

NCWGE NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION

September 14, 2004

Re: Nomination of Thomas Griffith to D.C. Circuit

Dear Senator:

We are writing on behalf of the National Coalition for Women and Girls in Education (NCWGE), a nonprofit coalition of more than 50 organizations dedicated to improving educational opportunities for women and girls, concerning the nomination of Thomas B. Griffith to the U.S. Court of Appeals for the District of Columbia Circuit. NCWGE members wish to bring to your attention Mr. Griffith's record with respect to Title IX of the Education Amendments of 1972 and ask that you evaluate it carefully as you consider this nomination. It is important to note that while NCWGE and its members typically have not been involved in the judicial nominations process, NCWGE is quite concerned about this nomination and some of our member organizations have taken the serious step of opposing Mr. Griffith's nomination.

Title IX bars sex discrimination in education programs or activities that receive federal funding, including athletics programs. Since Title IX's enactment, women's participation in sports has increased by more than 400% at the college level and more than 800% at the high school level, and this law has opened up not only opportunities to play sports but the chance to receive college scholarships and the significant health, emotional, and academic benefits that flow from sports participation. At the same time, Title IX's goal of equal opportunity has yet to be fully realized. Female athletes continue to be shortchanged, at both the high school and college levels, both in their playing and scholarship opportunities and in the quality of the facilities and programs available to them.

In 2002, Secretary of Education Roderick Paige created the Commission on Opportunity in Athletics to evaluate whether and how current standards governing Title IX's application to athletics should be revised. Mr. Griffith served as a member of this Commission, which made a series of recommendations to Secretary Paige that, if accepted, would have devastated current Title IX athletics policies and reduced the athletic opportunities and scholarship dollars to which women and girls are legally entitled. Secretary Paige ultimately rejected the Commission's recommendations. Mr. Griffith, however, not only joined in making these recommendations, he offered a radical proposal of his own that even the Commission – which was dominated by representatives of large universities that have the most to gain by weakening the law -- rejected by a lopsided vote of 11-4.

Mr. Griffith's proposal was to eliminate one prong of the three-part test that has long been part of the regulatory policies governing how educational institutions may comply with Title

IX's requirement that male and female students be offered equal opportunities to participate in sports. Under that prong, a school is in compliance with Title IX participation requirements if it offers athletics opportunities that are in substantial proportion to each gender's representation in the student body at that school. This component – which is one of three wholly independent ways that schools can satisfy Title IX's requirements -- in no way mandates that schools set aside certain numbers of athletics slots for either men *or* women. Instead, this prong of the test simply recognizes the obvious: that schools can comply with Title IX when they do provide their female students with the same athletics opportunities they offer to their male students. To prohibit schools from using the “substantial proportionality” prong of the three-part test, as Mr. Griffith's proposal would have done, would reduce schools' flexibility in complying with Title IX, enshrine unacceptable and unlawful stereotypes about women and their interest in playing sports, and freeze women's opportunities at their current levels. Mr. Griffith has subsequently described his own proposal as “radical.” The July 11, 2003 final clarification letter issued at the close of the Commission process by the U.S. Department of Education's Office of Civil Rights confirmed just how far outside the mainstream Mr. Griffith's proposal was, when it stated: “First, with respect to the three-prong test, which has worked well, OCR encourages schools to take advantage of its flexibility, and to consider which of the three prongs best suits their individual situations. ... Each of the three prongs is thus a valid, alternative way for schools to comply with Title IX.”

In support of his proposal, Mr. Griffith argued that the proportionality test is unreasonable, inconsistent with the language of Title IX, and a violation of the Equal Protection Clause of the Constitution. In so doing, as documented in the transcripts of the Commission's proceedings, Mr. Griffith dismissed the decisions of *eight Circuit Courts* (every one to consider the issue) upholding the proportionality test and rejecting the very arguments he was making. What the case law shows, but Mr. Griffith refused to accept, is that the proportionality test is simply a logical way to measure whether, in sex-segregated athletics programs, female students and male students are being provided with equal opportunities to play, and thus to ensure that schools allocate participation opportunities non-discriminatorily - - which is at the very heart of Title IX's mandate. See Miami University Wrestling Club v. Miami University, 302 F.3d 608 (6th Cir. 2002); Chalenor v. University of North Dakota, 291 F.2d 1042 (8th Cir. 2002); Pederson v. Louisiana State University, 213 F.3d 858 (5th Cir. 2000); Neal v. Board of Trustees of The California State Universities, 198 F.3d 763 (9th Cir. 1999); Boulahanis v. Board of Regents, 198 F.3d 633 (7th Cir. 1999), *cert. denied*, 530 U.S. 1284 (2000); Cohen v. Brown Univ., 991 F. 2d 888 (1st Cir. 1993) (Cohen I), and Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) (Cohen II), *cert. denied*, 520 U.S. 1186 (1997); Horner v. Kentucky High School Athletic Ass'n, 43 F.3d 265 (6th Cir. 1994); Kelley v. Board of Trustees, University of Illinois, 35 F.3d 265, 270 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128 (1995); Roberts v. Colorado State Board of Agriculture, 998 F.2d 824 (10th Cir.), *cert. denied*, 510 U.S. 1004 (1993); Williams v. School District of Bethlehem, 998 F.2d 168 (3^d Cir. 1993).

This is an important issue that will continue to come before the courts, including the court to which Mr. Griffith has been nominated. Indeed, just last week the D.C. Circuit affirmed the District Court's dismissal of a challenge to Title IX athletics policies (affirming the district

court's dismissal of the case on standing grounds), and en banc review may be sought in that case. NCWGE members therefore believe it is imperative that you carefully consider Mr. Griffith's strongly held views on Title IX as you evaluate his record and his suitability for a lifetime seat on this important court.

Thank you for your consideration. If you have any questions, please contact either of us.

Sincerely,



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Cc: Members of the Judiciary Committee

NCWGE NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION

Member Organizations*

Academy for Educational Development
*American Association for the
Advancement of Science*
*American Association of School
Administrators*
American Association of University Women
American Civil Liberties Union
American Council on Education
American Educational Research Association
American Federation of Teachers
American Psychological Association
*Association for Gender Equity Leadership in
Education*
Association for Women in Science
*Association of American Colleges and
Universities*
*Association of Junior Leagues
International, Inc.*
Association of Teacher Educators
Business & Professional Women USA
Center for Advancement of Public Policy
Center for Women's Policy Studies
Council of Chief State School Officers
Resource Center on Educational Equity
Dads and Daughters
Equal Rights Advocates
*Federation of Organizations for
Professional Women*
Feminist Majority Foundation
*Gallaudet University,
Women's Basketball Coach*
Girl Scouts of the USA
Girls Count
Girls Incorporated
Girlstart
Leadership Conference on Civil Rights
Ms. Foundation for Women
Myra Sadker Advocates for Gender Equity
*Legal Momentum, formerly NOW Legal
Defense and Education Fund*
National Alliance for Partnerships in Equity

*National Association for Girls & Women
in Sport*
*National Association of Collegiate Women
Athletic Administrators*
National Center for Lesbian Rights
*National Council of Administrative Women
in Education*
National Council of Negro Women
National Education Association
National Organization for Women
National PTA
National Partnership for Women & Families
National Women's History Project
National Women's Law Center
National Women's Political Caucus
Partners of the Americas
U. S. Student Association
Wider Opportunities for Women
Women Work!
Women's Edge
Women's Research and Education Institute
Women's Sports Foundation
Young Women's Christian Association

*(Attached for informational purposes only. Some member organizations do not take positions on judicial nominations.)