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## Equal Access Struggle: Counter-Military Recruitment on High School Campuses, 44 J. Marshall L. Rev. 459 (2011)

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# EQUAL ACCESS STRUGGLE: COUNTER-MILITARY RECRUITMENT ON HIGH SCHOOL CAMPUSES

PHILLIP RUBEN NAVA\*

## I. INTRODUCTION

All we want to do is make students aware that there are other ways to find college money and serve your country without joining the military. But they're not getting the other side.<sup>1</sup>

Sally Ferrell, a counter military recruiter from Wilkes County, North Carolina.

We're not going to allow her to do that anymore. We allow recruiters into the schools to recruit for post-high school opportunities. But she was not offering that.<sup>2</sup>

Stephen Laws, Superintendent of Wilkes County High Schools, North Carolina

### A. *Battle for the "Peace" Table*

Ms. Ferrell, who is a member of a local counter-recruiting group, had previously been allowed to distribute pamphlets about alternatives to the military such as AmeriCorps and given access to set up "peace tables" inside the high school, alongside military recruiters' tables.<sup>3</sup> However, after receiving complaints from a principal in the district, the superintendent told her she was no longer welcome, citing her conduct as unpatriotic.<sup>4</sup>

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\* Phillip Ruben Nava, J.D., 2011, The John Marshall Law School; M.B.A., 1997, Illinois Institute of Technology; B.A., 1993, Augustana College. I am grateful to my wife Martha, an educator and artist, for her patience and substantive contributions made during the writing of this Article. I wish to extend special thanks to my parents, Felipe and Dolores Nava for their helpful advice, unconditional support, and encouragement.

1. Mitch Weiss, *Quaker Tries to Outmaneuver Military Recruiters*, CNN.COM, Aug. 29, 2008, <http://us.cnn.com/2008/LIVING/wayoflife/09/03/woman.battles.military.recruiters.ap/index.html> (quoting Sally Ferrell, a counter-military recruiter from Wilkes County, North Carolina).

2. *Id.* (quoting Stephen Laws, Superintendent of Wilkes County High Schools, North Carolina).

3. *Id.*

4. *See id.* (explaining that the military is a good choice for students who are not going to college, and that people should not say anything negative about the military).

After unsuccessfully attempting to negotiate amicably with the school board, Ferrell turned to the ACLU for help.<sup>5</sup> ACLU legal director, Katherine Parker, declared that it had no choice but to initiate litigation against the Wilkes County School District, citing constitutional issues.<sup>6</sup>

Some school districts rely on their school policies in denying access to counter-recruiters.<sup>7</sup> Yet other school districts are concerned that if they violate the No Child Left Behind Act, they will risk losing federal funding.<sup>8</sup>

Counter-recruitment groups, which offer non-military alternative programs, as well as an education to students about the reality of military life, are now increasingly engaged in an equal access battle as a result of the current military recruitment practices.<sup>9</sup>

The fact that this is happening now is no surprise. Since U.S. military presence in Iraq and Afghanistan has surpassed the seven-year mark, the pressure for military recruiters to meet the demand for new recruits has greatly intensified.<sup>10</sup> Additionally,

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5. *Id.*

6. *See id.* (stating that the school district's refusal to grant access to Ms. Ferrell is a First Amendment issue, and that the school district has left the ACLU no other choice but to sue).

7. Christine Legere, *Antiwar Activists Want Table At School Career Day*, BOSTON GLOBE, Aug. 17, 2008, [http://www.boston.com/news/local/articles/=2008/08/17/antiwar\\_activists\\_want\\_table\\_at\\_school\\_career\\_day/](http://www.boston.com/news/local/articles/=2008/08/17/antiwar_activists_want_table_at_school_career_day/), (explaining that the school superintendent of the Bridgewater-Rayham Schools in Massachusetts denied permission for counter-recruiters for career day because it was not within school policy).

8. *See generally* Kate Dittmeier Holm, *CHALK TALK: No Child Left Behind and Military Recruitment in High Schools: When Privacy Rights Trump a Legitimate Government Interest*, 36 J.L. & EDUC. 581, 583-84 (2007) (stating that the NCLBA grants access to military recruiters as other post-secondary educational institutions and prospective employers, and if there is a violation of the NCLBA, the schools risk losing federal funding).

9. *See* Seema Mehta, *Activists Seek to Counter Military Recruiting Pitch*, L.A. TIMES, June 9, 2008, <http://articles.latimes.com/2008/jun/09/local/me-recruit9> (explaining that activists are troubled by military recruiting at Los Angeles high schools and seek equal access to students on campus to provide information about the armed forces and information about nonmilitary careers); *see also*, KATHY ROTH-DOUQUET & FRANK SCHAEFFER, *AWOL—THE UNEXCUSED ABSENCE OF AMERICAN'S UPPER CLASSES FROM MILITARY SERVICE—AND HOW IT HURTS OUR COUNTRY* 38 (2006) (noting that several communities have launched initiatives to make their town "recruiting free" zones, where the military is banned); *see also*, *Initiative Opposes Military Recruiting on Campus*, N.Y. TIMES, July 13, 2005, <http://www.nytimes.com/2005/07/13/national/13recruit.html> (discussing how drafters of a local ballot measure coined "College Not Combat" in San Francisco asked administrators from colleges and high schools to exclude military recruiters regardless of the loss of federal funding).

10. *See* Weiss, *supra* note 1 (stating that recruiters have turned to high schools to meet the increasing demands of the all-volunteer military); *see also* Martina Stewart, *Commander: U.S. Could Have Military Presence in Iraq*

the U.S. military death toll from operations in Iraq and Afghanistan is now in excess of 5500, which further boosts demand.<sup>11</sup> As a result, military recruiters have increasingly turned to high schools to meet quotas, often engaging in overly aggressive, and at times illegal, recruiting tactics without proper supervision.<sup>12</sup>

Ironically, high school policies have varied widely in terms of granting access to counter-recruiting groups nationwide.<sup>13</sup> The limited federal precedent and overall lack of knowledge regarding the rights to equal access for counter-recruiting groups makes litigation against school districts likely in the near future.<sup>14</sup>

Although much has been written about the reformation of military recruitment and related federal law, this Comment is limited to the legal rights of counter-recruiters and the public policy supporting their existence. The next section provides a brief history of the evolution of the all-volunteer military, discusses the No Child Left Behind Act NCLBA provision expanding military recruiter access to student information and high schools, and explores current military recruitment tactics. Part III analyzes applicable case law and constitutional arguments and will also discuss public policy support for counter-recruitment in high schools. Part IV sets forth solutions for amicably incorporating equal access for counter-recruiters and other groups offering

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*After 2011*, CNN.COM, Aug. 22, 2010, <http://politicalticker.blogs.cnn.com/2010/08/22/commander-u-s-could-have-military-presence-in-iraq-after-2011/> (revealing that General Ray Odierno anticipated a U.S. presence in Iraq beyond 2011).

11. Department of Defense, *Casualty Reports*, <http://www.pentagon.mil/new/casualty.pdf> (last updated Apr. 5, 2011) (the current military death toll for Operation Iraqi Freedom and Operation Enduring Freedom is 5920).

12. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-846, *MILITARY RECRUITING: DOD AND SERVICES NEED BETTER DATA TO ENHANCE VISIBILITY OVER RECRUITER IRREGULARITIES*, 4 (2006), available at <http://www.gao.gov/new.items/d06846.pdf>. According to the report between the years 2004-2005, service data indicates reports of recruiter wrongdoing incidents swelled to 6600 cases; substantial irregularities increased to 630, and criminal violations rose to seventy. *Id.* The report also admits that the government has limited visibility over military recruitment data, and that service data is likely to underestimate the true number of recruiting irregularities. *Id.* at 11.

13. See Mehta, *supra* note 9 (asserting that despite some dated legal precedent that generally allows equal access to schools, access rules vary widely from school to school).

14. See Legere, *supra* note 7 (explaining that a school committee member agrees with the school superintendent's decision to deny access to counter-recruiters, but will nevertheless still research the issue and offer a recommendation); see also Aamer Madhani, *Anti-War Activists Visit Schools to Counter Military Recruiter's Pitch*, CHICAGO TRIBUNE, Feb. 19, 2006, <http://www.sott.net/articles/show/110584-Anti-war-activists-visit-schools-to-counter-military-recruiters-pitch> (stating that the Chicago Public School system has been slow to implement a federal district court decision that grants opponents of military equal access to students).

alternatives to military enlistment.

