



# Military Recruitment Provisions Under the No Child Left Behind Act: A Legal Analysis

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## Summary

Under the No Child Left Behind Act (NCLBA) of 2001, which amended the Elementary and Secondary Education Act (ESEA), high schools that receive federal funds must provide certain student contact information to military recruiters upon request and must allow recruiters to have the same access to students as employers and colleges. Because the 111<sup>th</sup> Congress is likely to consider reauthorization of the ESEA, legislators may contemplate changes to the military recruitment provisions, either as part of the reauthorization or as stand-alone legislation. Currently, one bill, S. 87, has been introduced in the 111<sup>th</sup> Congress. This report describes the NCLBA military recruitment provisions and discusses the legal issues that they may raise.

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When Congress enacted the No Child Left Behind Act (NCLBA) of 2001,<sup>1</sup> it added several new requirements regarding the ability of military recruiters to access student information and to approach students directly. These new provisions—which are different from similar Department of Defense (DOD) provisions that allow DOD to compile directory information on high school students for military recruitment purposes or that require colleges and universities that receive federal funds to allow military recruiters on campus<sup>2</sup>—have proven to be somewhat controversial. Proponents of the recruitment provisions argue that the new law allows recruiters to inform students about the military opportunities available to them and eases the task of recruiting volunteers to sustain the nation’s military forces. On the other hand, opponents contend that the provisions raise concerns about student privacy and should be changed to make it easier to opt out.<sup>3</sup> Approximately 95% of the country’s school districts are estimated to be complying with the new requirements,<sup>4</sup> although it is important to note that, traditionally, most schools had already allowed military recruiters to contact students long before the NCLBA provisions became mandatory.<sup>5</sup>

The new NCLBA military recruitment provisions require high schools that receive federal funds to meet two requirements. First, such schools must “provide, on a request made by military recruiters ..., access to secondary school students names, addresses, and telephone listings,”<sup>6</sup> and second, schools must “provide military recruiters the same access to secondary school students as is provided generally to post secondary educational institutions or to prospective employers of those students.”<sup>7</sup> Schools that fail to comply with either of these two requirements—access to student information or equal access to students themselves—risk losing federal funds. However, private secondary schools that maintain a religious objection to military service are exempt from the recruitment provisions.<sup>8</sup>

## Access to Student Information

As noted above, schools must, when requested, provide military recruiters with information concerning student names, addresses, and telephone numbers. Unlike more personal information such as Social Security numbers, this type of data is not protected by the Family Educational

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<sup>1</sup> P.L. 107-110, 115 Stat. 1425.

<sup>2</sup> 10 U.S.C. §§ 503, 983. The requirements relating to institutions of higher education were the subject of a legal challenge, but the Supreme Court upheld the constitutionality of the statutory provisions requiring military access to college campuses that receive federal funds. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006). For more information, see CRS Report RS22405, *Military Recruiting and the Solomon Amendment: The Supreme Court Ruling in Rumsfeld v. FAIR*, by Charles V. Dale. For historical background on DOD provisions regarding military recruitment on high school and college campuses, see CRS Report RL30113, *Homosexuals and the U.S. Military: Current Issues*, by David F. Burrelli and Jody Feder. DOD recently published new regulations regarding military recruitment at institutions of higher education. Military Recruiting and Reserve Officer Training Corps Program Access to Institutions of Higher Education, 73 FR 16525 (March 28, 2008).

<sup>3</sup> Tamar Lewin, “Uncle Sam Wants Student Lists, and Schools Fret,” *N.Y. Times*, January 29, 2003, at B1.

<sup>4</sup> Alfred J. Sciarrino, *From High School to Combat? No Child Left Behind!*, 36 U. West. L.A. L. Rev. 94, 94 (2005).

<sup>5</sup> Lori Aratani, “Military Faces Parental Counterattack; High School Recruitment, a Longtime Tradition, Raises Worries in Wartime,” *Wash. Post*, November 1, 2005, at B1.

