

August 11, 2011

The Honorable Leon Panetta
Secretary of Defense
1000 Defense Pentagon
Washington, D.C. 20301-1000



Dear Mr. Secretary:

We at Servicemembers Legal Defense Network want to express our appreciation for your following through on the work begun by Secretary Gates and issuing the certification that will bring about the end of "Don't Ask, Don't Tell" next month. While this was surely a huge accomplishment, there is more that you can do to bring about a military that is both open and equitable.

First, Department officials, both civilian and military, have repeatedly said that gay and lesbian service members will be treated with respect and dignity and that nothing will stand in the way of their advancing as far as their skills and talents will take them. We applaud these sentiments. What we would like to see is the Department formalize these commitments by including them in Departmental policies and practices. Similar commitments to other groups of Americans are reflected in such documents. The same commitments should be made to gay and lesbian service members.

For example, the Department of Defense Human Goals Charter commits the Department to strive

"To make military service in the Department of Defense a model of equal opportunity for all regardless of race, color, sex, religion, or national origin."

On the civilian side the goal is

"To provide equity in civilian employment regardless of race, color, sex, religion, national origin, disability, age, or sexual orientation...."

It should be a simple matter to add the words "sexual orientation" to the first commitment, just as they appear in the second. It should be equally simple to bring enforcement of that commitment into the Military Equal Opportunity program, to join the armed forces' commitments as to race, color, religion, sex and national origin.

Second, with the repeal of "Don't Ask, Don't Tell", there will be two classes of service members in the U.S. military — those who receive full family support, pay and benefits and those who do not. We fully understand that the Defense of Marriage Act prevents the Department from extending the same support and benefits to all service members. However, you have the ability, within the confines of that law, to make same-sex married couples and their families eligible to take part in some of the same programs that are available to straight married couples and their families. These include making same-sex married couples eligible for joint duty assignments, family center programs and military family housing. A more complete list is attached.

We thank you for your consideration and look forward to working with you and your team to address these post-repeal opportunities.

Sincerely,

A handwritten signature in black ink, appearing to read "Aubrey Sarvis", is positioned above the typed name.

Aubrey Sarvis
SLDN Executive Director

CC: Dr. Clifford Stanley, Under Secretary for Personnel and Readiness
Jeh Johnson, DoD General Counsel

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BENEFITS AVAILABLE FOR EXTENSION TO SAME-SEX SPOUSES

DEERS & Military ID Cards: A Military ID is required for on-base activities, and there is no statute preventing issuance of IDs to same-sex spouses. An ID would also allow the same-sex spouse to bring dependent children on base without being accompanied by the service member. The ability to bring a child to on-base services such as health care facilities is essential. Currently, DODI 1000.13 governs eligibility for ID Cards, and should be updated to extend IDs to same-sex spouses.

Morale, Welfare & Recreation: Family members of service members are authorized for unlimited use of all MWR programs because they are eligible for ID cards and registration in DEERS.¹ “Family Member” includes “Individuals whose relationship to the sponsor leads to entitlements, benefits, or privileges administered by the uniformed services or who are eligible for issuance of a family member identification card.”² DoD should make clear that this includes same-sex spouses of service members.

Current regulations give installation commanders the authority to open up limited access to certain MWR programs to guests and the general public.³ DoD should issue regulations requiring that these programs be opened to same-sex spouses whenever possible, even if it declines to include partners in the definition of “Family Members.”

Military Family Housing: Under DoD regulations, Military Family Housing (MFH) is available only to service members who qualify for housing at the “with-dependent” rate.⁴ Gay and lesbian service members with children may qualify for MFH, but same-sex married couples without children are not eligible for this important benefit. DoD should update DOD Manual 4165.63-M to recognize same-sex spouses as dependents eligible for MFH.

Moreover, local base policy may prevent partners of gay service members with children from living with their families in military family housing. DoD should issue guidelines requiring base commanders to permit a same-sex co-parent from living on-base with the service member and their children. The Air Force already permits qualified live-in childcare providers to live in on-base housing,⁵ and the Army allows non-family members to live in military family housing (but not unaccompanied housing) with permission from the Housing Office.⁶ These policies should be extended to same-sex spouses and effective in all branches of the service.

Commissaries & Exchanges: Exchange and commissary privileges are restricted by Congress to “dependents” of service members. However, the statute in question does not define “dependent.”⁷ The DOD Instruction on commissary management defines “dependent” to include the service member’s spouse, dependent children and step-children, parents and parents-in-law, and former spouses that meet certain qualifications.⁸ DoD should expand the regulatory definition of “dependent” to include legally married same-sex spouses, and should consider adding children and parents of a same-sex spouse.

Family Programs: DoD already uses a flexible definition of “family” for the purpose of implementing Family Centers and programming,⁹ but leaves it up to the individual Service Secretaries to determine eligibility.¹⁰ Thus, each branch of the service (and each installation commander) determines the extent to which same-sex spouses have access to these programs, which include deployment support, marriage and family counseling, relocation assistance and financial management. DoD should explicitly include same-sex spouses in the definition of “family” contained service-wide regulations in order to dispel any confusion, and limit the discretion of base commanders to exclude gay families from Family Center programming.