## II. BACKGROUND

### A. *History of an All-Volunteer Military*

Voluntary recruitment of young men and women has been around since the early 1970s, when then-President Nixon created a commission that recommended that an all-volunteer military, instead of a compulsory draft, would best serve the United States.<sup>15</sup> The government was forced to explore a voluntary option due to intense public criticism of the mandatory draft policies in place for both World Wars, the Korean conflict, and Vietnam.<sup>16</sup>

At first, there was noted opposition to the all-volunteer concept by some of the Army's uniformed leaders, including Major General George S. Patton.<sup>17</sup> Patton objected to the concept because he feared that the Army would recruit "never do well" enlistees, and the Army would not be able to sustain the pay for quality personnel.<sup>18</sup> These deficiencies, he concluded, would result in an ineffective system and a general loss of interest by society for military affairs.<sup>19</sup>

Nevertheless, the volunteer program went forward, even though the Armed Forces had a difficult time meeting their recruiting objectives.<sup>20</sup> The Secretary of the Army in 1973—Howard Callaway—set out to assure potential enlistees that service to the country was a meaningful part of his or her life, and not an interruption.<sup>21</sup> Furthermore, Secretary Callaway wanted to

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15. U.S. PRESIDENT'S COMMISSION ON AN ALL-VOLUNTEER ARMED FORCE, THE REPORT OF THE PRESIDENT'S COMMISSION ON AN ALL-VOLUNTEER ARMED FORCE 11-12 (1970).

16. 30th Anniversary of the All-Volunteer Force, PUB.PAPERS 7690 (July 7, 2003); *see also* PHILIP GOLD, THE COMING DRAFT 65 (2006) (describing that the commission's name reveals its conclusion, and that its reason for recommending a volunteer force was because the mandatory draft was "an inequitable tax levied on young males who were underpaid for their work").

17. ROBERT K. GRIFFITH JR., TRANSITION TO THE ALL-VOLUNTEER FORCE 1968-1974 234 (1997) (stating that Maj. Patten wrote a ten-page-letter to Secretary Callaway focusing on Patton's philosophical objections to ending the mandatory draft policies).

18. *Id.* at 234-35 (describing Patten's concern that (1) the all-volunteer draft would result in a decrease in civilian control and (2) the Army could not sustain the pay scales necessary to attract quality personnel because he believed that "we cannot pay a man enough to make him willing to die for us. . . . There must be something more").

19. *Id.* at 234.

20. ROBERT K. GRIFFITH, JR., THE U.S. ARMY'S TRANSITION TO THE ALL-VOLUNTEER FORCE 1968-1974 228 (1997) (discussing the time that is necessary to assimilate all the new enlistment standards. As a result, in 1973, the first full year of the voluntary draft, the army only achieved seventy-six percent of its recruiting objective).

21. *Id.* at 231 (citing the goals of the volunteer army that had been listed in

convey that all men and women who served in the volunteer army would enjoy a standard of living comparable to that available in the civilian community.<sup>22</sup> To that end, since the beginning of the voluntary draft, the Army's main target group was high school-aged men and women, including high school dropouts.<sup>23</sup>

Over the years, military recruitment for the voluntary draft has been relatively successful and has received praise by many military leaders and the White House.<sup>24</sup> However, the military recruitment picture changed significantly in 2001 with the enactment of the No Child Left Behind Act.<sup>25</sup>

### *B. The No Child Left Behind Act Greatly Improved Military Recruiters' Access to High School Students*

On January 8, 2002, then-President Bush signed into law the educational federal grant program titled the No Child Left Behind Act of 2001 (NCLBA).<sup>26</sup> Buried deep within the NCLBA was a scarcely debated<sup>27</sup> and unrelated provision,<sup>28</sup> which granted

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a letter drafted by Secretary Callaway as part of a direct mail campaign to solicit support of business leaders and prominent Americans who had served in the Army).

22. *Id.*

23. *See id.* at 245. Toward the end of 1973, a bill limited the high school dropout recruits, and the focus became high school graduates. *Id.* at 249. In May 1974, sixty-seven percent of Army recruits were high school graduates. *Id.* at 288 (citing a year-by-year chart that indicated the educational level of enlistees from 1967-1979, which showed that the number of high school graduates averaged well above fifty percent during that time span).

24. *See supra* note 16 (noting that armed forces over the last thirty years have been composed entirely of volunteers and praising them for upholding the traditions of the country and the military); *see also* ROTH-DOUQUET & SCHAEFFER, *supra* note 9 at 125-26 (describing the "good short" wars, including the Gulf War and Serbia and stating that the military had undergone a virtual complete rehabilitation since Vietnam).

25. No Child Left Behind Act, 20 U.S.C. § 6301 et seq. (2006) [hereinafter NCLBA].

26. *Id.*

27. Sanja Zgonjanin, *No Child Left (Behind) Unrecruited*, 5 CONN. PUB. INT. L.J. 167, 170-74 (explaining that the proposed military recruitment amendment to the NCLBA had a very short legislative history and passed in the U.S. House by a large margin without any challenges, debate, objections, or comments); Deborah White, *Army Uses Aggressive Tactics to Recruit Teenagers: Military Recruiting on High School Campuses and Homes*, ABOUT.COM, <http://usliberals.about.com/od/homelandsecurit1/a/ArmyHighSchool.htm#> (explaining that high school campus recruiting was buried in the NCLBA as Section 9528, which requires all public and private schools receiving federal funds to provide military recruiters access to student information or lose federal funding); *see* Christine Lagoria, *Amid Scandal, Recruitment Halts*, CBSNEWS.COM, May 20, 2005, <http://www.cbsnews.com/stories/2005/05/20/national/main696991.shtml#> (reporting that a little-known provision in the NCLBA gives recruiters a secret weapon when aiming to recruit high school students as young as fourteen-years-old).

military recruiters *unprecedented* access to public high schools and student information.<sup>29</sup>

The provision, titled “Armed forces recruiter access to students and student recruiting information”,<sup>30</sup> established a new

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28. See Zgonjanin, *supra* note 27, at 192 (discussing that the military recruiting provision, § 9528 of the NCLBA, has no reasonable relation to improving academic achievement, yet is still included as part of the Act).

29. See 147 CONG. REC. H2535 (daily ed. May 22, 2001) (statement of Rep. Vitter (R-LA) and Rep. Sessions (R-TX)) (noting that the military recruitment provision was a carefully crafted tool to provide the military with access to high schools, and that young men and women all across the country might not have the opportunity to join the military simply because a school board or a school superintendent might have a bias against the military); Scott M. Stringer, *WE WANT YOU(TH)!: Confronting Unregulated Military Recruitment in New York City Public Schools*, NEW YORK CIVIL LIBERTIES UNION, at 4 (Sept. 6, 2007) [http://www.nyclu.org/files/we\\_want\\_youth\\_milrec\\_report\\_090607.pdf](http://www.nyclu.org/files/we_want_youth_milrec_report_090607.pdf) (stating that the NCLBA grants military recruiters unprecedented access to public high schools and to students’ personal information); see generally Press Release, Office of the Press Secretary, *Fact Sheet: No Child Left Behind Act* (January 8, 2002), available at <http://www.whitehouse.gov/news/releases/2002/01/20020108.html#> (providing no mention of military recruitment despite giving a specific overview of the act’s provisions and the problems it aimed to solve); see also Lila A. Hollman, *Children’s Rights and Military Recruitment on High School Campuses*, 13 U.C. DAVIS J. INT’L L. & POL’Y 217, 226 (stating that the NCLBA’s military recruiting policies represent a radical change in U.S. law); but see ROTH-DOUQUET & SCHAEFFER, *supra* note 9 at 37 (stating that parents find it onerous that their children might be asked to even consider serving their country, even though they are under no obligation to join the ranks).

30. 20 U.S.C. § 7908(a)(1)-(3) (2006):

Armed Forces recruiter access to students and student recruiting information:

(a) Policy

(1) Access to Student Recruiting Information

Notwithstanding section 1232g(a)(5)(B) of this title and except as provided in paragraph (2), each local educational agency receiving assistance under this chapter shall provide, on a request made by military recruiters or an institution of higher education, access to secondary school students names, addresses, and telephone listings.

(2) Consent

A secondary school student or the parent of the student may request that the student’s name, address, and telephone listing described in paragraph (1) not be released without prior written parental consent, and the local educational agency or private school shall notify parents of the option to make a request and shall comply with any request.

(3) Same access to students

Each local educational agency receiving assistance under this chapter shall 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.

(b) Notification

The Secretary, in consultation with the Secretary of Defense, shall, not later than 120 days after the date [of enactment of the No Child Left Behind Act of 2001], notify principals, school administrators, and other

condition to receive federal funds, namely that high schools must provide military recruiters access to the personal information of enrolled students.<sup>31</sup> Furthermore, the provision gave parents the ability to “opt out” of releasing this information only if they first submit written notification to a school.<sup>32</sup> The NCLBA provision does not provide any requirement, instruction, or mechanism to ensure that parents are aware of this option, and therefore, the provision has been criticized as violating the First Amendment right to anonymity.<sup>33</sup> Prior to the enactment of the NCLBA, the Family Educational and Privacy Act of 1975 (FERPA) protected high school students’ personal information from disclosure to military recruiters and other third parties unless they obtained parental consent.<sup>34</sup>

The NCLBA provision further granted military recruiters the equal access to high school students that college recruiters enjoy.<sup>35</sup> These dramatic changes in the law became the basis for the current struggle for equal access that counter-recruiters face.