<sup>6</sup> 20 U.S.C. § 7908(a)(1).

<sup>7</sup> *Id.* at § 7908(a)(3).

<sup>8</sup> *Id.* at § 7908(c).

Rights and Privacy Act (FERPA),<sup>9</sup> which currently allows the release of student directory information in the absence of parental objections.<sup>10</sup> Thus, even before the NCLBA provisions were enacted, such student contact information was potentially available to outside entities.

Like FERPA, the NCLBA also provides the opportunity to opt out of the provisions requiring the release of directory information to military recruiters. Under the NCLBA, students or their parents may request that the student's directory information not be released without prior written consent. In addition, the local educational agency or private school must notify parents of their right to make such a request.<sup>11</sup>

Schools appear to have interpreted these opt out provisions in a variety of ways. For example, some schools have, as part of their compliance with an array of privacy laws, issued a general notice informing parents that they can opt out of the release of student contact information, while other schools have issued a separate and more explicit notice informing parents that such information may be released to the military for recruitment purposes if the parents do not opt out. Both of these types of notice appear to meet the statutory requirement regarding informing parents of their right to opt out, but recipients of the latter type of notice may be more likely to exercise that option. As a result, the type of notice that a school elects to provide has been a subject of debate.<sup>12</sup>

In addition, the notification provision has become controversial in part because schools have interpreted parental responses in different ways. For example, if parents fail to respond to the notice informing them of their right to opt out of the release of student information, some schools interpret the lack of response as indicating that the parent does not wish to opt out, while other schools interpret a lack of response as signifying that the parent does want to opt out. As a result, some interest groups have pressed legislators to clarify the law with regard to this point.<sup>13</sup>

## Equal Access to Students

In addition to requiring schools to provide access to student information, the NCLBA also requires schools to provide access to students themselves. Specifically, schools must provide military recruiters the same access to students as is otherwise provided to other recruiters, such as private employers or institutions of higher education.<sup>14</sup> As with the notification provisions, schools have implemented the equal access provisions in a variety of ways. For example, some schools allow extensive access, permitting recruiters to set up information tables, visit classrooms, and freely approach students anywhere on campus. Other schools permit a lesser degree of access, and some restrict military access even further by forbidding information tables, requiring appointments before recruiters can meet students, and otherwise limiting access to

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<sup>9</sup> *Id.* at § 1232g. For more information on FERPA, see CRS Report RS22341, *The Family Educational Rights and Privacy Act (FERPA): A Legal Overview*, by Jody Feder.

<sup>10</sup> 20 U.S.C. § 1232g(b)(1).

<sup>11</sup> *Id.* at 7908(a)(2).

<sup>12</sup> Aratani, *supra* note 5, at B1.

<sup>13</sup> *Id.*; see also, Michael Dobbs, "Schools and Military Face Off; Privacy Rights Clash With Required Release of Student Information," *Wash. Post*, June 19, 2005, at A3.

<sup>14</sup> 20 U.S.C. § 7908(a)(3).

campus.<sup>15</sup> Despite these variations in school policy, schools are allowed to place as many or as few restrictions as they wish on military recruiters, as long as schools treat such recruiters the same way they treat other entities that wish to contact students.

## Legal Concerns

As noted previously, some opponents of the NCLBA military recruitment provisions have raised legal concerns about the new requirements. In particular, some critics have questioned whether the recruitment provisions violate a student's right to privacy, but neither statutory nor constitutional analysis appears to support this argument. Indeed, from a statutory perspective, the NCLBA provisions regarding release of student contact information are, as noted above, entirely consistent with FERPA, the longstanding law that protects the educational privacy rights of students. Likewise, the NCLBA military recruitment provisions, for the reasons discussed below, do not appear to raise constitutional concerns.

