NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

January 14, 2002

Major General Josiah Bunting III
Superintendent
Virginia Military Institute
Lexington, Virginia 24450

Dear General Bunting:

The National Women's Law Center is a non-profit organization working to protect the rights and opportunities of women and girls in education, the workplace and other aspects of their lives. We write concerning a parenting policy at the Virginia Military Institute ("VMI") that violates the rights and equal educational opportunities of female students, and request that you rescind this policy immediately.

As you know, VMI's Board of Visitors last year directed you to adopt a regulation "whereby a VMI cadet who chooses to marry, or to undertake the duties of a parent (including causing a pregnancy or becoming pregnant by voluntary act)," will be expected to resign or will be expelled from VMI. VMI has now proposed a regulation to implement this policy. The regulation states that "[a]bsent voluntary resignation, should [VMI] confirm that a cadet is married or the parent of a child, such cadet shall be separated from the Corps, for failure of eligibility, at the end of the semester in which the information is received and confirmed." We understand that the regulation is effective as of today, January 14, 2002.

Because they unfairly target and burden pregnant students, the parenting provisions of both the resolution adopted by the Board of Visitors and the implementing regulation (hereinafter the VMI "policy") constitute sex discrimination in violation of federal and state law. Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. § 1681, bars discrimination on the basis of sex in educational institutions that receive federal financial assistance. The 14th Amendment to the United States Constitution similarly bans sex discrimination, as well as the application of arbitrary presumptions about an individual's capabilities. And Virginia's own Human Rights Act prohibits discrimination based on sex and pregnancy, among other bases, and invalidates conduct that violates federal law. Va. Code Ann. §§ 2.2-3900, 3901.

The sex discrimination prohibitions of Title IX indisputably cover discrimination based on a woman's pregnancy. *See, e.g.*, *Pfeiffer v. Marion Center Area School District*, 917 F.2d

779, 784 (3d Cir. 1990) (Title IX regulations bar discrimination based on pregnancy, parental status, and marital status); *Wort v. Vierling*, C.A. No. 82-3169, Order at 6-7 (C.D. Ill. Sept. 4, 1984) (dismissal of student from National Honor Society based on pregnancy violated both Title IX and the Constitution). In fact, the regulations implementing Title IX expressly bar a school from excluding any student from its education program on the basis of pregnancy or related conditions. 34 C.F.R. § 106.40(b). The regulations further prohibit application of "any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex." 34 C.F.R. § 106.40(a). VMI's parenting policy directly contravenes these prohibitions; it is a rule about actual or potential parental status that, by its very nature, treats students differently on the basis of sex and that will significantly disadvantage only those students who can become pregnant – that is, female students.

VMI's policy requires the Institute to impose disciplinary consequences on a cadet (unless the cadet has voluntarily resigned) once it has confirmed that the cadet is the parent of a child. Because it is a visible manifestation of a woman's impending parenthood, a female cadet's pregnancy will automatically, and in all cases, trigger application of this rule. By contrast, the policy contains no mechanism for confirming – or even for discovering -- that male cadets have become parents. This is fundamental sex discrimination under the terms of Title IX. *Compare Chipman v. Grant County School District*, 30 F. Supp. 2d 975, 979 (E.D. Ky. 1998) (preliminary injunction granted against policy barring those who had engaged in premarital sex from membership in National Honor Society, where policy excluded 100% of "young women who have become pregnant from premarital sex and have become visibly pregnant," and "0% of young men who have had premarital sexual relations"); *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 667 (6th Cir. 2000) (under analogous statute, Title VII of the Civil Rights Act of 1964, "a school can not use the mere observation or knowledge of pregnancy as its sole method of detecting violations of its premarital sex policy").