### C. *Recruitment of High School Students Violates the Optional Protocol to the Convention on the Rights of the Child*

In 2002, Congress ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, which bound the United States to comply with its terms.<sup>36</sup> The Protocol instructs all signatory countries to set their own minimum age for voluntary

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educators about the requirements of this section.

31. *Id.*

32. *Id.*

33. *See id.* (lacking a requirement in the “Notification” section that requires the Secretary of Defense to notify parents of the opt-out option, even though the provision does require the Secretary to notify principals and school officials and educators); *see also* McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 342 (1995) (supporting the right to anonymity by stating that an author’s decision to remain anonymous is an aspect of the freedom of speech protected by the First Amendment).

34. 20 U.S.C. § 1232(g) (2006); *see generally* U.S. Department of Education, Policy Guidance-Access to High School Students and Information on Students by Military Recruiters, ED.GOV (Oct. 9, 2002), <http://www2.ed.gov/policy/gen/guid/fpco/hottopics/ht-10-09-02a.html> (providing explanatory information about the changes brought about by the enactment of the NCLBA); *see also* Hollman, *supra* note 29, at 226 (explaining that the NCLBA provides recruiters great access to students by granting military recruiter access to student information without prior parental consent).

35. *See supra* note 34 (discussing the access granted to military recruiters).

36. U.S. DEPARTMENT OF STATE, INITIAL REPORT CONCERNING THE OPTIONAL PROTOCOL ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT, *available at* <http://www.state.gov/g/drl/rls/83929.htm> (executed Sept. 14, 2002).



recruitment.<sup>37</sup> The U.S., by binding declaration, set the absolute minimum age at seventeen years.<sup>38</sup> Despite being part of this treaty, the U.S. military recruitment system openly targets high school students less than seventeen years of age.<sup>39</sup>

#### D. Current Status of U.S. Military Recruiting

##### 1. Keeping Up with Monthly Recruiting Quotas

The Department of Defense is fully committed to reaching its recruiting goals, evidenced by a recruiting budget that has eclipsed the one billion dollar mark.<sup>40</sup> The Armed Forces have established a four-tier recruiting hierarchy that sets quotas for the frontline recruiters.<sup>41</sup> In 2006, there were approximately fourteen thousand frontline recruiters nationwide with a quota of two recruits per month, which translates to an annual recruiting goal of over three hundred thousand.<sup>42</sup>

Recruiters are now using a variety of tactics to keep up with these quotas.<sup>43</sup> Some of the initiatives in place are the targeting of

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37. See *supra* note 36 (explaining the protocol and its specific terms).

38. See *supra* note 36 (explaining the protocol and its specific terms).

39. AMERICAN CIVIL LIBERTIES UNION, SOLDIERS OF MISFORTUNE: ABUSIVE U.S. RECRUITMENT AND FAILURE TO PROTECT CHILD SOLDIERS 2-3 (May 13, 2008) [http://www.aclu.org/pdfs/humanrights/crc\\_report\\_20080513.pdf](http://www.aclu.org/pdfs/humanrights/crc_report_20080513.pdf) [hereinafter ACLU].

40. See GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 12, at 6 n.7 (showing that for fiscal year 2006, the Department of Defense's recruiting budget includes \$800 million for its recruiting program, \$663 million for its advertising, and \$551 million for financial incentives for recruits).

41. See *id.* at 7 (showing a vertical organizational chart for Military Service Recruiting Commands for Army, Navy, Marines, and Air Force and explaining that each service has at least two levels between the senior headquarters and the frontline recruiters that oversee some 4800-8000 recruiting stations nationwide).

42. See Robert Burns, *Army Misses Recruiting Goal*, THE HUFFINGTON POST, June 11, 2008, <http://www.huffingtonpost.com/huff-wires/20070611/army-recruiting/> (explaining that Defense Secretary Robert Gates has set a goal of increasing the size of the active-duty Army by sixty-five thousand, bringing the total to 547,000 within five years); see also Acosta, *supra* note 26 (stating that each recruiter must enlist two recruits per month); GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 12, at 8-9 (explaining that frontline recruiters are assigned monthly goals and are supervised by some eight thousand management level staff recruiters and charting the breaking down of frontline versus supervisory recruiters for the years 2002-2006); see also Jim Lehrer, *Army Uses New Recruiting Tactics*, THE NEWS HOUR WITH JIM LEHRER (PBS online broadcast May 12, 2005), available at [http://www.pbs.org/newshour/bb/military/jan-june05/recruiting\\_5-12.html](http://www.pbs.org/newshour/bb/military/jan-june05/recruiting_5-12.html) (stating that the Army alone had a yearly recruiting goal of eighty thousand); GOLD, *supra* note 16, at 29-31 (describing that the Defense Department reported the Army had missed its goal of eighty thousand recruits by 6600, and the National Guard wanted sixty-three thousand recruits in fiscal 2005).

43. GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 12, at 1-38.

forty-year-old recruits and high school dropouts as well as the offering of hefty enlistment bonuses.<sup>44</sup> Also, military websites posing as “career guidance” resources are craftily designed to lure students into a military career.<sup>45</sup>

Turning its focus to high schools, the Army created a single source school recruitment guide for their recruiters that includes a detailed system to build and maintain an effective high school recruiting program.<sup>46</sup> The guide implores recruiters to cultivate relationships with educators, coaches, and student organizations with the express goal of creating the perception that the military is a positive career choice resulting in more recruits.<sup>47</sup> To achieve this, recruiters are told that they must utilize a “first contact, first contract” approach so they can sign up students before any other post graduation recruiters, which often results in the incessant badgering of students and their families.<sup>48</sup>

## 2. False Advertising

Recruiters have been reported to mislead, exaggerate, or engage in lying to students about military life and the various programs, or about the amount of college funds they will receive.<sup>49</sup>

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44. GOLD, *supra* note 16, at 31 (showing that the army is willing to give additional cash incentive to recruits that agree to go to certain Iraq-bound units after they complete training); *see also* Lehrer, *supra* note 42 (explaining that the maximum age of recruits has been raised to forty, and the number of high school dropouts the Army has accepted has doubled).

45. *See* ASVAB Career Exploration Program, <http://www.asvabprogram.com/index.cfm?fuseaction=overview.main> (describing the military aptitude test, ASVAB, as a tool for “career exploration” for high school students).

46. UNITED STATES ARMY RECRUITING COMMAND, SCHOOL RECRUITING PROGRAM HANDBOOK 1-2 (Sept. 1, 2004), *available at* [http://www.grassrootspace.org/army\\_recruiter\\_hdbk.pdf](http://www.grassrootspace.org/army_recruiter_hdbk.pdf).

47. *Id.* at 3 (explaining that school recruiting is critical to both short-term and long-term recruiting success); *see also* White, *supra* note 27 (describing that the army school guide for recruiters encourages them to set up basketball games among faculty, students, and recruiters, eat lunch at the cafeteria several times a month, be timekeepers at athletic events, and give awards to faculty members that aided in the high school recruiting effort).

48. *See* SCHOOL RECRUITING PROGRAM HANDBOOK, *supra* note 46, at 3 (suggesting to recruiters that if they wait until the student’s senior year to recruit, it is too late); *see also* Bill Bigelow, *Recruitment Minefield*, RETHINKING SCHOOLS (Spring 2005), [http://www.rethinkingschools.org/archive/19\\_03/recr193.shtml](http://www.rethinkingschools.org/archive/19_03/recr193.shtml) (explaining that recruiters often corner students in malls, phone them repeatedly, email them, visit them at home, buy them gifts, drive them around town, mail them videos and DVDs, and invite them to mini-boot camp weekends).

49. *See* Letter from Sen. Barbara Boxer, United States Congresswoman from California, to Francis J. Harvey, Sec’y of the Army (Nov. 6, 2006), *available at* <http://boxer.senate.gov/news/record.cfm?id=265698> (notifying Secretary Harvey of army recruiters severely misleading high school students to get them to enlist and warning him of potential violations of various provisions of the Uniform Code of Justice); *see also* *Army Recruiters Accused of*

In particular, the programs that promise college funds, such as the GI Bill, are especially misleading because very few veterans actually get the amounts promised, and some get nothing despite paying a significant nonrefundable buy-in.<sup>50</sup>

### 3. *Unethical and Illegal Recruiting*

More disturbing than being overly persistent and misrepresenting military programs,<sup>51</sup> recruiters have engaged in illegal tactics to rope in new recruits,<sup>52</sup> for example, threatening recruits with jail time if they change their mind about enlistment.<sup>53</sup> Furthermore, recruiters routinely persuade students to forge documents and lie to their parents to circumvent drug testing.<sup>54</sup>

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*Misleading Students to Get Them to Enlist*, ABC NEWS, Nov. 6, 2006, <http://abcnews.go.com/GMA/story?id=2626032> (reporting that two recruiters were lying to high school students, telling them that the war was over and that they were bringing troops back); see also White, *supra* note 27 (reporting that, in a California high school, five hundred juniors were told they were required to take the three-hour Armed Forces Vocational Aptitude Battery test, needed to gauge recruitability—only after taking the test did parents and students discover that it was optional); see also, Lehrer, *supra* note 42 (reporting that recruiter told a high school student posing as a dropout to go on the Internet to get a fake diploma so that the recruiters superiors will approve the enlistment).

