

## The NCAA Passed the Ball in its Updated Transgender Athlete Policy, but Proposed Changes in Title IX Regulations May Halt Any Forward Progress

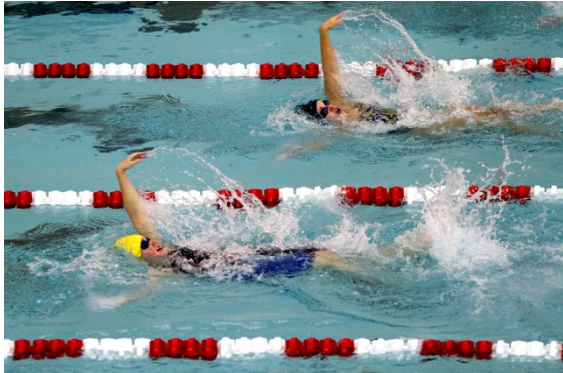


Photo Source: Midwestsusan, *swimming*, FLICKR (Jan. 16, 2016)

By: Sydney Baxter

### **Intro: Lia Thomas Gets the Ball Rolling**

Less than a year ago, Lia Thomas walked away from the NCAA Division I national championship with an event win in the 500-yard freestyle.<sup>1</sup> Despite her undeniable success, Thomas' record-setting senior season is permanently marked by controversy and policy change.<sup>2</sup> Thomas is a transgender swimmer who previously competed on the University of Pennsylvania's men's swim team for three seasons before transitioning in the late spring of 2019.<sup>3</sup> A year into

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<sup>1</sup> See Katie Barnes, *Amid protests, Penn swimmer Lia Thomas becomes first known transgender athlete to win Division I national championship*, ESPN (Mar. 17, 2022) [https://www.espn.com/college-sports/story/\\_/id/33529775/amid-protests-pennsylvania-swimmer-lia-thomas-becomes-first-known-transgender-athlete-win-division-national-championship](https://www.espn.com/college-sports/story/_/id/33529775/amid-protests-pennsylvania-swimmer-lia-thomas-becomes-first-known-transgender-athlete-win-division-national-championship) (describing how Thomas is not the “first known transgender athlete to win a Division I national championship in any sport”). Thomas finished ahead of the University of Virginia's Emma Weyant, and Thomas was about nine seconds off Katie Ledecky's five-hundred-yard freestyle record. The author also notes that the crowd was noticeably quiet for both Thomas' introduction and her podium ceremony.

<sup>2</sup> See Katie Barnes, *Penn Swimmer Lia Thomas Leaves Ivy League Meet a Four-Time Champion, but Questions Remain*, ESPN (Feb. 20, 2022) <https://www.espn.com/college-sports/story?id=33332856&slug=penn-swimmer-lia-thomas-leaves-ivy-league-meet-four-champion-questions-remain> (noting that a petition was signed by three-hundred swimmers in support of Thomas). The author then went on to describe the questions regarding fairness and inclusion in women's sports that grew out of Thomas' success in December of 2021. Thomas faced a great deal of anonymous criticism following the Ivy League championship from individuals who felt her inclusion on the team posed an unfair advantage. Her season was further characterized by the attention it gained from the NCAA altering its policy for transgender athletes on January 19th, 2022. At the time the new policy was implemented, it was unknown how it would impact Thomas and her ability to compete, and an executive director in the Ivy League felt Thomas' publicity and success elevated the issue to the NCAA policy makers.

<sup>3</sup> See Robert Sanchez, *'I am Lia': The Trans Swimmer Dividing America Tells Her Story*, Sports Illustrated (Mar. 3, 2022) <https://www.si.com/college/2022/03/03/lia-thomas-penn-swimmer-transgender->

her treatments, Thomas submitted all the necessary medical work to the NCAA and was approved to compete on Penn's women's team in 2020.<sup>4</sup> At the start of the 2021-2022 season, Thomas had completed over one year of hormone replacement therapy (HRT), definitively complying with the NCAA's previous transgender athlete competition policy.<sup>5</sup>

### **Policy Background: The NCAA Passes it Forward**

The NCAA's former policy on transgender athlete competition, drafted in 2011, intended to "ensure transgender student-athletes fair, respectful, and legal access to collegiate sports teams based on current medical and legal knowledge."<sup>6</sup> The policy further provided:

"A trans female (MTF) student-athlete being treated with testosterone suppression medication... for the purposes of NCAA competition may continue to compete on a men's team but may not compete on a women's team without changing it to a mixed team status until completing one calendar year of testosterone suppression treatment."<sup>7</sup>

