

CONCERNED  
WOMEN *for* AMERICA

**The Honorable Catherine E. Lhamon**

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

*Submitted via electronic form:*

September 26, 2024

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 San José State University (SJSU) for its egregious violations of the protections for women on the basis of sex secured over 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.

In April 2024, it was reported in a news article<sup>1</sup> that a 6'1" biological male player rostered as Blaire Fleming had been secretly competing on SJSU's women's volleyball team. Fleming, formerly known as Brayden, previously competed at National Collegiate Athletic Association (NCAA) Division I Coastal Carolina University and participated on the SJSU women's team during the 2022 and 2023 seasons. SJSU returned Fleming on scholarship as a redshirt senior for the 2024-25 season in the position of outside and right-side hitter.

Fleming is biologically a male who should not be eligible to compete in women's sports under current federal law provisions, depriving biologically female athletes of the safety, privacy, and competitive fairness afforded to them by Title IX on the basis of sex.<sup>2</sup>

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<sup>1</sup>Anna Slatz, "EXCLUSIVE: Biological Male Quietly Joined Women's NCAA Division I Volleyball At San Jose State University," *Reduxx*, April 17, 2024, <https://reduxx.info/exclusive-biological-male-quietly-joined-womens-ncaa-division-i-volleyball-at-san-jose-state-university/>

<sup>2</sup> 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>.

On August 30, 2024, SJSU women's volleyball opened its season at California State University, Fullerton. Fleming recorded a career high 25 kills in SJSU's opening match against Louisiana Tech University. SJSU won the match in straight sets. Video from SJSU's match against the University of Delaware on September 7, 2024, at the University of Iowa's Hawkeye Invitational captures Fleming's dangerous, match-winning spike against a libero (a defensive specialist) who didn't even have time to react or protect herself from the extraordinary velocity of Fleming's kill.

Fleming's biologically superior athleticism on the court is also clearly visible in vertical jumps that exceed female capacities on a net that is *over seven inches lower* than the men's net. This creates a substantial liability for female athletes on the receiving side of such hits, heightening their risk for concussions. Knowingly allowing this to continue creates a substantial risk of serious physical injury to opposing players. It is reckless.

Blaire Fleming's history of play on women's sports teams does not erase the fact that Fleming is biologically male, bearing all the physiological advantages of male developmental physique.<sup>3</sup> By allowing a male to take a spot, a scholarship, and compete on the women's team, depriving aspiring young women athletes of a fair and level playing field in competition, and the attending risk to their safety in play, SJSU 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 on the basis of sex.

SJSU's choice to roster a male on the women's volleyball team also inflicts direct harm to SJSU's own players. Their experience is presented in testimony made public in an amended legal complaint in *Gaines et al v. National Collegiate Athletic Association et al*, No. 1:24-cv-01109-MHC, Pl.'s Br. Mot. Leave 2AC (N.D. Ga. Sept. 23, 2024). In it, SJSU's setter and captain, Brooke Slusser, joined 18 other female student-athlete plaintiffs in challenging the NCAA's failure to abide by the requirement set out in federal law through Title IX, while at the same time forcing their novel interpretation of Title IX on colleges and universities. As detailed in pages 151-163 of Exhibit A of the amended filing,<sup>4</sup> SJSU has inflicted sexual harassment, emotional and psychological hostility, and substantial risk of injury. It has forced its women's team to share hotel rooms with a male without consent and threatened retaliation. The complaint alleges "SJSU officials told the SJSU women's volleyball team members that they should not speak about Fleming's sex gender identity with anyone outside the team."<sup>5</sup> And threatened further that, "if the women spoke publicly about Fleming being male, things would go badly for the team members."<sup>6</sup>

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<sup>3</sup> 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/jappl.2000.89.1.81>.

<sup>4</sup> *Gaines et. al. v. National Collegiate Athletic Association et. al.*, No. 1:24-cv-01109-MHC, Pl.'s Br. Mot. Leave 2AC Ex. A at 151-63 (N.D. Ga. Sept. 23, 2024).

<sup>5</sup> *Id.* at 156.

<sup>6</sup> *Id.*

Slusser and her teammates face ongoing sexual discrimination, harassment, and risk associated with the physical attributes and advantages of Fleming on the team under the threat of punishment by SJSU. She reasonably concluded that “if she were to protest Fleming’s participation on the SJSU team or to speak publicly about harms for Fleming’s participation on the SJSU team that she would be disciplined by SJSU and could be suspended or removed from the team and/or have her athletic scholarship taken away.”<sup>7</sup> This is a fundamental violation of Title IX that should not be allowed to continue under any circumstance.