50. See Elizabeth F. Farrell, *GI Blues—Military Recruiters Promise Money for College, But Veterans Find That Tuition Benefits Fall Short*, THE CHRONICLE OF HIGHER EDUCATION, May 13, 2005, <http://chronicle.com/free/v51/i36/36a03101.htm> (explaining that between 1995-2005, only eight percent of all veterans received their full tuition benefit from the GI Bill, and thirty percent failed to use it at all, even though the \$1200 buy-in was not refundable); see also Montgomery GI Bill—Active Duty—Chapter 30, DEPT. OF VETERANS AFFAIRS (Dec. 2008), <http://www.vba.va.gov/VBA/benefits/factsheet/s/education/Ch30.doc> (indicating that monthly benefits payable to veterans with three or more years of service is only \$1321 per month subject to some restrictions).

51. Lehrer, *supra* note 42 (interviewing one high school student in the Chicago area saying that recruiters call her house almost every day); see also Anna M. Schleelein, Note, *The Legal Implications Of Unauthorized Promises And Other Military Recruiter Misconduct*, 17 B.U. PUB. INT. L.J. 141, 143 (2007) (stating that recruiter misconduct and misrepresentation in order to get recruits to sign on the dotted line has tarnished the reputation of those who have earned respect).

52. See GOVERNMENT ACCOUNTABILITY OFFICE, *supra* note 12, at 4 (explaining the government has reported at least seventy known cases of recruiting misconduct involving criminal violations).

53. David Martin, *Army Recruiters Use Scare Tactics*, CBS EVENING NEWS (July 28, 2008), available at <http://www.cbsnews.com/stories/2008/07/28/eveningnews/main4301305.shtml>; see also Schleelein, *supra* note 51, at 142-43 (explaining that it is common for recruiters to tell students that the military will physically force them to report to duty if they do not show up for basic training).

54. See Acosta, *supra* note 26 (explaining that a CBS news report caught

There have been other disturbing occurrences involving recruiters. The number of rape and assaults by male recruiters on young women recruits has increased dramatically.<sup>55</sup> Moreover, the practice of targeting low income and minority students has, in essence, undermined the very notion of an all-volunteer military.<sup>56</sup> For these reasons, along with the expansion of military access to students by current law, there has been a growing counter-recruitment movement<sup>57</sup> supported by students, parents, activists, and educators nationwide.

### III. ANALYSIS

#### A. Direct Access to High Schools and Students Via the Equal Access Act

The Equal Access Act prohibits high schools from denying equal access to any student who wishes to conduct a meeting within a limited open forum on the basis of political, philosophical, religious, or other content.<sup>58</sup> A “limited open forum” is created when a high school allows for one or more non-curriculum related student groups to meet on school premises during non-class time.<sup>59</sup> The Supreme Court has broadly interpreted “non-curriculum related group” to mean any student group that does not directly relate to courses offered by the school.<sup>60</sup> Furthermore, courts have

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recruiters on tape asking teens to lie to parents and forge documents).

55. Blanca Solorzano, *Sexual Abuse by Military Recruiters—More than 100 Women Raped Or Assaulted By Recruiters In Past Year*, CBS NEWS, Aug. 20, 2006, <http://www.cbsnews.com/stories/2006/08/19/national/main1913849.shtml> (reporting on a CBS News investigation that revealed that women were raped on recruiting office couches and in government cars, and that over eighty military recruiters nationwide were disciplined in 2006 alone); see also Aimee Allison, *Recruiter Sexual Abuse: Friendly Fire at Home?*, ALTERNET.ORG, July 24, 2007, <http://www.alternet.org/rights/57378/> (describing a lawsuit filed by two California teenage girls regarding a Marine Corps recruiter who got them drunk before the attack).

56. See ACLU, *supra* note 39, at 3.

57. See PRINCE GEORGE COUNTY MD PEACE & JUSTICE COALITION, COUNTER RECRUITMENT CAMPAIGN BROCHURE (2007), available at <http://www.justpeace-pgmd.org./counter-recruit/index.html> (showcasing a Maryland peace organization that promotes a campaign in accordance with the national counter-recruitment movement).

58. The Equal Access Act, 20 U.S.C. § 4071(a) (2006). The Act applies only to public secondary schools which receive Federal financial assistance. *Id.* See also *Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 241 (1990) (explaining that a school district seeking to escape the statute’s obligations could simply forgo federal funding).

59. 20 U.S.C. § 4071(b); *Student Coal. for Peace v. Lower Merion Sch. Dist. Bd.*, 776 F.2d 431, 438 (3d Cir. 1985).

60. See *Mergens*, 496 U.S. at 239 (explaining that groups such as the chess club, stamp collecting club, or community service club are examples of non-curriculum related student groups because they do not directly relate to the

held that non-student invitees (for example, counter-recruiters and peace activists) are also protected under the Equal Access Act so long as they do not direct, conduct, control, or regularly attend such student meetings.<sup>61</sup> In this regard, counter-recruiters can gain access to high schools as invitees of these student groups. The challenge for counter-recruiters, however, has been finding students who are interested in forming counter-military recruitment groups.<sup>62</sup>

*B. Counter-Recruitment Groups Must Be Given the Same Access as Military Recruiters*

A favorable body of case law provides constitutional support for direct access for counter-military recruiters on high school campuses.

*1. Searcey v. Crim: The Eleventh Circuit Grants Equal Access to Counter-Recruitment Groups*

In a case of first impression, the Eleventh Circuit dealt with the issue of whether the Atlanta Public Schools properly denied an Atlanta counter-recruitment group similar access to high schools as the Armed Forces.<sup>63</sup>

In *Searcey*, the Atlanta Peace Alliance (“Alliance”) contended that students were entitled to as much information as possible about the military before making a decision regarding a career in the military.<sup>64</sup> Further, the Alliance requested permission to distribute informational literature and be granted equal time for Career Days and speaking opportunities alongside Armed Forces recruiters.<sup>65</sup> The Alliance argued that the school board had

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body of courses offered by the school, which is consistent with Congress’ intent to provide a low threshold for triggering the Equal Access Act’s requirements); *but see id.* at 240 (clarifying that the school still maintains a significant measure of authority over the type of officially recognized activities in which their students participate and that the school can prohibit meetings that would materially and substantially interfere with the orderly conduct of educational activities in the school).

61. *Student Coalition for Peace*, 776 F.2d at 442; *see also* 20 U.S.C. § 4071(c) (requiring additionally that these protected groups must be voluntary, student-initiated, not sponsored by school personnel and not materially interfere with educational activities).

62. *See Rights of Counter-Recruiters to Access Schools*, Oregon Socialist Party, 2 (Mar. 2007), [http://www.thesocialistparty.org/spo/pub/Memo\\_re\\_Right\\_R\\_of\\_Counter\\_Recruiters\\_March\\_2007.pdf](http://www.thesocialistparty.org/spo/pub/Memo_re_Right_R_of_Counter_Recruiters_March_2007.pdf) (suggesting that counter-military recruiters should find students to form counter-military groups in order to gain the protection of the Equal Access Act).

63. *Searcey v. Crim*, 815 F.2d 1389, 1390 (11th Cir. 1987); *see also id.* at 1391 (intervening in the case, the United States alleged a protectable interest in ensuring that military recruiters continue to have access to public schools).

64. *Id.*

65. *Id.* (the group requested to distribute informational literature about

violated its First and Fourteenth Amendment rights by denying permission to present educational and career opportunities related to peace while providing the Armed Forces access to recruit for military careers.<sup>66</sup> The school board argued that it created a nonpublic forum, and that its policies lawfully and reasonably limited the expressive activity.<sup>67</sup>

In reaching its decision, the *Searcey* court discussed the types of forums defined by Supreme Court precedent for determining the constitutionality of restrictions on speech, even though the court ultimately decided it was not necessary for them to determine whether a public or nonpublic forum was created.<sup>68</sup> The court explained that in public forums, the government can *only* exclude outside speakers when the exclusion is necessary to serve a compelling state interest.<sup>69</sup> For nonpublic forums, as long as the school creates a forum for speakers to discuss a particular topic, the school cannot exclude other speakers on the same topic solely because of their viewpoint.<sup>70</sup>

military recruitment, military life, draft counseling, and alternative careers to the military).

66. *Id.*; *accord Searcey v. Crim*, 681 F. Supp. 821, 822 (N.D. Ga. 1988) (explaining the Atlanta Peace Alliance brought sued for declaratory and injunctive relief alleging that the Atlanta Board of Education violated their First and Fourteenth Amendment rights by arbitrarily and capriciously denying them permission to use established channels in the Atlanta public schools to present information to students concerning alternative career opportunities related to peace).