On January 19, 2022, the NCAA altered this longstanding transgender athlete policy during a time of heightened publicity and scrutiny surrounding Thomas' success.<sup>8</sup> "Phase One" of the new policy, effective immediately, took a "sport-by sport" approach to transgender participation

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[woman-daily-cover](#) (providing background that Thomas spent her three previous seasons competing on the mens team prior to becoming one of the "nation's most powerful female collegiate swimmer"). The author also explains that Thomas swam her best season in 2018 to 2019 on the mens teams with top three finishes in multiple Ivy championship races, but she was miserable. Further, Thomas initially postponed hormone replacement therapy (HRT) over fears that it would end her swimming career, but she ultimately decided to undergo the treatment in May of 2019.

<sup>4</sup> See *Id.* (explaining that at the time Thomas began her transition, in May of 2019, the NCAA transgender athlete policy allowed athletes to switch their gender category, but a male athlete transitioning to female was required to undergo a year of HRT before being eligible to compete against other females in a championship event). Therefore, Thomas was eligible in May of 2020 to compete, but she took off the 2020-2021 college season due to COVID-19.

<sup>5</sup> See Swimming World Editorial Staff, *NCAA Appears to Give Lia Thomas Green Light to Compete at Championships*, Swimming World Magazine (Mar. 1, 2022)

<https://www.swimmingworldmagazine.com/news/ncaa-appears-to-give-lia-thomas-green-light-to-compete-at-championships/> (highlighting that at the start of the 2021-2022 season, Thomas was fully in compliance with the NCAA rule that required a transgender woman to undergo HRT for at least a year before competing). However, the authors note that this policy was based off of scientific studies from the early 2010s that have come under fire for their accuracy and applicability.

<sup>6</sup> See *NCAA Inclusion of Transgender Student-Athletes*, Nat'l Collegiate Athletic Ass'n, 1-38, 12 (Aug. 2011) <https://ncaanewsarchive.s3.amazonaws.com/2011/september/transgender-policy-approved.html>

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

<sup>8</sup> See Dawn Ennis, *Goodbye, Lia Thomas? New NCAA Trans Student-Athlete Policy is 'Effective Immediately'*, Forbes (Jan. 2, 2022). <https://www.forbes.com/sites/dawnstaceyennis/2022/01/20/goodbye-lia-thomas-new-ncaa-trans-student-athlete-policy-is-effective-immediately/?sh=1c7904fd34db> (explaining how the NCAA caved under pressure, following Thomas' success, to change its decade-long policy of equality in sports).

in athletics.<sup>9</sup> College sports now must align transgender athlete policies with those from the “United States Olympic and Paralympic Committee and International Olympic Committee.”<sup>10</sup> Therefore, transgender participation for each sport is “to be determined by the policy for the national governing body of that sport, subject to ongoing review and recommendation by the NCAA Committee on Competitive Safeguards and Medial Aspects of Sports [CSMAS] to the Board of Governors.”<sup>11</sup> The NCAA rationalizes that this policy will generate greater alignment and consistency between college sports and the U.S. Olympics, and the policy will “bring the organization [NCAA] in line with the approach taken by the International Olympic Committee [IOC].”<sup>12</sup> However, this policy will create greater inconsistencies between college sports because transgender policies vary among national governing bodies.<sup>13</sup>

For collegiate swimming, the NCAA’s new policy indicates that it will now pass the ball to USA Swimming for guidelines on how to determine transgender eligibility.<sup>14</sup> Subsequently, on February 1, 2022, USA Swimming promptly announced its own policy changes based on “statistical data comparing male and female cisgender athletes, who identify with their sex assigned at birth.”<sup>15</sup> The policy lays out two requirements for competition:

“[1] The concentration of testosterone in their blood must be less than 5 nano moles per liter [nmol/L] continuously for at least 36 months before they apply to compete, and [2] they must provide evidence that going through puberty as their sex

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<sup>9</sup> See Media Center, *Board of Governors Updates Transgender Participation Policy*, (Jan 19, 2022), <https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx> (describing the new policy as one that will “preserve opportunity for transgender student-athletes while balancing fairness, inclusion and safety for all who compete”).

