulation has been called into question by Judge Lifland in the FAIR litigation. Forum for Academic & Inst'l Rights, Inc. v. Rumsfeld, 291 F. Supp. 2d 269, 321 (D.N.J. 2003) (citing Letter from Carr to Levin, dated May 29, 2003).

with the Solomon Amendment. The government thus ignores the plain language of the regulation in trying to transform a safe harbor into a principal prohibition.[6]

Even accepting defendant's view that 32 C.F.R. § 216.4(c)(3) is not a safe harbor, the regulation's reference to access "at least equal in quality and scope" to that afforded all other employers extends well beyond anything contained in the actual text of the Solomon Amendment. As this Court explained:

> The DOD also extended the plain text of the Amendment in another way. Though the Amendment itself speaks only to schools that "in effect, prevent" military recruiting on campus, the DOD promulgated regulations requiring access "at least equal in quality and scope" to that afforded to other employers, if not identical.

Ruling in Burt v. Rumsfeld at 4 (citing 32 C.F.R. § 216.4(c)(3)). Agency regulations cannot be permitted to extend the scope of proscribed conduct to activities that Congress expressly did not intend to prohibit. See Guardians Ass'n. v. Civil Serv. Comm'n of N.Y., 463 U.S. 582, 614-615 (1983) (O'Connor, J. concurring) ("Although the Court has stated that an agency's legislative regulations will be upheld if they are 'reasonably related' to the purposes of the enabling statute . . . we would expand considerably the discretion and power of agencies were we to interpret 'reasonably related' to permit agencies to proscribe conduct that Congress did not intend to prohibit. 'Reasonably related to' simply cannot mean 'inconsistent with.'") (citation omitted).

Neither can defendant rely on Chevron to transform 32 C.F.R. § 216.4(c)(3) into a basis for equal treatment. Under Chevron, where, as here, Congress has spoken clearly on the precise question at issue, the agency regulation must give effect to congressional intent. Chevron, 467 U.S. at 843 ("First, always, is the question whether Congress has directly

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6 Defendant's claim that it may "reasonably conclude that 32 C.F.R. § 216.4(c)(3) is applicable, not exclusively as a safe harbor, but rather whenever a school does not provide the requested access" (Def. Supp. Br. at 8) is not due any deference. See Norfolk S. Ry. Co. v. Shanklin, 529 U.S. 344, 356 (2001) (agency's interpretation of its own regulations not worthy of deference under Lyng v. Payne, 476 U.S. 926 (1986), because it was contrary to the text of the regulation).

spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). As discussed in the previous section, the language of the statute and the intent of Congress are clear and unambiguous, and affirmatively do not require equal access.

Nor is 32 C.F.R. § 216.4(c)(3) a reasonable "gap filling" measure: the plain words "policy," "practice," and "access" are not statutory lacunae in need of reinterpretation. See, e.g., First S. Prod. Credit Assoc. v. Farm Credit Admin., 926 F.2d 339, 344, 346 (4th Cir. 1991) (declining to afford Chevron deference or to place the requested "gloss on the statute when the language is so clear"). Gap-filling is warranted only in instances, unlike this case, where a statute is patently ambiguous. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159 (2000) ("Deference under Chevron to an agency's construction . . . is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."). As the Second Circuit recently noted, courts should be careful not to allow agencies to advance dubious arguments in favor of deference in matters of minimal ambiguity, especially where there is a clearly expressed congressional intent running contrary to the agency's proffered construction. See Natural Res. Def. Council v. Abraham, 355 F.3d 179, 199 (2d Cir. 2004). Here, the Solomon Amendment clearly does not require equal access. DOD cannot use its regulations to subvert the clearly expressed will of Congress. Its attempts to use 32 C.F.R. § 216.4(c)(3) to demand equal access must fail.

Even assuming, arguendo, that the plain language of the Solomon Amendment is ambiguous, which it is not, the DOD's regulation fails under the second step of the Chevron analysis, which requires agency regulations to be "reasonable interpretations" of a statute.

Chevron, 467 U.S. at 843.[7] Reading the "equal in quality and scope" requirement imposed by 32 C.F.R. § 216.4(c)(3) as a principal requirement of the Solomon Amendment ignores the Amendment's silence on "equality of treatment," and its emphasis on policies that prevent or prohibit access to students and campuses. Indeed, Congress expressly declined to include an equal treatment requirement in the Solomon Amendment. See Opening Mem. at 14-15 n.6; see also Osorio v. Immigration & Naturalization Serv., 18 F.3d 1017, 1022 (2d Cir. 1994) (rejecting agency's interpretation of "political opinion" where "'it appears from the statute or its legislative history' that the interpretation is contrary to Congress's intent") (citation omitted).