67. *Searcey*, 815 F.2d at 1391 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)) (noting that the school board relies on the *Perry Education Ass'n* decision to make their primary argument that their access policies are reasonable regulations of expressive activity in a nonpublic forum); *see also Perry Educ. Ass'n*, 460 U.S. at 45-46 (identifying three categories of government property: (1) traditional public forums, which have "by long tradition or by government fiat" been devoted to assembly and debate; (2) designated, created or limited public forums, consisting of property "which the state has opened for use by the public as a place for expressive activity"; and (3) nonpublic forums, which consist of property "which is not by tradition or designation a forum for public communication . . .").

68. *Searcey*, 815 F.2d at 1392-93.

69. *Id.*; *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985); *Perry*, 460 U.S. at 45.

70. *Searcey*, 815 F.2d at 1391; *see also Cornelius*, U.S. 473 at 806 (explaining that even in a nonpublic forum, the government can be held to violate first amendment when it denies access to a speaker solely to suppress the point of view he or she espouses on an otherwise includible subject); *United States v. Belsky*, 799 F.2d 1485, 1489 (11th Cir. 1986) (regulation restricting speech in a nonpublic forum must be reasonable and viewpoint neutral); *M.N.C. of Hinesville, Inc. v. U.S. Dep't of Defense*, 791 F.2d 1466, 1474 (11th Cir. 1986) (content-based restrictions imposed in nonpublic forums fall into two categories: those that distinguish between the views of certain speakers and those that do not); *c.f. Cornelius*, U.S. 473 at 806 (explaining that even in a nonpublic forum, the government can be held to violate the First Amendment when it denies access to a speaker solely to suppress the

The *Searcey* court ultimately held in favor of the counter-recruiters, explaining that the school board had failed to provide a compelling state interest for excluding them and in any case, had unlawfully excluded the group on the basis of viewpoint discrimination.<sup>71</sup>

2. *School Districts Engage in Viewpoint Discrimination If They Exclude Counter-Military Groups While Simultaneously Allowing Pro-Military Recruitment*

In *San Diego Committee Against Registration and the Draft v. Grossmont Union High School District*, the Ninth Circuit again upheld counter-recruiters' equal access rights on a First Amendment basis.<sup>72</sup> The court was asked to decide whether a school district could prohibit a counter-military group from placing ads in a school newspaper while simultaneously allowing the Armed Forces to place pro-military ads.<sup>73</sup> The court held that the school board publications were devoted entirely to expressive activity and thus had created a "limited public forum" as defined by the Supreme Court.<sup>74</sup> The court concluded that the school board violated the counter military group's First Amendment rights by failing to provide a compelling governmental interest for establishing a limited public forum that allowed the pro-military viewpoint while simultaneously prohibiting the counter viewpoint on the same topic.<sup>75</sup>

Importantly, the court, in dicta, admitted that military service is by definition controversial and political in nature, and that our nation has a long history of opposition to military service.<sup>76</sup> Counter-recruitment groups have utilized this court's

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point of view he or she espouses on an otherwise includible subject).

71. *Searcey*, 815 F.2d at 1394-95.

72. *San Diego Comm. Against Registration and the Draft v. Governing Bd. of Grossmont Union High Sch. Dist.*, 790 F.2d 1471, 1473 (9th Cir. 1986).

73. *See id.* at 1472 (the San Diego Committee, a non-profit California organization, was actively involved in counseling young men on alternatives to military service and sued the Grossmont School District when it was denied equal access to school publications as the pro-military recruiters).

74. *See id.* at 1475-76 (citing *Perry*, 460 U.S. at 45; *Cornelius*, 473 U.S. at 800) (indicating that the school board evinced an intent to create a limited public forum under the *Cornelius* test because the newspapers were devoted entirely to expressive activity, and allowing non-students to use the forum to avail themselves as long as their speech consists of vocational opportunities and other topics to students).

75. *See id.* at 1478-81 (holding that having established a limited public forum, the board could not, absent a compelling governmental interest, exclude speech otherwise within the boundaries of the forum and that in particular, the board could not allow the presentation of one side of an issue, but prohibit the presentation of the other side).

76. *Id.* at 1477.

verbiage to further their cause.<sup>77</sup>

In a recent Ninth Circuit decision, *Hills v. Scottsdale Unified School District*, the court also followed Supreme Court precedent by holding that viewpoint discrimination is unconstitutional when it is directed at speech otherwise falling within the forum scope.<sup>78</sup> There are also several federal district court decisions out of Illinois, Pennsylvania, and Florida that have also recognized this rule.<sup>79</sup>

In particular, the Northern District of Illinois dealt specifically with a clergy group who was repeatedly denied access by the Chicago Board of Education to public high schools for the purpose of providing students counseling regarding military service and legal alternatives to the draft alongside Armed Forces recruiters.<sup>80</sup> The district court found that the school had opened a forum protected under the dual mandate of the First Amendment and the Equal Protection clause, and therefore, the school board “pick[ed] and choose” which views it felt should be expressed in the forum.<sup>81</sup>

### 3. *Anti-Military Recruitment Statute 18 U.S.C. § 2388 Has Not Been Tested and Is Otherwise Unconstitutional*

A less-known federal statute titled Activities Affecting Armed Forces During War makes it a felony to willfully obstruct U.S. military recruitment services.<sup>82</sup> Although this federal law has never been used to prosecute counter-recruitment, its predecessor

77. See Rick Jahnkow, *Using Equal Access To Counter Militarism In High Schools*, PROJECT YOUTH AND NON-MILITARY OPPORTUNITIES (YANO), July 2006 at 2, available at <http://www.projectyano.org/pdf/Equalaccess2006.pdf> (stating that the government’s interest in promoting military service is not an economic one; rather political or governmental and the subject of military service is historically been controversial and political in nature).

78. *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1051 (9th Cir. 2003) (citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995)) (confirming the Supreme Court *Cornelius* and *Perry* tests on viewpoint discrimination).

79. *Ninth Circuit Court Ruling: Confronting Militarism By Using Equal Access To High Schools*, Committee Opposed to Militarism and the Draft (Aug. 27, 2008), [http://www.comdsd.org/article\\_archive/9thcirintro.htm](http://www.comdsd.org/article_archive/9thcirintro.htm).

80. *Clergy & Laity Concerned v. Chicago Bd. of Educ.*, 586 F. Supp. 1408, 1411 (N.D. Ill. 1984).

81. *Id.* at 1412.

82. 18 U.S.C. § 2388(a) (2006).

(a) . . . Whoever, when the United States is at war, willfully causes or attempts to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or willfully obstructs the recruiting or enlistment service of the United States, to the injury of the service or the United States, or attempts to do so -

Shall be fined under this title or imprisoned not more than twenty years, or both.

*Id.*



was used in a few cases during the World Wars.<sup>83</sup> Nevertheless, the First Amendment right to free speech has evolved considerably since that time, and free speech activity such as counter-recruitment has been held to be constitutionally protected.<sup>84</sup> Moreover, the statute does not specifically address counter-recruitment on school campuses.<sup>85</sup>

In summary, although the issue has not been appealed to the U.S. Supreme Court, it is clear that decisions by the Eleventh and Ninth Circuits stand for the proposition that the First Amendment prohibits public high schools from discriminating against counter-recruiting groups if, at the same time, their policies allow a pro-military presence. Indeed, these decisions would be persuasive in the proposed counter-recruitment lawsuit by the ACLU and any future litigation because they remain good law. Additionally, the Equal Access Act provides an alternative approach for counter-recruiters to convey their message in high schools.

### C. Public Policy Clearly Supports Counter-Recruiter Access to High School Students and Campuses

In addition to the favorable law for counter-recruitment, public policy concerns have reinforced the importance of allowing a counter-military presence in high schools. Specifically, concerns have been voiced that U.S. military recruitment practices have violated parental and student privacy rights,<sup>86</sup> have exploited the young developing minds of students,<sup>87</sup> and have disproportionately

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83. *Butler v. United States*, 138 F.2d 977, 978 (7th Cir. 1943); *Reeder v. United States*, 262 F. 36, 38 (8th Cir. 1919); *Rhuberg v. United States*, 255 F. 865, 870 (9th Cir. 1919); *Deason v. United States*, 254 F. 259, 260 (5th Cir. 1918); *O'Hare v. United States*, 253 F. 538, 539 (8th Cir. 1918); *United States v. Hall*, 248 F. 150, 152 (D. Mont. 1918); *see also* *United States v. Gordon*, 138 F.2d 174, 176 (7th Cir. 1943) (prosecuting two founders of the 1930s organization known as the Peace Movement of Ethiopia for willfully conspiring to cause insubordination, disloyalty, mutiny, and for refusing duty in the United States military and naval forces, and for obstructing the recruiting and enlistment service).

84. *See* *Virginia v. Black*, 538 U.S. 343, 359 (2003) (noting that constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."); *see generally* *Brandenburg v. Ohio*, 395 U.S. 444 (1969); (considering that speech, even if found to be illegal, is still constitutionally protected).