<sup>10</sup> See *Id.*; see also International Olympic Committee, *IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations* (last visited Oct. 11, 2022) <https://stillmed.olympics.com/media/Documents/Beyond-the-Games/Human-Rights/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf> (affirming that every person has the right to participate in their sport without discrimination, but the credibility of a competitive sport relies on a level playing field where no athlete is given an unfair, disproportionate advantage over their competitors).

<sup>11</sup> See *Id.* (clarifying that in this policy, the Board of Governors wants the divisions to still provide flexibility to allow for additional eligibility if transgender student-athletes lose eligibility based on the changing policy, as long as they meet the newly adopted standards). Moving forward, transgender student-athletes must document their sport-specific testosterone levels four weeks prior to the championship selection for their sport. Once the 2022-2023 school year begins, any transgender student-athletes must document their testosterone levels at the beginning of their season, and then provide a second round of documentation six months following the first.

<sup>12</sup> See Barnes, *supra* note 2 (explaining that the IOC’s new policy, which changed in November of 2021, authorized international federations to craft policies specific to each sport).

<sup>13</sup> See Nuria Diaz, *NCAA to allow national governing bodies to decide transgender athlete policy*, The GW Hatchet (Feb. 7, 2022) (highlighting that the NCAA acknowledged different sports may differ in terms of what biological advantages a transgender woman possess, and thus have different policies).

<sup>14</sup> See Dan D’Addona, *Lia Thomas to Sports Illustrated: ‘I Want to Swim and Compete as Who I Am’*, Swimming World Magazine (Mar. 3, 2022) (rationalizing that the NCAA is now deferring to USA Swimming guidelines in determine transgender eligibility as a response to criticism over Thomas’ participation on the women’s swim team).

<sup>15</sup> *Id.*

assigned at birth ‘does not give the athlete a competitive advantage over the athlete’s cisgender female competitors.’ A panel of three independent medical experts will be charged with reviewing applicants and implementing the policy.”<sup>16</sup>

The NCAA ultimately did not adopt this policy for the 2022 swimming championships.<sup>17</sup> The NCAA’s CSMAS reviewed the new testosterone threshold, and determined “implementing additional changes at this time could have unfair and potentially detrimental impacts on schools and student-athletes intending to compete in 2022 NCAA women’s swimming championship.”<sup>18</sup>

### **Analysis: Scrambling on the Field**

Despite its intentions to foster inclusion for transgender athletes, the NCAA’s new policy defers to other organizations to set the rules and guidelines for transgender athletes, and leaves no assurance of stability for those athletes.<sup>19</sup> The NCAA is failing “to take the lead in this important discussion,” that strikes at the heart of fairness and inclusivity in athletics.<sup>20</sup> The new policy lacks any clarity as to what regulations will be followed moving forward given that “many NGB’s [National Governing Body’s] have not created policies for transgender athletes and policies vary from sport NGB to NGB.”<sup>21</sup> Additionally, the NCAA’s 2011 policy was once

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<sup>16</sup> *Id.*; see also USA Swimming, *USA Swimming Releases Athlete Inclusion Competitive Equity and Eligibility Policy*, USA Swimming (Feb. 1, 2022) (noting that USA Swimming’s policy acknowledges “a competitive difference in the male and female categories and the disadvantages this presents in elite head-to-head competition”).

<sup>17</sup> James Sutherland, *NCAA Won’t Adopt USA Swimming Transgender Policy for 2022 Championships*, SwimSwam (Feb. 10, 2022), <https://swimswam.com/ncaa-wont-follow-usa-swimming-transgender-policy-for-2022-championships/> (highlighting that although the NCAA did not adopt USA Swimming’s updated transgender athlete policy before the women’s swimming championships, a testosterone restriction was still in place for transgender female athletes).

<sup>18</sup> *Id.* (providing that a primary reason the CSMAS came to this conclusion was due to the fact that the NCAA originally implemented a four-week time period in which schools could submit the required testosterone documentation for eligibility, but USA Swimming’s policy was released after the time period opened). However, USA Swimming’s updated policy is not completely thrown out, and will be considered by CSMAS for the 2022-2023 and 2023-2024 academic school years.

<sup>19</sup> See Ennis, *supra* note 8 (highlighting that the NCAA’s new policy did not provide any new or additional medical or legal justification for the change, so the policy will either be exactly what proponents of trans inclusion have been working for, or it will damper their fight). The author also called attention to the fact that the NCAA has released a “flip-flopping statement” as to whether largely republican states that ban trans athletes may lose championship tournaments. Additionally, the NCAA’s “newly adopted standards are out of alignment with the International Olympic Committee’s abandonment of using testosterone levels to determine eligibility.

