

CONCERNED
WOMEN *for* AMERICA

The Honorable Catherine E. Lhamon

Assistant Secretary for Civil Rights
U.S. Department of Education
Office for Civil Rights
400 Maryland Avenue, SW
Washington, D.C. 20202-1100

Submitted via electronic form:

March 17, 2022

Dear Assistant Secretary Lhamon,

Concerned Women for America (CWA), the nation's largest public policy organization for women, is filing this formal complaint with the U.S. Department of Education Office for Civil Rights (OCR) against the University of Pennsylvania (UPenn) for its egregious violations of the protections for women on the basis of sex secured a half-century ago in the landmark passage of Title IX of the Education Amendments of 1972. The infractions have not only occurred within the 180 days required but, to the detriment of current and future female student-athletes nationwide, it is ongoing.

On February 16-19, 2022, Lia Thomas (formerly Will Thomas), a Division I swimmer who is biologically male but rostered as a senior on UPenn's women's team and competed through the season displacing teammates in events and shattering pool, league, and national records, was allowed to compete in the Ivy League Championships (ILC) as a member of UPenn women's swimming team in direct violation of the prohibition against sex discrimination under Title IX. Thomas is currently competing in the National Collegiate Athletic Association (NCAA) National Championships (scheduled for March 16-19, 2022). Thomas is anatomically/biologically a male who should not be eligible to compete in women's sports, depriving anatomically/biologically female athletes of the opportunities afforded to them by law.

Predictably, Thomas has set records and crushed women's aspirations as a male-bodied athlete competing in women's sports.¹ Thomas' time in the 500-yard freestyle event at the ILC was 7.5 seconds faster than the second-place finisher, Thomas' teammate Catherine Buroker. It is undeniable that Buroker was deprived of the first place finish she earned in the women's category.

Despite the blatant injustice to female athletes, UPenn and the Ivy League doubled down on its celebration of a biological male who self-identifies as the opposite sex competing in women's swimming by awarding Thomas First Team All-Ivy honors in three events (200-, 500- and 1000-yd freestyle) and the single team athlete selected by UPenn for the 2021-22 Ivy League Women's Swimming and Diving Academic All-Ivy team.² All significant career-enhancing opportunities that female student-athletes were deprived of because of sex— because of their unique biological design as females.

As recent as 2020, Thomas was competing as a member of UPenn's men's swimming team. In 2021, just a year later, UPenn allowed Thomas to join the women's team after self-identifying as a woman. But Thomas is still anatomically a male, bearing all the biological advantages of male developmental physique.³ By allowing a male to take a spot and compete on the women's swim team, depriving aspiring young women athletes of a fair and level playing field in competition, UPenn commits a grave injustice and violates the most fundamental principles of equity in Title IX's historic efforts to promote equal opportunity in sports in educational institutions.

It cannot be overlooked that UPenn's policy has a disparate impact on women, given the clear biological differences between the sexes.⁴ Women unquestionably lose under these types of discriminatory practices, and the U.S. Supreme Court has long recognized such disparate impact to establish a *prima facie* case of discrimination.⁵ To allow such a discriminatory policy to continue is to say that an educational institution could have an all-biological male swimming or even wrestling or boxing team, both in the men's and women's categories of competition, while remaining in full compliance with federal law, potentially eliminating all opportunities for

¹ Brooke Migdon, "Lia Thomas wins 500-yard freestyle, sets pool record at Ivy League Championships," *The Hill* (Feb. 18, 2022), available at <https://thehill.com/changing-america/respect/diversity-inclusion/594905-lia-thomas-wins-500-yard-freestyle-sets-pool>.

² *Ivy | ESPN*, "Women's Swimming & Diving All-Ivy, Postseason Awards Announced" (Feb. 23, 2022), available at <https://ivyleague.com/news/2022/2/23/womens-swimming-diving-all-ivy-postseason-awards-announced.aspx>.