85. 18 U.S.C. § 2388 (2006).

86. *See* *Dittmeier Holm*, *supra* note 8, at 588 (concluding that NCLBA's opt-out policy violates the right of parents to rear their children as they see fit and to control who has access to their children).

87. *See* *Hollman*, *supra* note 29, at 228-29 (describing that the immaturity of judgment make high school students more prone to be influenced and take risks, which recruiters capitalize on).

targeted minority, immigrant, and low income groups.<sup>88</sup>

1. *Recruitment Practices and Related Federal Law Violate Privacy Rights of Parents*

a. Parental Privacy Rights

The Supreme Court has long recognized that the Constitution affords every individual certain personal rights that are deemed fundamental within the concept of liberty, and that those rights are extended to include the right for parents to control how their children are raised, who comes in contact with their children, and how their children are educated.<sup>89</sup> Federal law appears to be at odds with these rights.

b. Counter-Recruiter Presence Is Critical to Ensure Parental Privacy Rights are Protected Given the NCLBA Recruiter Access Provision

Under the NCLBA recruiter access provision, high school districts must give recruiters access to students' names, addresses, and telephone numbers without obtaining parental consent.<sup>90</sup> Supported by this provision, the Pentagon has also created a national database of all students age sixteen to twenty-five to enhance recruitment efforts.<sup>91</sup> Emboldened by the NCLBA, the New York City Department of Education drafted a new policy wherein military recruiters are now given centralized access to the department's student information, alleviating the need for recruiters to go from school to school where they might find

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88. See *Honesty In Recruitment*, Coalition Against Militarism In Schools, at 5 (Dec. 10, 2004), <http://www.militaryfreeschools.org/PDF/Honesty%20in%20Recruitment%20Newsletter.pdf> (explaining that pro-military recruiter's strong presence at career fairs enable students from low income families, and that JROTC programs are sold as financial tools to attract low income children).

89. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (explaining Supreme Court cases that have recognized certain implicit fundamental rights for all individuals); see also *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (extending fundamental rights to family relationships); see also *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (extending fundamental rights to child rearing and education of children).

90. 20 U.S.C. § 7908 (a)(3); 10 U.S.C. § 503 (c)(1)(A)(i) (2006); see also Dittmeier Holm, *supra* note 8, at 583 (describing the latitude of recruiters under the NCLBA and the National Defense Authorization Act).

91. Damien Cave, *Age 16-25? The Pentagon Has Your Number and More*, N.Y. TIMES, June 24, 2005, at A18, [http://www.nytimes.com/2005/06/24/politics/24recruit.html?\\_r=1](http://www.nytimes.com/2005/06/24/politics/24recruit.html?_r=1); Jonathan Krim, *Pentagon Creating Student Database: Recruiting Tool for Military Raises Privacy Concerns*, WASH. POST, June 23, 2005, at A1, [http://www.washingtonpost.com/wp-dyn/content/article/2005/06/22/AR2005062202305\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/06/22/AR2005062202305_pf.html); Mark Mazzetti, *Military Enlists Marketer to Get Data on Students for Recruiters*, L.A. TIMES, June 23, 2005, at A1, <http://articles.latimes.com/2005/jun/23/nation/na-privacy23>.

opposition.<sup>92</sup> This NCLBA provision clearly infringes on these fundamental parental rights to their child because parental consent is assumed until it is revoked.<sup>93</sup> The NCLBA provision does loosely place the burden on schools to notify parents about their right to opt-out, but unfortunately, it is rarely done and seldom enforced.<sup>94</sup> As a result of this dilemma, the efforts of counter-recruitment organizations have become increasingly important to ensure that the parental rights are protected, and these organizations have championed opt-out campaigns in school districts nationwide to increase parent awareness.<sup>95</sup>

## 2. *High School Students' Impressionable Minds Are No Match for the Aggressive Military Recruiter Pitch*

By simply being on high school campuses, the military exposes children as young as fifteen-years-old to the sales pitch for military life.<sup>96</sup> Significantly, seventeen percent of all enlisted persons in the U.S. Army are ages seventeen to twenty.<sup>97</sup> Junior

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92. *Military Opt-Out Letters*, NEW YORK CITY DEPARTMENT OF EDUCATION, <http://schools.nyc.gov/StudentSupport/StudentAttendance/MilitaryOptOutLetters/default.htm> (last updated Dec. 18, 2010); see also Javier Hernandez, *Gathering Pupil Data for Military is Criticized*, N.Y. TIMES, Oct. 16, 2008, at A35, <http://www.nytimes.com/2008/10/16/nyregion/16recruit.html> (stating that the New York Civil Liberties Union is heavily criticizing the new New York City Department of Education policy that allows centralized access to military recruiters).

93. See Dittmeier Holm, *supra* note 8, at 586 (explaining that parents are not asked permission by recruiters to contact their children).

94. See Claire Schaeffer-Duffy, *Counter-Recruitment Grows: Activists Combat Military's Access to Students And Schools*, NATIONAL CATHOLIC REPORTER, Nov. 25, 2005, [http://findarticles.com/p/articles/mi\\_m1141/is\\_/\\_ai\\_n15970435](http://findarticles.com/p/articles/mi_m1141/is_/_ai_n15970435) (explaining that although the NCLBA states that schools "must inform parents and students of their right to withhold names from recruiters or other groups, many schools have done a poor job advertising the 'opt-out' provision."); see also Zgonjanin, *supra* note 27, at 175-76 (describing how the ACLU chapter of New Mexico has filed a complaint against the Albuquerque public schools because they failed to implement policies and procedures regarding the disclosure of student information, and because they disclosed private information before giving notice to parents about their rights regarding disclosure).

95. See Zgonjanin, *supra* note 27, at 176-78 (citing several counter-recruitment groups nationwide such as the LMCA's Family Privacy Project that have initiated opt-out awareness campaigns in both Spanish and English to increase parental awareness of this issue); see also Tamar Lewin, *Uncle Sam Wants Student Lists, and Schools Fret*, N.Y. TIMES, Jan. 29, 2003, at B10, <http://www.nytimes.com/2003/01/29/nyregion/uncle-sam-wants-student-lists-and-schools-fret.html> (describing how the opt out campaign was initiated when the Fairport Central School District in New York had adopted an opt in policy).

96. Hollman, *supra* note 29, at 236.

97. UNITED STATES ARMY OFFICE OF ARMY DEMOGRAPHICS, UNITED STATES ARMY PROFILE, FISCAL YEAR 2004 4 (2004).

ROTC recruiters start even as young as thirteen.<sup>98</sup> Indeed, U.S. law, in accordance with international treaties, has recognized most rights beginning at age eighteen.<sup>99</sup> The U.S. Supreme Court, in *Roper v. Simmons*, explained that juveniles under eighteen often “lack maturity” and “have an underdeveloped sense of responsibility,” which makes them prone to “impetuous and ill-considered actions and decisions.”<sup>100</sup> Furthermore, studies have shown that a teenager’s character is much less developed, less fixed, and more “transitory.”<sup>101</sup>

As a result, recruiters have had a relatively easy task in engaging high school students by glorifying dangerous military activities.<sup>102</sup> For example, one Armed Forces recruiter in California enticed male students by saying they can get paid for jumping out of airplanes, shooting cool guns, blowing things up, and travelling all over the world.<sup>103</sup>

Counter-recruitment organizations argue that one of their main objectives is to be able to present both sides of the story, so students can be completely informed before they make their decision, especially during wartime when the chances of being sent into active combat are high.<sup>104</sup>

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98. Ben Arnoldy & Gordon Lubold, *JROTC: Leadership course or recruiting tool? San Francisco will vote in November on a ballot to save the military program in schools*, THE CHRISTIAN SCIENCE MONITOR, Oct. 15, 2008, <http://www.csmonitor.com/USA/2008/1016/p01s01-usgn.html>.

99. See *supra* notes 36-39; see also Elizabeth S. Scott, *Criminal Responsibility In Adolescence: Lessons from Developmental Psychology*, in YOUTH ON TRIAL: A DEVELOPMENT PERSPECTIVE ON JUVENILE JUSTICE 291, 302 (Thomas Grisso & Robert G. Schwartz eds., 2003) (discussing age boundaries in U.S. law, which recognizes most rights at eighteen years).

100. *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005) (noting that the differences between juveniles under eighteen and adults are significant because juvenile offenders cannot with reliability be classified among the worst offenders due to their comparative immaturity and irresponsibility). The Court also stated that almost every state prohibits those under eighteen years of age from voting, serving on juries, or marrying without parental consent. *Id.*

101. *Id.*; for a general analysis of a teenagers character, see generally ERIK ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968).

102. Hollman, *supra* note 29, at 240.

103. *Supra* note 91.