Legal Services: Free legal services are a statutory benefit limited to “dependents.” However, the statute, 10 U.S.C. § 1044(e), leaves it up to the service secretary concerned to define “dependent.” DoD should take

¹ See Department of Defense Instruction (DODI) 1015.10, *Military Morale, Welfare, and Recreation (MWR) Programs*, Table 1, July 6, 2009.

² See *Id.* at 51.

³ See *Id.* at Table 2.

⁴ 37 U.S.C. §401, §403. See also DOD Manual 4165.63-M *DOD Housing Management* at 49-50, October 28, 2010 (defining “dependent,” “family,” and “family member”).

⁵ Air Force Instruction 32-6001, *Family Housing Management*, ¶ 2-12, June 26, 2008.

⁶ Army Regulation 420-1, *Army Facilities Management*, ¶ 3-15.a, March 28, 2009.

⁷ 10 U.S.C. § 2481.

⁸ See DODI 1330.7, *Armed Services Commissary Operation* at 42, October 8, 2008.

⁹ See DODI 1342.22, *Family Centers*, ¶ E2.1.5, December 30, 1992 (“Family Members. Includes those individuals for whom the member provides medical, financial, and logistical (for example, housing, food, clothing) support. This includes, but is not limited to, the spouse, children under the age of 19, elderly adults, and persons with disabilities.”).

¹⁰ *Id.*, ¶ 5.3.2.

steps to ensure that the Service secretaries define “dependent” to include the service member’s same-sex spouse.

Hospital Visitation: Federal health regulations require that hospitals participating in Medicare not restrict or limit visitation privileges on the basis of sexual orientation and stipulate that a patient has the right to allow visitation from any person, including a same-sex partner.¹¹ DoD should ensure that military hospitals that do not participate in Medicare are held to the same standards of non-discrimination.

DoD should also make explicit requirements that both legal parents should be able to visit a child in a military treatment facility regardless of the sexual orientation of the parents or their marital status.

Joint Duty Assignments: DoD regulations counsel that married, dual-career military couples are generally to be stationed in the same geographic area.¹² The language of the applicable regulations makes same-sex military couples ineligible for co-location consideration for duty assignments. Instead of limiting same-sex military couples to hardship-based requests for accommodation in assignments, DoD should issue guidelines for joint duty assignments for dual-military same-sex spouses.

Exemption from Hostile-Fire Areas: In dual-military families, if one family member is killed, 100% disabled or goes into missing status in a hostile-fire area, other members of the same family may be exempted from serving in such an area.¹³ The definition of “family members” should be expanded to include the service member’s same-sex spouse.¹⁴

Command-Sponsored Dependent Status and Space-Available Travel: To the extent possible depending on the agreement with a host-country, DoD should give same-sex spouses command-sponsored dependent status.

A command-sponsored dependent is also eligible for greater space-required and space-available travel privileges than non-command-sponsored individuals.¹⁵ The regulation on “Air Transportation Eligibility”¹⁶ uses the definition of “dependent” from the Joint Federal Travel Regulations (JTFR), Volume I, Appendix A1. The JTFR in turn defines “dependent” of a uniformed services member as in 37 U.S.C. § 401, which excludes same-sex partners. However, there is no statutory reason for using this definition of dependent for Space Available Travel. Notably, the Joint Federal Travel Regulations define “dependent” more broadly for civilian employees, to include domestic partners. DoD should take a similar approach for same-sex partners of service members.

Spousal Privilege in Courts Martial: The Rules of Evidence in the Manual for Courts-Martial (MRE) gives spouses the privilege to refuse to testify against their spouse in criminal cases, subject to a few exceptions.¹⁷ Because same-sex marriage is not recognized under DOMA, same-sex spouses can be forced to testify against their loved ones and disclose confidential information shared during the marriage relationship. The UCMJ is codified by statute, but the MRE can be changed to include this privilege without an act of Congress.

¹¹ 42 C.F.R. § 482.13.

¹² See DODI 1315.18, *Procedures for Military Personnel Assignments*, ¶¶ 6.2.3.2, E2.1.29, E2.1.33, January 12, 2005.

¹³ *Id.*, ¶ E3.11.1.1.

¹⁴ *Id.*, ¶ E3.11.4.

¹⁵ Department of Defense Directive 4515.13-R, *Air Transportation Eligibility*, April 9, 1998. Non-command-sponsored dependents are eligible for space-required or space-available travel under limited circumstances. Non-dependents who are “close blood or affinitive relatives” of a military member who are “dependent on the sponsor for a home” (such as children over age 21, and perhaps a same-sex partner) are eligible for space-required travel in some emergency situations. *Id.* ¶ DL1.1.12.

¹⁶ Department of Defense Directive 4515.13-R, *Air Transportation Eligibility*, April 9, 1998.

¹⁷ Manual for Courts Martial, MIL. R. EVID. § 504, 2008 Ed.