<sup>20</sup> See Liz Clark and Rick Maese, *NCAA Changes Policy for Transgender Athletes; Members Approve New Constitution*, Washington Post (Jan. 20, 2022), <https://www.washingtonpost.com/sports/2022/01/20/ncaa-transgender-rules/> (providing that the NCAA “has the budget and access to sufficient scientific expertise to update its transgender policy to reflect the latest research and craft a solution that embraces inclusivity while also ensuring a competitive playing field,” but they have not).

<sup>21</sup> See Ennis, *supra* note 8 (describing how the updated policy will come with complexities that the NCAA is not ready to handle). The author also highlights that tracking the compliance of the policy, with

more inclusive than the IOC's but now the NCAA is following in the IOC's footsteps by deferring to other governing bodies.<sup>22</sup> Ultimately, the NCAA's policy has provided minimal guidance and an unclear picture as to what the future of competition will look like for transgender athletes, and new proposed amendments to Title IX are further muddling and calling into question the legitimacy and efficacy of the NCAA's abrupt policy change.

### **Impact/Conclusion: Interception from Title IX**

In June of 2022, The U.S. Department of Education (DOE) proposed legislative amendments to Title IX regulations.<sup>23</sup> A primary purpose of the proposed regulations is to strengthen protections for LGBTQI+ students and reaffirm a “core commitment to fundamental fairness for all parties...”<sup>24</sup> More specifically, the proposed regulation would “Protect LGBTQI+ students from discrimination based on sexual orientation, gender identity, and sex characteristics,” thus clarifying that Title IX's prohibition on discrimination based on sex extends to sexual orientation and gender identity.<sup>25</sup> Further, this protection would prohibit preventing a student from “participating in school programs and activities consistent with their gender identity.”<sup>26</sup>

However, with respect to the provision listed above, a separate notice of rule making as to whether or how the amended Title IX regulations will impact a students' eligibility to participate in male or female athletics teams will be released at a later date.<sup>27</sup> Therefore, although the DOE has not yet clarified how it will address the increased protections afforded to LGBTQI+ students in terms of athletic participation, the NCAA's deferential policy on transgender athlete

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each sport plausibly taking a different approach to the eligibility requirements for transgender participation, is going to create a nightmare for the NCAA.

<sup>22</sup> See Richard J. Hunter, Jr. and Taylor E. Brown, *Transgender Athlete Rights Under Title IX and NCAA Policy: Inadequacy and Unevenness of Treatment Demands Equal Protection and At Least Intermediate Scrutiny Analysis*, Int. J. Sport Stud, 5(7), 752, 756 (2015) (distinguishing the NCAA's policy from the IOC's).

<sup>23</sup> U.S Department of Education, *U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment*, Department of Education (Jun. 23, 2022) <https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment>; see also Federal Register Notice of Proposed Rulemaking, Title IX of the Education amendments of 1972, 20 U.S.C. §1681 et seq., into law.

<sup>24</sup> See *Id.* (providing that the proposed regulations will restore critical protections for students who find themselves as victims of discrimination); see also *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (noting that it is “impossible to discriminate against a person on the basis of sexual orientation or gender identity without discriminating against that individual based on sex”).

<sup>25</sup> US Department of Education, *Fact Sheet: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations*, (last visited Oct. 12, 2022) <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf> (explaining that this amendment to Title IX would help carry out the non discrimination mandate).

<sup>26</sup> *Id.* (demonstrating that this provision will ensure that LGBTQI+ student's access to education does not involve any form of discrimination).

<sup>27</sup> *Id.*

participation appears inconsistent with the DOE's purpose behind the proposed Title IX amendments.<sup>28</sup>

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<sup>28</sup> See Meghan Brink, *Protections for Trans Athletes in Title IX Proposal Still Unknown*, Inside Higher Ed (Jul. 5, 2022) <https://www.insidehighered.com/news/2022/07/05/title-ix-transgender-athletes-be-considered-separately> (providing that the separate rules issued on athletics will focus on transgender athletes, and it is the first ever policy of its kind to be issued in the history of the DOE). The author also cites that the DOE felt it was necessary to separately craft the rules determining eligibility for transgender athletes given that states are passing laws that are targeted at LGBTQI+ students. There is also speculation that the rule-makers are opposed to any blanket bans on transgender women participating in athletics in school.