NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

Planned Parenthood Federation of America, Inc.

November 7, 2001

BY HAND DELIVERY

Stephen Joel Trachtenberg
President and Professor of Public Administration
The George Washington University Rice Hall
2121 Eye Street, NW
Washington D.C. 20052

Dennis H. Blumer
Vice-President and General Counsel
The George Washington University
2100 Pennsylvania Ave., NW
Suite 525
Washington D.C. 20052

Colin Clasper
Vice-President - University Compliance Officer
University Compliance Office
The George Washington University
2100 M Street, NW
Suite 309
Washington D.C. 20052

Michael K. Young, Dean
The George Washington University Law School
Lerner Hall
2000 H Street, NW
Washington, D.C. 20006-4234

Yvonne DeVigne, Associate Dean for Student Affairs
The George Washington University Law School
Stockton Hall
720 20th Street, NW
Washington, D.C. 20006-4306

Dear Messrs. Trachtenberg, Blumer, Clasper and Young and Ms. DeVigne:

Planned Parenthood Federation of America and The National Women's Law Center represent female law students enrolled at The George Washington University ("GW"). On behalf of our clients, and along with our potential co-counsel Trial Lawyers for Public Justice, we write to bring to your attention a discriminatory health coverage practice at GW and to request that this practice be ended without delay. This request is also supported by GW students who have signed the enclosed petitions.

Specifically, the Student Health Insurance Plan that GW "endorse[s]" and "strongly encourages" students to purchase (*see* introductory page of Plan Brochure) explicitly excludes coverage of prescription "contraceptive methods, devices or aids," despite covering other prescription drugs, devices and services. Plan Brochure at 32, no. 23. FDA-approved contraceptives are, of course, available only to women. While GW's health plan covers women's

gynecological services generally, the failure to provide coverage for prescription contraceptives is a glaring omission that causes injury to our clients and many other female students at GW, and constitutes sex discrimination in violation of the District of Columbia Human Rights Act, D.C. Code Ann. §§ 2-1401.05, 2-1402.41 (2000) ("DCHRA"), and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* ("Title IX").

Under Title IX, it is unlawful for an educational institution receiving federal funds to discriminate on the basis of sex. As the regulations implementing Title IX make clear, the statutory ban on sex discrimination applies to health benefits, plans, and services provided to students by GW. 34 C.F.R. § 106.39. Moreover, the Title IX regulations specifically provide that when a recipient administers a health benefit, service, plan or policy, it must treat pregnancy and related conditions in the same manner as any other temporary disability. 34 C.F.R. § 106.40(b)(4). The regulations further make clear that Title IX's mandate relating to pregnancy encompasses "*potential* parental, family or marital status" (emphasis added), and prohibits any rule based on those statutes that treats students differently on the basis of sex. 34 C.F.R. § 106.40(a).

The DCHRA similarly prohibits an educational institution from "deny[ing], restrict[ing] or . . . abridg[ing] . . . any of its . . . services to any person . . . based upon . . . sex." D.C. Code Ann. § 2-1402.41 (2000). The prohibition against sex discrimination by educational institutions specifically includes discrimination on the basis of "pregnancy, childbirth, or related medical conditions." D.C. Code Ann. § 2-1401.05 (2000). The DCHRA language regarding pregnancy discrimination is *identical* to the language of the Pregnancy Discrimination Act ("PDA") of Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000e(k) ("Title VII"). As the Supreme Court has made clear in interpreting the PDA, the potential for pregnancy is a pregnancy-related condition that is included in the prohibition on pregnancy-based discrimination. *International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

In a very recent federal court ruling, *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001), the court ruled that Title VII and the PDA prohibit excluding prescription contraceptives from an otherwise comprehensive health benefits plan. The court ruled that "the exclusion of prescription contraceptives creates a gaping hole in the coverage offered to female employees, leaving a fundamental and immediate healthcare need uncovered."[1] 141 F. Supp. 2d at 1277. The court held that Title VII's prohibition on pregnancy discrimination protects women against any discrimination based on their "unique sex based characteristics," such as excluding coverage of prescriptions (like contraceptives) that only women need. The court rejected the employer's argument that prescription contraception is different than other prescription drugs. It wrote: "[T]he availability of affordable and effective contraceptives is of great importance to the health of women and children . . . In addition, the adverse economic and social consequences of