SJSU’s willful nondisclosure of the biological identity of this athlete has caught other teams off guard and is forcing them to confront the same increased safety risk and injustice of unfair competition. Southern Utah University was scheduled to compete against SJSU on September 14, 2024, at the Santa Clara invitational but pulled out of the match.<sup>8</sup>

It cannot be denied that SJSU’s policy to allow trans-identifying athletes to compete on women’s teams has a disparate impact on women student-athletes, given the clear biological differences between the sexes.<sup>9</sup> 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.<sup>10</sup> To allow such a discriminatory policy to continue is to say that an educational institution could have an all-biological male volleyball, basketball, or even wrestling or rugby 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 female athletes in a program. Any interpretation of federal law facilitating such a result is anathema to the historic and congressional intent behind 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. Fleming has a place to compete in sports against other athletes according to the athlete's biological makeup as a male, not to interfere with the opportunities of female athletes based on an expression of gender identity that does not align with Fleming’s natal sex.

What is happening at SJSU, 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

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<sup>7</sup> *Id.*

<sup>8</sup> Dan Zaksheske, “Southern Utah Refuses To Play San Jose State Volleyball, Which Has Transgender Player,” *OutKick*, Sept. 14, 2024, <https://www.outkick.com/sports/exclusive-southern-utah-san-jose-state-volleyball-transgender>.

<sup>9</sup> 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/>.

<sup>10</sup> See *Dothard v. Rawlinson*, 433 U.S. 321, (1977).

deserve protection, not intimidation and abuse. Federal law demands schools receiving federal funds comply with the laws on sex discrimination, not flout it. As recently as September 2021, SJSU has been investigated by the U.S. Department of Justice for sexual harassment of female athletes and faced penalties for its failure.<sup>11</sup> OCR has a duty to protect women's rights under Title IX. The policies at SJSU have produced a hostile educational environment for its female athletes on their volleyball team, and it is time for OCR to take actions to remedy this untenable situation.

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 San José State University and generally as an ongoing matter of enforcement against any school discriminating against women on the basis of sex by allowing males to take away their opportunities, privacy, sense of dignity, and their safety. Nothing in federal law has changed OCR's obligation to enforce an abject denial of biological impact and flagrant sex discrimination against female student-athletes.

In fact, OCR has protected female athletes in similar cases in the past. In 2020, a complaint against Franklin Pierce University (FPU) resulted in a resolution agreement where the university agreed to rescind its "Transgender Participation and Inclusion Policy" which allowed males to compete in female sports. OCR showed great concern then, as it should now, that such a policy "denies female student athletes equal athletic benefits and opportunities."<sup>12</sup> Federal law has not changed since then. Title IX should still protect female athletes today as it did then. Why would women have fewer rights today than they had just a few years ago? OCR must act now as this situation affects more and more female student athletes across the country.

OCR must ensure female students are not deprived of their rights under the law and denied recourse for sex discrimination. SJSU is in violation of the letter and the spirit of Title IX in continuing its crusade to advantage its women's volleyball team with a male-born player while knowingly and willingly harming its own players and opponents. It is essential that OCR enforcement be predicated on prohibiting discrimination on the basis of sex, male and female, according to its own claims in regulations promulgated on April 29, 2024<sup>13</sup> as "consistent with the Javits Amendment and longstanding athletics regulations." No changes have been made to athletics regulations.

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<sup>11</sup> Office of Public Affairs, "Justice Department Reaches \$1.6M Agreement to Remedy Title IX Violations at San José State University," United States Department of Justice, Sept. 21, 2021, <https://www.justice.gov/opa/pr/justice-department-reaches-16m-agreement-remedy-title-ix-violations-san-jos-state-university>.

<sup>12</sup> Doreen Denny, "University Forced to Rescind Transgender Policy as Violation of Title IX after Biological Male wins NCAA Championship in Women's Track," *Concerned Women for America*, Oct. 15, 2024

<sup>13</sup> See 34 CFR 106.41(b)(c). Under the longstanding athletics regulations, individual students may be excluded from a particular male or female athletic team on the basis of their sex, even when doing so may impose on them more than de minimis harm, as long as students, regardless of sex, have an equal opportunity to access the recipient's athletic program as a whole.

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,



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