104. See Aamer Madhani, *Enlisting opposition—Anti-war activists visit schools to counter military recruiters’ pitch*, CHICAGO TRIBUNE, Feb. 19, 2006, at A1 (portraying a recruiter’s effort to discuss the war with teens was met with indifference and lack of interest); see also Hollman, *supra* note 29, at 242 (explaining that after the enactment of the NCLBA, there is a great risk that young military recruits will be sent into active combat); see Stringer, *supra* note 29, at 9 (explaining that given the high and dangerous stakes during war time, it is crucial that young people have access to full and open information about the military).

D. *Low-income, Minority, and English as a Second Language Recruits are Primary Targets for Military Recruiters*

Since the 1960s, the Armed Forces recruiting efforts have targeted the poorer, black and Latino communities.<sup>105</sup> During the Vietnam War, the White House did little to rectify the fact that minority groups were dying in disproportionately high numbers compared to white soldiers.<sup>106</sup> U.S. ground forces in Vietnam were often characterized as a “working-class military,” made up of poorer, less-educated minorities.<sup>107</sup>

The scenario is not much different for the Iraq War, as military recruiters have increasingly targeted Latinos and blacks.<sup>108</sup> Army recruiting offices are often strategically set up in heavily populated minority communities and schools.<sup>109</sup>

Minorities are also much more likely to be on the deadly front line in hand to hand combat as opposed to whites (who hold seventy-eight percent of all officer positions).<sup>110</sup> Low-income

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105. LORENA OROPEZA, ¡RAZA SI! ¡GUERRA NO! CHICANO PROTEST AND PATIOTISM DURING THE VIETNAM WAR ERA 68 (2005).

106. See *id.* (in 1966, the White House made an “attempt” to rectify the uneven ratio of minority to white deaths in Vietnam by simply placing more African Americans on draft boards).

107. CHRISTIAN APPY, WORKING CLASS WAR: AMERICAN COMBAT SOLDIERS AND VIETNAM 25, 37 (1993).

108. Allison Keyes, *Military Recruiters Target Blacks, Hispanics*, NATIONAL PUBLIC RADIO, Aug. 15, 2005, <http://www.npr.org/templates/story/story.php?storyId=4801610>; see also Mady Wechsler Segal and David R. Segal, *Latinos Claim Larger Share of U.S. Military Personnel*, POPULATION REFERENCE BUREAU, Oct. 2007, <http://www.prb.org/Articles/2007/HispanicsUSMilitary.aspx> (stating the “Army has launched a vast recruiting campaign targeting Latino youth, placing ads in Spanish-language media, including magazines, radio, and television. The number of Hispanic Army enlistments rose 26 percent between 2001 and 2005”); see also *Study Notes High Percent Of Black Deaths In Iraq*, ATLANTA DAILY WORLD, Jan. 21, 2004 (describing that nearly a fifth of the fatalities among U.S. troops in the current war in Iraq are black, which will be the highest cost African Americans have paid in any of America’s wars).

109. See Bryan Watson, *Antiwar Protests Save Teachers’ Jobs! Tukwila Authorities Forced to Back Down*, SOCIALIST ALTERNATIVE, Jan. 24, 2008 (explaining that Foster in the Tukwila School District between Seattle and Tacoma is made up of seventy-one percent low-income students who are eligible for free or reduced-cost school meals, making it a very active spot for military recruiters); see also Triana Belvis Nazario, *The Army Digs a Trench In Spanish Harlem*, NY LATINO J. (2006), [http://nylatinojournal.com/home/news/new\\_york/the\\_army\\_digs\\_a\\_trench\\_in\\_spanish\\_harlem\\_2.html](http://nylatinojournal.com/home/news/new_york/the_army_digs_a_trench_in_spanish_harlem_2.html) (stating that the military is heavily involved in Spanish Harlem, New York).

110. See Summer Harlow, *Military Recruiters Set Sights on Hispanics*, USA TODAY, Aug. 20, 2007 (citing a Pew Hispanic Center report found that Hispanics were over-represented in the most deadly frontline positions, making up nearly eighteen percent of personnel who handled weapons directly); see also *Hispanics in the Military—Fact Sheet*, PEW HISPANIC CENTER, (Mar. 27, 2003), available at <http://pewhispanic.org/files/factsheets/6.pdf> (showing a chart indicating the 2001 Officer Corp breakdown based

enlistees, regardless of race, constitute sixty-eight percent of the Iraq War casualties and were from a zip code with a median household income below the national level.<sup>111</sup> For immigrant Latino families, parents are often confused and find themselves challenged to provide sound guidance to their children about the military life because recruiters fail to communicate effectively.<sup>112</sup>

Counter-recruiters argue that their access to low income and ethnic students is necessary to effectively educate about the realities of a military career and to temper aggressive recruiting efforts.<sup>113</sup>

#### IV. PROPOSAL

Given the favorable case law supporting counter-recruitment activities in high schools, school districts across the country should endeavor not to promote policies barring these groups on campus, or they may face a losing battle in the courtroom for engaging in viewpoint discrimination.<sup>114</sup> As an alternative to litigation, there are several diplomatic solutions to facilitate the inclusion of counter-recruitment advocates on high school campuses. Specifically, high schools should enact guidelines to incorporate access programs for counter-recruitment or other non-military alternative groups. Secondly, engaging educators, unions, and administrators as advocates will greatly facilitate counter-recruitment. Finally, at the federal level, an adjustment of the Department of Education Guidelines or amendments to current legislation would have a legitimizing effect on the counter-

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on race); see also Jill Colvin, *The Re-Militarized Zone*, RETHINKING SCHOOLS ONLINE, (Fall 2007), [http://www.rethinkingschools.org/archive/22\\_01/zone221.shtml](http://www.rethinkingschools.org/archive/22_01/zone221.shtml) (explaining that recruiters have easy pickings in urban area for enlisting recruits).

111. Matt Baker, *Poor areas bear burden of casualties in Iraq*, NORTHWESTERN UNIVERSITY MEDILL SCHOOL OF JOURNALISM, Mar. 2006, [http://observer.medill.northwestern.edu/301-wi06-sec04/2006/03/poor\\_areas\\_bear\\_burden\\_of\\_casu.html](http://observer.medill.northwestern.edu/301-wi06-sec04/2006/03/poor_areas_bear_burden_of_casu.html).

112. Lizette Alvarez, *Army Effort to Recruit Hispanics Draws Recruits, and Criticism*, N.Y. TIMES, Feb. 9, 2006, at A1 (quoting Jorge Mariscal, the director of Latino Arts for the University of California, who stated that there is a much confusion among immigrant parents, and military recruiters are preying on that confusion).

113. Javier C. Hernandez, *Counter-Recruiter' Seeks to Block Students' Data From the Military*, N.Y. TIMES, Oct. 22, 2008 at A1 (explaining how counter recruiter made it her mission to combat an increasingly aggressive attempt to recruit low-income and minority students into the armed forces); see also *Counter-recruitment Basics*, CHICAGO VETERANS FOR PEACE, [www.chicagovfp.org/CounterRecruitment/COUNTER%20RECRUITMENT%20BASICS.ppt](http://www.chicagovfp.org/CounterRecruitment/COUNTER%20RECRUITMENT%20BASICS.ppt) (indicating that about half of the inner city schools in Chicago have JROTC programs, yet only five of the affluent suburban schools have similar programs).

114. See *supra* notes 59-75 and accompanying text.

recruitment movement.

A. *Altering School Policies to Incorporate Counter/Alternative Career Recruitment Access*

1. *School Districts Should Recognize Counter-Recruitment Rights and Adopt Inclusive Programs.*

There have been a few school districts across the country that have formally allowed counter-recruitment access in their schools.<sup>115</sup> Most of these districts have simply written a letter to their school principals instructing them that they should grant non-military recruiters the same access as military recruiters.<sup>116</sup> However, other districts have actually incorporated provisions regarding access to counter-recruiters into their school policies. For example, the Chicago Public School system (CPS) has granted access to counter-recruiters in its large, urban school district.<sup>117</sup> The CPS policy manual contains recruiter access provisions that incorporate counter-recruiters in two areas.<sup>118</sup> First, the provision states that its purpose is to establish the parameters for college recruiters, military recruiters, prospective employers *and other providers* of career information to have access to high schools, high school students or their directory information.<sup>119</sup> Secondly, the CPS policy manual also defines the term “recruiter” as follows:

“Recruiter” means an entity with information for high school students about a college or university; trade school or apprenticeship; scholarship, grant or loan; or other post-secondary school vocational or career opportunity. Recruiters include, but are not limited to, college recruiters, prospective employers, military

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115. Chicago Public Schools Policy Manual, *Recruiter Access Provision § 708.1* (Adopted Jan. 23, 2008), available at [http://www.comdsd.org/School\\_policies/Chicago\\_equal\\_access\\_and\\_recruiter\\_policy\\_708.1.pdf](http://www.comdsd.org/School_policies/Chicago_equal_access_and_recruiter_policy_708.1.pdf) [hereinafter CPS Policy Manual]; Seattle Public Schools, *Procedure Code E14.03 Alternatives to Military Recruitment Equal Access* (Sep 2005), available at [http://www.comdsd.org/School\\_policies/E14.03\\_Seattle\\_equal\\_access\\_policy.pdf](http://www.comdsd.org/School_policies/E14.03_Seattle_equal_access_policy.pdf) [hereinafter Seattle Public Schools Procedure Code]; San Diego Unified School District, *Equal Access Directive*, available at [http://www.comdsd.org/School\\_policies/S\\_DUSD\\_equal\\_access\\_directive.pdf](http://www.comdsd.org/School_policies/S_DUSD_equal_access_directive.pdf); see also Letter from Austin Independent School District General Counsel to School Principals, Austin Texas Independent School District, (Aug. 15, 2005) available at [http://www.comdsd.org/School\\_policies/Austin\\_equal\\_access\\_directive.pdf](http://www.comdsd.org/School_policies/Austin_equal_access_directive.pdf) (advising new policy in school district them non-military options at the same level as pro-military options to provide).