---

[1] While the *Erickson* ruling arose in the employment context, the DCHRA and Title IX extend the protections against discrimination to students at educational institutions.

unintended pregnancies fall most harshly on women and interfere with their choice to participate fully and equally in 'the marketplace and the world of ideas.'" 141 F. Supp. 2d at 1273. The court also rejected the employer's contention that the cost of covering contraception justifies the contraceptive exclusion, saying that an employer "cannot . . . penalize female employees in an effort to keep its benefit costs low." 141 F. Supp. 2d at 1274.[2]

The *Erickson* court ruling relies in part on a recent Commission Decision by the Equal Employment Opportunity Commission ("EEOC"), the primary Title VII enforcement agency, finding that an employer's failure to provide insurance coverage for prescription contraceptives constitutes unlawful sex discrimination under the PDA. *See* Decision, http://www.eeoc.gov/docs/decision-contraception.html. Applying *Erickson*'s holding and the EEOC decision here, the exclusion of prescription contraceptive coverage for female students at GW constitutes sex discrimination in violation of the DCHRA and Title IX.

Not only is equitable coverage of contraception the correct legal result, it is the correct public health result. Medical professionals agree that contraception is essential for women's health and well-being because the consequence of failure to use contraception – unintended pregnancy – carries significant risks for the woman and the infant. Indeed, if no method of contraception were used, the average woman would be expected to bear between 12 and 15 children in her lifetime. The physical, financial and emotional costs of such prolific childbearing – on the women, her education, her family, and on society – would be extremely high. Moreover, female students are likely to be particularly unprepared for the physical consequences of pregnancy, the demands of parenting, and the costs that result from both. Where a health benefits plan – such as GW's – excludes coverage of contraceptives, women must thus either pay the out-of-pocket expenses of purchasing prescription contraception, which can be expensive (hundreds of dollars a year, depending on the form of contraception), or bear all of the health and other risks associated with unplanned pregnancy.

At the same time, the cost to a university of adding such coverage is minimal at most. Study after study has shown that health insurance providers can *save* money by including contraceptive coverage in their policies. For example, the Washington Business Group on Health has estimated that failing to provide contraceptive coverage could cost employers at least 15% more than providing this coverage. Concrete experience bears this out. When the federal government added contraceptive benefits for its employees, its insurance costs did not change at

---

[2] Subsequent to the *Erickson* ruling, the U.S. District Court for the Southern District of California denied the defendant's motion to dismiss in another PDA/contraceptive exclusion case. The court ruled that it "adopts the reasoning set forth in *Erickson v. Bartell Drug Co.* and concludes that Plaintiffs have indeed stated viable Title VII gender discrimination claims." *Wessling v. AMN Healthcare*, No. 01-CV-0757 W (RBB) (S.D. Cal. Aug. 8, 2001). The case subsequently settled with the defendant agreeing to provide coverage for all FDA-approved contraceptives.

all. Thus, GW's exclusion of prescription contraceptives from the student health insurance plan is harmful to GW's female students and has no economic justification.

For these reasons, we strongly urge that GW take immediate action to comply with its legal obligation to its students by providing insurance coverage for all FDA-approved prescription contraceptive drugs and devices, and related medical services, in the health plan offered to its students. We look forward to hearing from you promptly in the hope that we can resolve this matter without resort to the courts and request that you contact us by November 19, 2001 with your response.

Sincerely,

Eve C. Gartner
Senior Staff Attorney
Planned Parenthood Federation of America
(212) 261-4617

Jocelyn Samuels
Vice President/Director of Educational Opportunities
The National Women's Law Center
(202) 588-5180

Leslie A. Brueckner
Staff Attorney
Trial Lawyers for Public Justice, P.C.
(202) 797-8600

Enclosures (petitions)