Under the auspices of the Fourteenth Amendment,<sup>16</sup> the Supreme Court has recognized that there is a constitutional right to privacy that protects against certain governmental disclosures of personal information,<sup>17</sup> but it has not established the standard for measuring such a violation. In the absence of explicit standards, the circuit courts have tended to establish a series of balancing tests that weigh the competing privacy interests and government interests in order to determine when information privacy violations occur.<sup>18</sup>

In *Falvo ex rel. Pletan v. Owasso Independent School District No. I-011*,<sup>19</sup> the Court of Appeals for the Tenth Circuit weighed the plaintiff's claim that peer grading and the practice of calling out grades in class resulted in an impermissible release of her child's education records in violation of FERPA. The plaintiff also claimed that the practice of peer grading violated her child's constitutional right to privacy. Although the court, in a holding that was later reversed by the Supreme Court,<sup>20</sup> ruled that the practice of peer grading violated FERPA, the Tenth Circuit denied the plaintiff's constitutional claim. In rejecting this claim, the court applied a three-part balancing test that considers "(1) if the party asserting the right has a legitimate expectation of privacy, (2) if disclosure serves a compelling state interest, and (3) if disclosure can be made in the least intrusive manner."<sup>21</sup> Based on the first prong of this test, the Tenth Circuit rejected the plaintiff's constitutional claim because it ruled that student's school work and test grades were not highly personal matters that deserved constitutional protection.<sup>22</sup>

Like peer graded student homework assignments, the release of student names, addresses, and telephone numbers to military recruiters would probably not be viewed by a court as violating a student's constitutional right to privacy under such a balancing test. Unlike Social Security

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<sup>15</sup> Dobbs, *supra* note 13, at A3.

<sup>16</sup> U.S. Const. amend. XIV, § 1.

<sup>17</sup> *Whalen v. Roe*, 429 U.S. 589 (1977).

<sup>18</sup> *See, e.g., Flanagan v. Munger*, 890 F.2d 1557, 1570 (10<sup>th</sup> Cir. 1989); *Plante v. Gonzalez*, 575 F.2d 1119, 1134 (5<sup>th</sup> Cir. 1978).

<sup>19</sup> 233 F.3d 1203 (10<sup>th</sup> Cir. 2000).

<sup>20</sup> *Owasso Indep. Sch. Dist. v. Falvo*, 534 U.S. 426 (2002).

<sup>21</sup> *Falvo ex rel. Pletan v. Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203, 1208 (10<sup>th</sup> Cir. 2000).

<sup>22</sup> *Id.* at 1209.

numbers or medical records, for example, it is unlikely that a court would hold that individuals have a legitimate expectation of privacy in the type of basic contact information that is typically found in a phone book. Furthermore, the government could argue persuasively that the release of such information serves a compelling state interest in facilitating the maintenance of the nation's armed forces. Finally, a court would probably view the disclosure required by the NCLBA as minimally intrusive, given that students can either opt out of the information release or decline to join the military, or both.

Ultimately, a court reviewing any privacy based challenge to the NCLBA military recruitment provisions would be likely to reject such a claim, especially in light of the fact that Congress was clearly acting within the scope of its constitutional authority when it enacted the military recruitment provisions of the NCLBA. Under the Spending Clause of the Constitution,<sup>23</sup> Congress frequently promotes its policy goals by conditioning the receipt of federal funds on state compliance with certain requirements. Indeed, the Supreme Court “has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy,”<sup>24</sup> and the Court recently reaffirmed this principle when, in response to a First Amendment challenge, it upheld similar military recruitment provisions that apply to colleges that receive federal funds.<sup>25</sup> Thus, the Court would likely uphold the NCLBA provisions in part on the basis of congressional authority under the Spending Clause.<sup>26</sup>

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<sup>23</sup> U.S. Const. art. I, § 8, cl. 1.

<sup>24</sup> Fullilove v. Klutznick, 448 U.S. 448, 474 (1980).

<sup>25</sup> Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 126 S. Ct. 1297, 1306-07 (U.S. 2006).

<sup>26</sup> A search of the legal database Lexis-Nexis for cases involving challenges to the NCLBA military recruitment provisions revealed no results.