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FISCAL IMPACT REPORT

SPONSOR Foley DATE TYPED 03-01-05 HB 1089

SHORT TITLE Military Recruiter Access to College Campuses SB _____

ANALYST Woods

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
	NFI				

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Response Received From

New Mexico Department of Military Affairs (DMA)

No Response Received From

New Mexico Commission on Higher Education (CHE)

SUMMARY

Synopsis of Bill

House Bill 1089 – An Act Relating to Higher Education; Ensuring that Military recruiters have Access to New Mexico University and College Campuses – proposes the following:

Section 1. Military Recruiters and Organizers Permitted on Public Campuses – Equal Access – In order to avoid loss of federal funds for higher education:

A. a public institution of higher education shall not institute a policy or practice that prohibits entry to campus or access to enrolled students aged seventeen and older or their directory information by United States armed services

representatives for purposes of employment recruitment, placement assistance or organizing a senior reserve officer training corps organization; and

B. a campus non-discrimination policy shall not be interpreted to authorize exclusion of a legally operating representative of a United States armed services organization from employment recruitment, placement assistance efforts or organization of a senior reserve officer training corps.

There is no appropriation attached to this legislation.

Significant Issues

The New Mexico Department of Military Affairs notes that his legislation may be subject to the Doctrine of Federal Preemption, due to existing federal law, 10 U.S.C. Section 503 and 10 U.S.C. Section 2358. Further, that while it is unclear if an institution of higher education did not provide student access to military recruiters what the consequences might be, potentially New Mexico institutes of higher education might seek to prevent military recruiters to having access to students for possible enlistment in the military services.

OTHER SUBSTANTIVE ISSUES

This matter finds its genesis in the federal Solomon Amendment, specifically Title 10, U.S. Code: Section 983 as follows:¹

§983. Institutions of higher education that prevent ROTC access or military recruiting on campus: denial of grants and contracts from Department of Defense, Department of Education, and certain other departments and agencies.

(a) Denial of Funds for Preventing ROTC Access to Campus.-- No funds described in subsection (d)(1) may be provided by contract or by grant (including a grant of funds to be available for student aid) to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents--

(1) the Secretary of a military department from maintaining, establishing, or operating a unit of the Senior Reserve Officer Training Corps (in accordance with section 654 of this title and other applicable Federal laws) at that institution (or any subelement of that institution); or

(2) a student at that institution (or any subelement of that institution) from enrolling in a unit of the Senior Reserve Officer Training Corps at another institution of higher education.

(b) Denial of Funds for Preventing Military Recruiting on Campus.-- No funds described in subsection (d)(2) may be provided by contract or by grant (including a grant of funds

¹Georgetown University School of Law. <http://www.law.georgetown.edu/solomon/Rules.html>

to be available for student aid) to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents—

(1) the Secretary of a military department or Secretary of Transportation from gaining entry to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting; or

(2) access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution):

(A) Names, addresses, and telephone listings.

(B) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

(c) Exceptions. -- The limitation established in subsection (a) or (b) shall not apply to an institution of higher education (or any subelement of that institution) if the Secretary of Defense determines that--

(1) the institution (and each subelement of that institution) has ceased the policy or practice described in that subsection; or

(2) the institution of higher education involved has a longstanding policy of pacifism based on historical religious affiliation.

(d) Covered Funds. --

(1) The limitation established in subsection (a) applies to the following:

(A) Any funds made available for the Department of Defense.

(B) Any funds made available in a Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act.

(2) The limitation established in subsection (b) applies to the following:

(A) Funds described in paragraph (1).

(B) Any funds made available for the Department of Transportation.

(e) Notice of Determinations.-- Whenever the Secretary of Defense makes a determination under subsection (a), (b), or (c), the Secretary--

(1) shall transmit a notice of the determination to the Secretary of Education and to Congress; and

(2) shall publish in the Federal Register a notice of the determination and the effect of the determination on the eligibility of the institution of higher education (and any subelement of that institution) for contracts and grants.

(f) Semiannual Notice in Federal Register.--The Secretary of Defense shall publish in the Federal Register once every six months a list of each institution of higher education that is currently ineligible for contracts and grants by reason of a determination of the Secretary under subsection (a) or (b).

Against this backdrop, in September 2003 a lawsuit was filed against the Department of Defense, alleging First Amendment violations by the Forum for Academic and Institutional Rights [FAIR].² Excerpts from a Saturday, September 20, 2003 *Associated Press* article provide additional detail:³

A group of law schools, professors and students is suing the Department of Defense, alleging its requirement that law schools allow military recruiters on campus violates the First Amendment....But last year, after the Defense Department threatened to pull federal funding from law schools that deny military recruiters access to students, schools including Harvard and Boston universities and Boston College backed off their bans.

Kent Greenfield, a Boston College law professor leading the lawsuit, said the government is forcing agreement on its policies from schools that fear the loss of benefits....The lawsuit also argues there are flaws in the 1996 law, which permits the Defense Department to deny federal money to institutions of higher learning that restrict military recruiting or ROTC on campus. The lawsuit was filed Friday in federal court in Newark, N.J.

The Forum for Academic and Institutional Rights, which Greenfield formed to file the lawsuit, declined to release the names of members....The group's board includes professors from Yale, Stanford, Georgetown and New York universities, and the University of Southern California. The group filed the suit along with the Society of American Law Teachers, student groups at Boston College Law School and Rutgers University School of Law and three Rutgers law students.

Eventually, two federal courts found the Solomon Amendment unconstitutional:⁴

- *In FAIR et al. v. Rumsfeld*

On November 29, 2004, the U.S. Court of Appeals for the Third Circuit overturned the New Jersey District Court's denial of plaintiffs' motion for an injunction against the Solomon Amendment, holding that "FAIR has demonstrated a likelihood of success on the merits of its First Amendment claims." The Court of Appeals remanded the case to the District Court with instructions to issue an injunction.

² FAIR is an association of twenty-eight law schools and law faculties whose stated mission is "to promote academic freedom and to support educational institutions is opposing discrimination."

³ <http://www.law.georgetown.edu/solomon/Documents/News%20Observer%20Article.doc>

⁴ http://www.law.georgetown.edu/solomon/amendment_enjoined.htm

- *Burt et al. v. Rumsfeld*

On January 31, 2005, in a suit brought by members of the Yale Law School faculty, a federal district court in Connecticut declared the Solomon Amendment unconstitutional under the First Amendment and enjoined the law's enforcement against Yale.

However, the American Association of University Professors observes that the government has "indicated its intention" to appeal the matter to the Supreme Court, thus leaving the matter unresolved at present.⁵

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⁵ <http://www.aaup.org/newsroom/Newsitems/Burtetal.htm>