

CONCERNED  
WOMEN *for* AMERICA

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*Sent via email:*

July 12, 2023  
**Re: 03222104**

Dear Supervisory Attorney Ginsburg,

The hundreds of thousands of women we represent at Concerned Women for America (CWA) are encouraged to know the Department of Education's Office of Civil Rights (OCR) is addressing the serious allegations involving the women's swim team at the University of Pennsylvania (UPenn) in 03-22-2035. We were disappointed that it took the Department over a year to inform us of that fact, given the urgency of this situation for female collage athletes.

As you are undoubtedly aware, everything we have uncovered about this policy since our complaint<sup>1</sup> points to ongoing, systemic, and willful violations of Title IX by multiple institutions causing great harm to women athletes on the basis of their sex. The disparate impact based on sex is palpable as we continue to see female students be the ones that must take great courage to speak out publicly on this issue at a high personal and professional cost. We hope you notice the tremendous pressure female athletes are under to remain silent is, in and of itself, a significant red flag.

Lia Thomas' teammate Paula Scanlan, who competed during the 2018-19 and 2021-22 seasons, has come out publicly to share her experience as a member of UPenn's women's swim

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<sup>1</sup> Concerned Women for America U.S. Department of Education Office for Civil Rights Complaint Against University of Pennsylvania, March 17, 2022, at <https://concernedwomen.org/wp-content/uploads/2022/03/CWA-UPENN-Title-IX-Complaint.pdf>.

team and to speak on behalf of female athletes.<sup>2</sup> Notably, Scanlan revealed, “[T]he university wanted us to be quiet, and they did it in a very effective way. They continued to tell us that our opinions were wrong, and if we had an issue about it, we were the problem, and it’s frightening, and your future job is on the line.” By any definition of Title IX, this is a grave violation that should not be ignored. She added, “[A]fter that point, no one would talk about it anymore. They effectively silenced us even within talking to each other.”<sup>3</sup> Her account is illuminating because she also exposes how the institutions were aware of other options available to them that would have prevented infringing on all female athletes’ rights. She said, “When this was first announced, we were maybe told Lia might be changing in a different locker room or might continue to stay in the men’s locker room,” but once they got there, they “saw the locker room chart and saw that Lia definitely had a locker in the women’s room.”<sup>4</sup>

In recent congressional testimony, All-American college swimmer Riley Gaines described to U.S. Senate Judiciary Committee members how she felt as she was forced to compete against Lia Thomas, the swimmer at the center of our complaint (who had competed in UPenn’s Men’s Swim Team for three years), at the 2022 NCAA Division I National Championships. Gaines actually tied with Thomas in the 200-yard freestyle but was told that, since they had only one trophy, she would go home empty-handed. Gaines testified she was “shocked” when she was told, “Thomas needed to hold the trophy for photo purposes.”<sup>5</sup> Imagine the mental and emotional trauma of such a violation of both the letter and the spirit of Title IX. Gaines testified she “felt betrayed and belittled, reduced to a photo-op.” All because of her sex.

Gaines did not stop at pointing out the injustice of the significant awards, titles, and records being taken from female athletes, which is no small matter. She testified Thomas’ record in the 500-yard freestyle beat out even female Olympians. But she also spoke passionately about the indignity of being forced, without previous warning, to undress in front of “a 6’4”, 22-year-old male equipped with (and exposing) male genitalia.” She said, “If nothing else, I truly hope you can see how this is a violation of our right to privacy and how some of us have felt uncomfortable, embarrassed, and even traumatized by the experience.”

CWA wants to ensure you note this unavoidable testimony as you address the complaint (03-22-2035) before you. We have heard from multiple female athletes experiencing the same trauma. Title IX was passed to protect women from such discrimination based on their sex. Why is this allowed to continue? Gaines testified:

“I can attest to the anger and frustration expressed by girls who had worked so hard and sacrificed so much to get this moment, only to have to compete in what felt like a farce. And I can attest to the fact that, around the country,

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<sup>2</sup> Daniel Chaitin, *‘Fighting For Women’: Lia Thomas Teammate Tells Her Story To Matt Walsh*, The Daily Wire, June 5, 2023, at <https://www.dailywire.com/news/fighting-for-women-lia-thomas-teammate-tells-her-story-to-matt-walsh>.

<sup>3</sup> Yaron Steinbuch, *Lia Thomas’ ex-teammate accuses UPenn of silencing swimmers*, New York Post, June 7, 2021, at <https://nypost.com/2023/06/07/lia-thomas-ex-teammate-accuses-upenn-of-silencing-swimmers/>.