Moreover, defendant is, in actuality, demanding special, not equal, treatment. No employer who discriminates on the basis of sexual orientation is allowed to participate in official school recruiting programs. See Safriet Decl. ¶¶ 4, 5; Bryant Decl. ¶ 6.[8] Because of defendant's unjustified interpretation of the Solomon Amendment, military recruiters are the only employers allowed to both discriminate and recruit in the fall and spring interview programs. Two other courts have also found that military recruiters cannot claim entrance into recruiting events

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7 Defendant also relies on United States v. Mead Corp., 533 U.S. 218 (2001), and Skidmore v. Swift, 323 U.S. 134 (1944), for the proposition that the Court should afford deference to its construction of the Amendment. This reliance is unavailing. Mead held that deference is not due where – as here – the regulation is "manifestly contrary to the statute." Mead, 533 U.S. at 220; see also Def. Supp. Br. at 5. And, as Mead recognized, Skidmore deference is applicable "where the regulatory scheme is highly detailed, and [the administrative agency] can bring the benefit of specialized experience to bear on the subtle questions in [the] case." Mead, 533 U.S. at 235. Here, the regulatory scheme could not be simpler: all that is required is a determination of whether an institution of higher education is providing access to students on campus for the purpose of military recruiting. Nor has the military exhibited consistency in interpreting the Amendment. See id. at 227 (citing "the value of uniformity" in an agency's understanding of the law). During the 1990s, the military expressed no objections to the access offered by the law school. Safriet Decl. ¶ 8-11. Yet, in 2001, the DOD reversed course and adopted its new, erroneous reading of the Amendment. Id. at ¶ 13. As the Second Circuit has noted, this "inconsistency is a ground for rejecting a claim of deference." N.Y. City Health & Hosps. Corp. v. Perales, 954 F.2d 854, 861 (2d Cir. 1992). In short, there is no specialized or substantial knowledge inherent in defendant's regulations that warrants deference of any sort.

8 Unless otherwise indicated, all declarations cited are attached to the Declaration of Carmine D. Boccuzzi, dated April 18, 2004, filed with the Local Rule 56(a)(1) Statement as provided by District of Connecticut Local Civil Rule 56(a)(3).

excluding all discriminatory employers under the guise of "equal treatment." See Gay & Lesbian Law Students Ass'n v. Bd. of Trs., 673 A.2d 484, 493 (Conn. 1996); Lloyd v. Grella, 83 N.Y.2d 537, 547 (1994). Defendant's half-hearted attempt to distinguish these cases fails. And in trying to distinguish these cases, defendant concedes that its regulation "does not require the 'same' access between military and other recruiters," Def. Supp. Br. at 9 n.3, although that is of course what defendant seeks here. See also Letter from Miller to Levin, January 6, 2003 ("as provided in federal law, it is imperative that Department of Defense recruiters receive be afforded the same access to your students as that afforded other employers.") (emphasis added).

POINT III

THERE IS NO AUTHORIZATION FOR WITHDRAWAL OF ALL FEDERAL FUNDING TO YALE UNIVERSITY

Defendant acknowledges that the sole regulatory authority for the DOD to deny over $300 million in funding to all of Yale University is an interim regulation. Def. Supp. Br. at 11 n.4; 65 Fed. Reg. 2065 (January 13, 2000) (effective without notice or comment period). DOD cannot rely on non-finalized rules to impose on Yale University an extraordinary hardship that is unauthorized by the statute itself. Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("Interpretations [contrary to statutory language] lack the force of law [and] do not warrant Chevron-style deference.").

The proposed rule allowing the DOD to deny all federal funding to the entire Yale University, while not binding, only highlights the heavy-handed, punitive approach defendant has pursued with respect to the Solomon Amendment. As demonstrated in plaintiffs' Opening and Reply Memoranda, the First Amendment interests at stake require that the government proceed in a manner narrowly tailored to achieve compelling government interests. Opening Mem. at 30-34; Reply Mem. at 6-8. Moreover, in the context of plaintiffs' Fifth Amendment

claim, the mere fact that, prior to the Supreme Court's decision in Lawrence v. Texas, 539 U.S. 558 (2003), the military's Don't Ask Don't Tell policy was sustained in Able v. United States, 155 F.3d 628 (2d Cir. 1998), is irrelevant. Able simply upheld Don't Ask Don't Tell as a rational exercise of congressional and executive authority to regulate military life. It did not authorize incursion by the military into civilian spheres – here, the university – to single out a class of citizens for denial of benefits or protections otherwise available to them. See Yick Wo v. Hopkins, 118 U.S. 356, 377 (1886) (law "directed so exclusively against a particular class of persons amount[ed] to a practical denial . . . of that equal protection of the laws).

CONCLUSION

For the reasons set forth above, this Court should grant plaintiffs summary judgment on their claim that the DOD has incorrectly concluded that Yale Law School violates the Solomon Amendment.

THE PLAINTIFFS,

By ___________________________

Stuart M. Katz (CT-12088)
Stewart I. Edelstein (CT-06021)
Cohen and Wolf, PC
1115 Broad Street
Bridgeport, Connecticut 06604
Telephone: (203) 368-0211
Fax: (203) 394-9901

Carmine D. Boccuzzi (CT-25488)
Catharine M. Clark (CT-25689)
Joseph Landau (CT-25810)
Jennifer L. Burns (CT-25811)
Cleary Gottlieb Steen & Hamilton
One Liberty Plaza
New York, New York, 10006
Telephone: (212) 225-2000

Attorneys for Plaintiffs