There is substantial evidence that VMI adopted its policy precisely as a means to exclude pregnant female cadets. Prior to its admission of women -- and despite its current claims that men, as well as women, cannot act both as students and as parents at the same time -- VMI did not act to expel students based on marriage or parental status. VMI did not enforce its then-existing policy prohibiting cadets from marrying. *See* Chittum, "VMI Drafts Pregnancy Policy," *Roanoke Times*, front page (June 30, 2001) (VMI rule forbidding marriage applied "with a 'don't ask, don't tell' policy"). And it ignored, and refused to penalize, male cadets who fathered children and undertook the duties of fatherhood. *See The Washington Post*, "Pregnant on the Parade Ground" at B08 (April 1, 2001) (citing examples showing that "[p]arenthood has been a fact of life for several VMI cadets in the past few decades"). In fact, the VMI Board of Visitors adopted the current policy only after a female cadet became pregnant while attending the school.

The penalties VMI has adopted further violate Title IX and its implementing regulations. The regulations not only bar exclusion of pregnant cadets, but also require affirmatively that

pregnancy be treated "as a justification for a leave of absence for so long a period of time as is deemed medically necessary . . . at the conclusion of which the student shall be reinstated to the status she held when the leave began." 34 C.F.R. § 106.40(b)(5). We also believe that VMI's policy is inconsistent with the policies adopted at other schools. According to news reports, The Citadel, for example, treats pregnancy as a temporary medical disability which may at some point require a medical furlough; the United States Naval Academy allows pregnant midshipmen to either resign or to take a leave of up to one year.

VMI's parenting policy also violates the Equal Protection Clause of the 14th Amendment to the United States Constitution. As discussed above, VMI's policy is neither neutral nor justified; it was adopted to, and does, treat female students differently on the basis of sex. There can be no "exceedingly persuasive justification" for this discrimination. *United States v. Virginia*, 518 U.S. 515, 531 (1996). Moreover, to the extent that it creates an irrebuttable presumption that parents cannot meet both their parental and their academic responsibilities, VMI's policy runs afoul of Supreme Court cases requiring an opportunity for individualized consideration of a person's ability or record. *See, e.g., Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 644 (1974) (invalidating "conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing" to teach); *Stanley v. Illinois*, 405 U.S. 645 (1972) (statute containing an irrebuttable presumption that unmarried fathers are incompetent to raise their children violated the Due Process Clause).

Moreover, Virginia's own Human Rights Act makes clear that any conduct that violates a federal discrimination statute will also violate Virginia law. Va. Code Ann. §§ 2.2-3900, 3901 (2001). Because VMI's policy, as discussed above, constitutes unlawful discrimination on the basis of sex and pregnancy under federal law, VMI is likely to face liability under state law as well.

Finally, there is nothing in the Order dismissing *United States v. Virginia*, C.A. No. 90-0126-R (Dec. 6, 2001), that sanctions this policy. That Order finds that VMI has met its obligation to "formulate, adopt, and implement a plan that conforms with the Equal Protection Clause of the Fourteenth Amendment as applied to this case by the Supreme Court." As applied by the Supreme Court in the VMI case, of course, the Equal Protection Clause analysis addressed only the admission of women -- not the parenting policy VMI has now decided to adopt. And the parties' joint motion to dismiss this case makes explicit that the United States Department of Justice has taken no position on whether VMI's policy complies with either the Equal Protection Clause or Title IX.

For the reasons set forth above, VMI's parenting policy violates the Constitution, the prohibitions of Title IX, and state law. The National Women's Law Center also believes that VMI's approach represents poor policy, in that it may cause young women cadets to seek to

terminate their pregnancies in circumstances in which they would not otherwise do so. We urge you to rescind the policy expeditiously and adopt a policy that complies with the law.

We look forward to your prompt reply.

Sincerely,

Marcia D. Greenberger
Co-President

Jocelyn Samuels
Vice President and Director, Education

cc: Bruce C. Gottwald, President
Board of Visitors
Virginia Military Institute
Lexington, Virginia 24450

The Honorable Mark Warner
Governor of Virginia
State Capitol, 3rd Floor
Richmond, Virginia 23219

Dr. Carl N. Kelly
Chairman
State Council of Higher Education for Virginia
101 North 14th Street, 9th Floor
Richmond, Virginia 23219

Dr. Belle S. Wheelan
Secretary of Education
Virginia Department of Education
P. O. Box 2120
Richmond, Virginia 23218