<sup>4</sup> *Id.*

<sup>5</sup> Reily Gaines, *Testimony before the Senate Judiciary Committee Hearing on Protecting Pride: Defending the Civil Rights of LGBTQ+ Americans*, June 21, 2023, at [https://www.judiciary.senate.gov/imo/media/doc/2023-06-21\\_-\\_testimony\\_-\\_gaines.pdf](https://www.judiciary.senate.gov/imo/media/doc/2023-06-21_-_testimony_-_gaines.pdf).

*female athletes who protested the inclusion of Lia Thomas in the women's division were threatened, intimidated, and emotionally blackmailed into silence and submission.” (Emphasis ours)*

These allegations cannot be ignored and must be addressed. UPenn's policy had widespread Title IX ramifications that go way beyond its decision to allow a male-bodied athlete to compete in a female-only team and sport.

Gaines' testimony also included the heartbreaking reference to a group of women champion athletes who felt more comfortable changing in a storage closet rather than having to deal with the mental and emotional trauma of Thomas' presence in the female locker room. Though Gaines did not mention names, CWA has spoken with one young woman who went through that traumatic experience. Kylee Alons, a 31-time All-American, 2-time NCAA national champion, and 5-time ACC champion, has also felt the need to speak out publicly while under tremendous pressure to remain silent in order to expose the plight of upcoming female athletes who face sexual harassment and injustice in their sport.

Telling her story on Concerned Women Today,<sup>6</sup> Alons said of having to share a locker room with Thomas:

“[I]t felt violating, to be honest, in the locker room. I mostly, even if I went in there and looked around and Thomas wasn't in there, I felt like I needed to change completely under my parka, under my towel just to feel like I had some sort of privacy, changing with my back to the room.”

If Title IX does not protect a female athlete from being exposed to a naked male against her consent or having to deal with such distress as she is trying to compete at the highest levels of her sport, it is worthless. U.S. Secretary of Education Miguel Cardona had to admit as much in a hearing before the U.S. House of Representative's Education and Workforce Committee on May 16, 2023. Rep. Erin Houchin (R-Indiana) asked Secretary Cardona about sexual harassment under Title IX:

**Rep. Houchin:** Do you believe that requiring those women to undress in front of Lia Thomas and allowing Lia Thomas to undress in front of female athletes constitutes sexual harassment, yes or no?

**Sec. Cardona:** I don't believe students should, be, feel unsafe in any locker room.

**Rep. Houchin:** Do you believe that it constitutes sexual harassment to force women to undress in front of biological males?

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<sup>6</sup> Concerned Women for America, *NCAA Forces Women into the Closet: Former NC State Swimmer Speaks Out for the First Time*, Concerned Women Today Podcast, June 23, 2023, audio and transcript available at <https://concernedwomen.org/ncaa-forces-women-into-the-closet/>.

**Sec. Cardona:** I do believe forcing, uh, forcing women to undress in front of biological males is a concern and sexual ... yes.<sup>7</sup>

The Secretary struggled through the exchange, but he was forced to admit the obvious. We are dealing with the very essence of Title IX in this whole debacle. The men's team does not have to deal with feeling unsafe in their own locker room. Why is this tolerated in the case of female athletes? This trampling of women's rights cannot be the requirement for us to embrace diversity.

Alons also explained the unique nature of the sport of swimming in relation to the locker room situation:

"Swimming is very unique from other sports in that what you're wearing for your races is very important to how you swim. The suits that you are wearing are, they repel the water so, they are skintight. They cover you from your knee to your neck and they take at least ten minutes to go on. Sometimes, even longer than half an hour it takes for some people to put theirs on depending on what brand they use and you're doing this several times a day, so you're going to the locker room to change into your practice suit. You go warm up in your practice suit which is just a normal women's suit and then you go back in and have to put on your tech suit before your race and you only use it for your race because they're such expensive materials that you don't want to use it for any longer. So you're using this locker room multiple times a day and any time I went into the locker room, I felt extremely uncomfortable knowing that Thomas, a man, was at this meet, using the lockers as well to change. And yeah, that was violating."<sup>8</sup>

These are issues that are still unaddressed to this day. Issues that UPenn and the NCAA and other organizations are ignoring. Yet, these are the types of issues for which Title IX was specifically enacted. Here is the extent to which UPenn's policy and the NCAA's reckless disregard for their female athletes' safety took on this young woman. Alons said:

"I wanted to feel safe, and I wanted my private space changed, and what I did is I ended up changing in a storage closet that was right behind my team's bleachers, and it was a little room right behind our bleachers, and it was dark in there, but I ended up changing in there for the rest of the meet because it alleviated all of the stress I had going into that locker room."