116. See Letter from Austin Independent School District, *supra* note 115 (recommending that high schools that display or provide access to military recruiters on campus also provide access to information about non-military alternatives in a similar place and manner as the military recruiters).

117. CPS Policy Manual, *supra* note 115.

118. *Id.*

119. *Id.* (emphasis added).

recruiters and entities that offer information on alternatives to military careers.<sup>120</sup>

This method cleverly expands the definition of recruiter to allow equal access to an “entity” such as a counter-recruiting organization without actually mentioning the term “counter-recruiter” which can have an adversary tone.<sup>121</sup> The CPS provisions are also careful to note that they do not endorse any particular recruiters’ message, but instead aim to comply with the law and to provide students with the full range of options, so they can make informed decisions about their careers.<sup>122</sup>

Other school districts use more of a surgical strike in allowing counter-recruiter access.<sup>123</sup> For example, Seattle Public Schools not only expressly grant counter-recruiter access, but also provide specific examples of the non-military career choices that counter-recruiting groups offer, such as the Peace Corp and AmeriCorps, and also grant equal access to organizations that offer students “truth in military recruiting” information.<sup>124</sup>

Importantly, counter-recruitment groups must endeavor to offer actual peace or non-military career alternatives when discussing their equal access rights to make it more palatable for school districts to incorporate them amicably as “recruiters” and not merely “anti-war protesters.”

## 2. Counter-Recruiters Must Utilize School Publications and Bulletin Boards and Engage in Literature Distribution to Disseminate Their Message

Counter-recruitment is typically a volunteer operation, and finding personnel to put in the same amount of time as military recruiters can be challenging. Accordingly, providing pamphlets, posting signs, running advertisements in school-run publications and bulletin boards, and participating in career fairs are effective and efficient ways to convey the counter-recruitment message. For example, the San Diego Unified School District, as part of their Equal Access Directive, incorporates the distribution of career information on alternatives to military careers in the same manner as other career information from other sources, such as

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120. *Id.* § 708.1(1)(A) (emphasis added).

121. *Id.*

122. CPS Policy Manual, *supra* note 115.

123. See Seattle Public Schools Procedure Code, *supra* note 115 (requiring that, if a high school in the district permits military recruiters to speak with students, “the school must provide equal access for organizations that wish to counsel alternatives to, or provide additional information about, military service.”).

124. See *id.* (listing specific organizations that “must be given equal access” to students if a high school permits military recruiters to speak with students).



colleges and trade schools.<sup>125</sup>

*B. Educators and Other Personnel Can Facilitate Counter-Recruitment in High Schools*

A sensible method to provide direct access to counter-recruitment in schools is to engage teachers and school administrators themselves as counter-recruiters. They are already familiar with school policies, the facilities, and, perhaps most importantly, many of the students. As a result, they can be instrumental in facilitating counter-recruitment organizations on campus and organizing student groups.<sup>126</sup> Teachers, who naturally influence students about career choices, can also be a sobering counterweight against the military's various tactics to luring students.<sup>127</sup> One eighth-grade teacher in California has joined a counter-recruitment organization and has concentrated on persuading the teachers union by drafting resolutions for the union to remove the NCLBA's Section 9528.<sup>128</sup>

Educators, however, should be careful about the extent of their involvement in organizing or participating in counter-recruitment activities because they might risk losing their jobs.<sup>129</sup>

*C. Changing Guidelines or New Legislation at the Federal Level Would Dramatically Help Counter-Recruitment.*

Repealing Section 9528 of the NCLBA is the preferred course of action, as it would significantly decrease the military's access to

125. San Diego Public Schools Unified School District Equal Access Directive, *supra* note 115.

126. See Adolfo Guzman-Lopez, *Teachers Counter Military Recruitment in Public Schools*, (Southern California Public Radio, KPCC radio broadcast Mar. 20, 2008) available at [http://legacy.scpr.org/news/stories/2008/03/20/08\\_iraq\\_recruitment\\_032.html](http://legacy.scpr.org/news/stories/2008/03/20/08_iraq_recruitment_032.html) (describing three teachers successfully engaging in counter-military recruitment with their students at their respective schools); Gregory Sotir, *NCLB and the Military*, ZNET, June 3, 2007, <http://www.zcommunications.org/nclb-and-the-military-by-gregory-sotir> (encouraging others, as an eighth-grade teacher, to call, write, or visit his or her congressional representatives about military recruiting in schools, and to pass anti-9528 resolutions in his or her union).

127. See *supra* notes 100–05 and corresponding text (describing military recruiters' tactics, such as glorifying military life and befriending students).

128. See Sotir, *supra* note 126 (describing how, as an eighth-grade teacher, Sotir has proposed NCLBA reform resolutions to the Human Rights Committee of United Teachers Los Angeles, a joint National Education Association and American Federation of Teachers (AFT) local, through the California Federation of Teachers (CFT), the AFT statewide teacher union affiliate).

129. See Emily Heffter, *Protesting teacher back at Tukwila school*, SEATTLE TIMES, Nov. 29, 2007, available at [http://seattletimes.nwsource.com/html/education/2004041566\\_tukwila29m.html](http://seattletimes.nwsource.com/html/education/2004041566_tukwila29m.html) (explaining how a protesting teacher at a student-run, anti-war protest was forced to take leave from his job due to participation in the student anti-war protest).

high school students and likely reduce the need for counter-recruitment efforts.<sup>130</sup> There have been several bills authored by Democratic Congressman Michael Honda (2007, 2009) and Republican Congressman Duncan Hunter (2009) amending the NCLBA military recruiting provision and calling for written parental consent before allowing military personnel to recruit children.<sup>131</sup> However, these bills have failed because they have not gained sufficient traction in Congress.<sup>132</sup> There is new hope for the counter-recruitment movement, however, as President Obama in his 2011 State of the Union address announced that the NCLBA will be replaced.<sup>133</sup>

Another, perhaps simpler, approach is to lobby for a minor change in the Department of Education Guidelines for Military Recruiter Access. These are the guidelines followed most by schools to be in compliance with federal law.<sup>134</sup> The guidelines currently state that military recruiters must be granted the same access to schools that “post-secondary institutions” or “prospective employers” enjoy.<sup>135</sup> Expanding this terminology to include “other providers of career information” would encourage schools to allow access to counter-recruitment groups. In either case, counter-recruitment groups, parents, and educators alike should keep the pressure on their congressional representatives to repeal the NCLBA provision.

## V. CONCLUSION

Since the passage of the NCLBA and the prolonged U.S. involvement in the wars in Iraq and Afghanistan, military recruitment efforts within U.S. high schools have gotten out of control. Students are being brainwashed, harassed, taken advantage of, and misled about the realities of military life. Minority students are unfairly being targeted. Students and

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130. See generally *supra* notes 25–34 and corresponding text.

131. H.R. 1346, 110th Cong., available at <http://www.govtrack.us/congress/bills/110/1346>; H.R.1091, 111th Cong., available at <http://www.govtrack.us/congress/bills/111/1091>; H.R. 1026, 111th Cong., available at <http://www.govtrack.us/congress/bills/111/1026>.

132. See *supra* note 131.

133. Press Release, Office of the Press Secretary, Remarks by the President in the State of the Union Address, (Jan. 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>; see also Press Release, Office of the Press Secretary, President Obama Calls on Congress to Fix No Child Left Behind Before the Start of the Next School Year, (March 14, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/14/president-obama-calls-congress-fix-no-child-left-behind-start-next-school>.

134. Access to High School Students and Information on Students by Military Recruiters, U.S. Dep’t of Educ., (Oct. 9, 2002), <http://www2.ed.gov/policy/gen/guid/fpco/hotopics/ht-10-09-02a.html>.

135. 20 U.S.C. § 7908(a)(3).

parental privacy rights are being compromised. It is for these reasons the presence of counter-military recruitment is essential. Counter-recruiters provide students and their parents a more complete picture of military life and military programs, allowing students to make informed decisions. Until legislation reforms current military recruitment law, equal access for counter-recruitment organizations must be an essential part of school policies.