³ Knox T, Anderson LC, Heather A, "Transwomen in elite sport: scientific and ethical considerations," *Journal of Medical Ethics* 2019;45:395-403, available at <https://jme.bmj.com/content/45/6/395>; David J Handelsman, Angelica L Hirschberg, Stephane Bermon, "Circulating Testosterone as the Hormonal Basis of Sex Differences in Athletic Performance," *Endocrine Reviews*, Volume 39, Issue 5, October 2018, Pages 803–829, available at <https://doi.org/10.1210/er.2018-00020>; Doriane Lambelet Coleman and Wickliffe Shreve, "Comparing Athletic Performances: The Best Elite Women to Boys and Men," *Duke Law*, available at <https://law.duke.edu/sites/default/files/centers/sportslaw/comparingathleticperformances.pdf>; Ian Janssen, Steven B. Heymsfield, ZiMian Wang, and Robert Ross, "Skeletal muscle mass and distribution in 468 men and women aged 18–88 yr," *Journal of Applied Physiology* 2000 89:1, 81-88, available at <https://doi.org/10.1152/jap.2000.89.1.81>.

⁴ Thibault, V., Guillaume, M., Berthelot, G., Helou, N. E., Schaal, K., Quinquis, L., Nassif, H., Tafflet, M., Escolano, S., Hermine, O., & Toussaint, J. F. (2010). Women and Men in Sport Performance: The Gender Gap has not Evolved since 1983. *Journal of sports science & medicine*, 9(2), 214–223; Institute of Medicine (US) Committee on Understanding the Biology of Sex and Gender Differences; Wizemann TM, Pardue ML, editors. *Exploring the Biological Contributions to Human Health: Does Sex Matter?* Washington (DC): National Academies Press (US); 2001. 2, Every Cell Has a Sex. Available from: <https://www.ncbi.nlm.nih.gov/books/NBK222291/>.

⁵ See *Dothard v. Rawlinson*, 433 U.S. 321, (1977).

female athletes in a program. Any interpretation of federal law facilitating such a result is anathema to Title IX.

Educational institutions have a responsibility under federal law to protect every student's right to learn in a safe environment free from unlawful discrimination and to prevent unjust deprivations of that right. This includes students who experience gender dysphoria, but it also includes female students, who make up over 50% of post-secondary students. Thomas has a place to compete in sports against other athletes according to the athlete's biological makeup as a male. As already mentioned, Thomas indeed competed in the men's team from 2018 to 2020, even while taking steps to embrace a new identity. There would be no injustice if Thomas retained a roster spot on the men's team. But to allow a male-bodied athlete to displace female student-athletes in the women's category based on inevitable biological advantages is a gross violation of Title IX. Thomas' own teammates have spoken out, saying, "Biologically, Lia holds an unfair advantage over competition in the women's category, as evidenced by her rankings that have bounced from #462 as a male to #1 as a female."⁶

The situation has devolved into a hostile environment for female athletes at UPenn at the hands of the UPenn swim coach and University administration. Female athletes are being forced to forfeit their rightful privacy and dignity in sex-specific locker rooms in direct violation of Title IX. Worse yet, they do not feel free to speak up in disagreement with the policy without creating adverse effects on their dreams of an athletic college career. Therefore, female athletes have been forced to speak up only on the condition of anonymity. One of Thomas' teammates spoke of the injustice towards her and her teammates to *OutKick*:⁷

"Pretty much everyone individually has spoken to our coaches about not liking this. Our coach [Mike Schnur] just really likes winning. He's like most coaches. I think secretly everyone just knows it's the wrong thing to do," the female Penn swimmer said during a phone interview.

"When the whole team is together, we have to be like, 'Oh my gosh, go Lia, that's great, you're amazing.' It's very fake," she added.

She later discussed the fear of speaking out for women's rights:

"If we protest it, we're only hurting ourselves because we're going to miss out on all that we've been working for," Thomas' female teammate said, but she added that something needs to be done to protect biological women who've fought for an equal playing field in collegiate athletics.

⁶ Isaac Schorr, "Transgender Swimmer Lia Thomas Continues to Dominate, Break Records, at Ivy League Championships," *National Review* (Feb. 18, 2022), available at <https://www.nationalreview.com/news/transgender-swimmer-lia-thomas-continues-to-dominate-break-records-at-ivy-league-championships/>.

⁷ Joe Kinsey, "Penn Trans Swimmer's Teammate Speaks Out as Lia Thomas Smashes More Records," *OutKick* (Dec. 11, 2021), available at <https://www.outkick.com/outkick-exclusive-penn-trans-swimmers-teammate-speaks-out-as-lia-thomas-smashes-more-records/>.