How is this acceptable in 2023? After all the advances we thought we had gained for women's rights, this cannot be where "progress" takes us. The advancement of any group, no matter what it is called, cannot be attained at the cost of women's rights.

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<sup>7</sup> Committee on Education & the Workforce Hearing, *Examining the Policies and Priorities of the Department of Education*, May 16, 2023, at <https://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=409132>.

<sup>8</sup> Concerned Women Today at <https://concernedwomen.org/ncaa-forces-women-into-the-closet/>.

CWA has heard from many others. One coach reached out to us a few days after the 2022 NCAA Division I swimming championships in confidence to express her frustration:

“I am an NCAA Division I female swim coach that was on deck in Atlanta last week for the Women's NCAA Championship with my team. I cannot begin to thank your organization enough for standing up and speaking out for us. We have been silenced. What I saw and what I felt this week for myself and for the strong women I coach. I would like to offer my voice and my help in any way to help strengthen your case. I would love to speak on the psychological effects that it took on my athletes, myself, and many others surrounding me. Our program was seated directly next to both Lia and Iszac and had to witness things that we have yet to process.”

This poignant admission from this coach is revealing. These young women athletes are still processing what happened to them a year after their experience. Alons also discussed the extreme mental aspects that is the nature of collegiate sports competition:

“In order to prepare for those races you do have to be firing on all cylinders including mentally and you're already under your own, like, the way you want to perform, expectations from others, expectations from yourself and you already want to be in the zone just thinking about your race. You don't want to be thinking about how uncomfortable or worried you are about having to go into the locker room and get completely naked in front of a man.”

The negligent behavior by institutions implementing policies that ignore federal law and impose unjust burdens on women based on unscientific data will have harmful consequences that will forever affect these young athlete's lives. Alons told the *Daily Mail* that she was holding back thinking that the NCAA would issue an apology and revise its policy, but the opposite has been true. She said, “I think after the meet I just thought that, that the rules would change. I thought that giving a couple of months things would be different, but it's been over a year since the NCAA Championships and, the NCAA specifically has not apologized for the hostile environment that they created at the NCAA Championships, and they haven't revised their policies going forward.”<sup>9</sup> She is still dealing with the feelings of that day to the point that she has been forced to speak out publicly, though it is not something she really wanted to do. It was the most important meet of her life. A year later, the wounds created by the failures to abide by Title IX are still fresh. And that was just one meet. UPenn subjected their female athletes to that hostile environment continually for the entire year, and the violations are still ongoing.

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<sup>9</sup> Will Potter, *EXCLUSIVE: Champion swimmer who was forced to change in a CLOSET to avoid undressing in front of trans athlete Lia Thomas breaks her silence and slams NCAA for putting women in a 'stressful and hostile environment,'* Daily Mail, June 24, 2023, at <https://www.dailymail.co.uk/news/article-12228187/Champion-swimmer-forced-change-CLOSET-avoid-trans-athlete-Lia-Thomas-breaks-silence.html>.

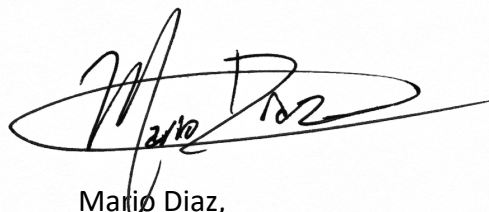
OCR has the ability to protect female athletes in the future as it addresses this complaint. Whatever a person's political or philosophical persuasion, the reality is that, as Justice Ruth Bader Ginsburg recognized, the "Physical differences between men and women ... are enduring..."<sup>10</sup> and the disparate, discriminatory (or negative) impact on the benefits available to female athletes is undeniably based on that genetic reality.<sup>11</sup> Courts have traditionally understood this and acknowledge the law "does not require things which are different in fact ... to be treated in law as though they were the same." American jurisprudence "realistically reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981). Title IX modeled this scientifically-based, traditional approach, and it has allowed women athletes to thrive within an environment that protects their unique status and nature as females.

We urge the Department to act in accordance with that precedent and bring justice for women athletes all over our nation.

Sincerely,



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Mario Diaz,  
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CC

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<sup>10</sup> *United States v. Virginia*, 518 U.S. 515, 533 (1996).

<sup>11</sup> See Thibault, Valérie et al. *Women and Men in Sport Performance: The Gender Gap has not Evolved since 1983*, Journal of sports science & medicine, vol. 9,2 214-23. 1 Jun. 2010; 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, 2, *Every Cell Has a Sex* <https://www.ncbi.nlm.nih.gov/books/NBK222291/>.