Another account to *NewsNation* expressed the frustration:

"The first word that comes to my mind is insane," the swimmer told *NewsNation*. "I feel like it's something that's so basic that people have just somehow managed to twist and make [it] way more complicated than it should have ever been."⁸

The situation is untenable. Teammates say the female athletes feel uncomfortable changing in their own locker room, something Title IX specifically addresses.

"It's definitely awkward because Lia still has male body parts and is still attracted to women," one swimmer on the team told *DailyMail.com* in an exclusive interview.

Lia has told her teammates that she dates women.

While Lia covers herself with a towel sometimes, there's a decent amount of nudity, the swimmer said. She and others have had a glimpse at her private parts.

She stated that team members have raised their concern with the coach, trying to get Thomas ousted from the female locker room, but got nowhere.

"Multiple swimmers have raised it, multiple different times," the UPenn swimmer said. "But we were basically told that we could not ostracize Lia by not having her in the locker room and that there's nothing we can do about it, that we basically have to roll over and accept it, or we cannot use our own locker room."⁹

What has happened at the University of Pennsylvania, Ivy League, and the NCAA is a complete failure of compliance obligation under Title IX. Female athletes are accorded rights on the basis of sex under the law and deserve protection, not intimidation and abuse. Federal law demands schools receiving federal funds comply with the laws on sex discrimination, not flout it.¹⁰ OCR has a duty to protect women's rights under Title IX. The policies at UPenn have produced the very definition of a hostile work environment for its female athletes in their swim team. It can never be an acceptable practice for school coaches and officials to tell female

⁸ Bobby Oler, "Lia Thomas situation 'insane,' Penn teammate says," *NewsNation* (March 7, 2022), available at <https://www.newsnationnow.com/prime/lia-thomas-situation-insane-penn-teammate-says/>.

⁹ Shawn Cohen, "EXCLUSIVE: 'We're uncomfortable in our own locker room.' Lia Thomas' UPenn teammate tells how the trans swimmer doesn't always cover up her male genitals when changing and their concerns go ignored by their coach," *Daily Mail* (Jan. 27, 2022), available at <https://www.dailymail.co.uk/news/article-10445679/Lia-Thomas-UPenn-teammate-says-trans-swimmer-doesnt-cover-genitals-locker-room.html>.

¹⁰ UPenn is one of the federal government's most well-funded universities. See Evan Comen, Michael B. Sauter, Samuel Stebbins, Thomas C. Frohlich, "Universities Getting the Most Money from the Federal Government," *24/7 Wall St.* (March 22, 2017), available at <https://247wallst.com/special-report/2017/03/22/universities-getting-the-most-money-from-the-federal-government/4/>.

athletes to "suck it up"¹¹ when they complain about sexual harassment and these flagrant violations of their rights as biological women.


As the federal agency charged with enforcing federal civil rights laws that prohibit discrimination on the basis of sex in programs or activities that receive federal financial assistance in the educational context, OCR must act urgently against the University of Pennsylvania and generally as an ongoing matter of enforcement before this abject denial of biological impact and flagrant sex discrimination against female student-athletes affects more and more female students across the country.

OCR must ensure female students are not deprived of their rights under the law and denied recourse for sex discrimination. We plead for you to issue clear, decisive guidance to clarify the law and prevent colleges and university athletic programs from violating women's rights by allowing biological male athletes to compete in the women's category of sport. Protecting all female student-athletes from this type of injustice is the very essence of OCR's mission to ensure equal access to educational opportunities and benefits the law requires under Title IX.

We thank you in advance for your immediate attention to this matter,



Penny Nance
President and CEO
Concerned Women for America



Mario Diaz, Esq.
General Counsel
Concerned Women for America

¹¹ "It is definitely uncomfortable and has been expressed to our coach and members of the athletic department that people are uncomfortable with it," the teammate said. "We were basically told to, 'suck it up.'" Dan D'Addona, "Lia Thomas Teammate: Situation is 'Unfair' and NCAA is 'Discriminating Against Cisgender Women'; Locker Room Discomfort," *Swimming World* (March 9, 2022), available at <https://www.swimmingworldmagazine.com/news/lia-thomas-teammate-situation-is-unfair-and-ncaa-is-discriminating-against-cisgender-women-locker-room-discomfort>.