



Which Lane Can They Swim In? An Examination of Transgender Athlete Eligibility Policies

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This article is a condensed version of the author's paper written in December 2022 for his "Introduction to International Sports Law" class at Queen's University. The full version, with all references, can be found on the SDRCC website. The opinions expressed are those of the author. They do not necessarily correspond to the SDRCC position on any of the issues.

The issue of how gender is determined for athlete eligibility in competition is a source of significant debate. The 2024 Olympic hopeful Lia Thomas's case to compete has been a springboard for a debate that has existed for decades. The most often-cited reason from those who do not support allowing transgender athletes to compete in their chosen gender category, in women's sports especially, is that it threatens the integrity of the sport¹. The debate then hinges on how one believes fairness should be defined in sport. Is true fairness unequivocal inclusion or ensuring an equal competitive opportunity?

To further explore the issues surrounding transgender athlete eligibility, the current landscape of attitudes, policies, and research will be examined in the United States, at the International level, and here in Canada.

United States and Title IX:

The United States are polarized on many issues, and the issue of transgender athlete eligibility in sport is no exception. There's been shifting positions at the Federal level towards more inclusivity over recent years. However, the contrasting positions at the state level present significant confusion on when a transgender athlete is eligible to participate, if at all.

Title IX

Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance"². The Federal Department of Education was quick to piggyback off the Supreme Court of the United States ruling in *Bostock v Clayton County* by issuing a new interpretation for Title IX in 2021³. The 2021 interpretation clarifies Title IX prohibits discrimination based on sexual orientation and gender identity. In essence, individuals cannot be excluded, denied equal access, or otherwise be treated differently because of their sexual orientation or gender identity. However, there remains significant disagreement over how Title IX should apply to transgender athletes, especially with state-enacted laws that ban transgender women and girls from playing on female sport teams⁴.

International Level:

The International Olympic Committee ("IOC") released a framework in 2021 for fairness and inclusion on the basis of gender identity and sex variations⁵. The IOC aims for the framework to be taken into consideration by International Federations and other sport organizations when establishing eligibility rules. Thus, the IOC has delegated the responsibility of eligibility rules to each international sports body as opposed to coming up with one binding rule.

World Aquatics, the international body responsible for administering international competition in water sports, released an updated policy in 2021 for transgender athlete eligibility which presents one of the strictest rules seen against transgender participation in international sports. In essence, the policy prohibits transgender women from competing in women's events unless they began medical treatment to suppress the production of testosterone before going through an early stage of puberty, or by age 12, whichever occurred later⁶. World Aquatics is requiring future transgender athletes to transition at an early age and at a time when, in many countries, it's increasingly criminalized or logistically impossible to do so⁷. Many have questioned if the policy is truly in step with the IOC framework on fairness and inclusion. It's important to keep before the updated World Aquatics policy, there have not been any transgender women competing



in swimming at the international level.

Canadian Sport:

Canada has a plethora of provincial and national sport organizations that oversee competitive and grassroots sport. While it is their responsibility to develop their own transgender athlete eligibility policies, the Canadian Centre for Ethics in Sport (“CCES”) sought to guide how these policies are drafted by releasing an instrumental document titled “Creating Inclusive Environments for Trans Participants in Canadian Sport”⁸.

For developmental and recreational sport, the CCES policy guidance suggests that individuals should be able to participate in the gender with which they identify and not be subject to requirements beyond those required of cisgender athletes⁹. For high-performance sport, the policy guidance advises that hormonal therapy should not be required for an individual to participate unless the sport organization can prove that hormone therapy is a reasonable and bona fide requirement¹⁰.

Reframing the Issue:

Joanna Harper, a medical physicist, suggests that instead of looking at the rare instances of transgender women athletes having success and calling it unfair, we should look to see if transgender women are overrepresented in women’s sports¹¹. Transgender women are evidently, severely underrepresented in the world of women’s sports. There’s an unfounded fear for many sport organizations that trans women are going to rise to the top of the podium en masse.

“Transphobia is based in a fundamental lack of understanding, which is explained away conveniently by offering elaborate hypotheticals that have little basis in reality”¹². This interpretation of transphobia perfectly encapsulates the most often-cited rationale for why trans women shouldn’t be allowed to compete against cisgender women. The argument that trans women are presenting a serious threat to the fairness and integrity of women’s sport is not supported by the significant underrepresentation of trans women athletes in women’s sport. Policies such as World Aquatics’ are in response to no current or former international level trans women swimmers. It is a response to a purely hypothetical problem that doesn’t exist. Exclusionary policies like World Aquatics’ which are propped up as maintaining fairness in women’s sport are attempts to regulate away discomfort in a way that feels logical¹³.

Not only has Lia Thomas achieved great athletic success, she also helped start a conversation that needed to be had. More refined research and collective human rights advocacy will keep the conversation alive and continue the push for eligibility policies that are inclusive and responsive to the athletic realities of transgender athletes, not based on elaborate hypotheticals.

[1] Canadian Centre for Ethics in Sport, “Creating Inclusive Environments for Trans Participants in Canadian Sport”, (2018) [CCES].

[2] *Title IX, Education Amendments of 1972*, 20 U.S.C.

[3] *Bostock v Clayton County*, 590 U.S. ____ (2020).

[4] Jo Yurcaba, “Louisiana becomes 18th state to enact a transgender athlete ban”.

[5] International Olympic Committee, “IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations”.

[6] Matthew Futterman, “Swimming Body Bars Most Transgender Women”.

[7] Laura McQuillan, “Transgender women athletes’ future in competition uncertain as sports organizations change rules, issue bans”.

[8] CCES, *supra* note 1.

[9] *Ibid*.

[10] *Ibid*.

[11] Lisa Deaderick, “Banning transgender women from competing in women’s sports is ‘unnecessary’ and ‘restrictive’”.

[12] *Ibid*.

[13] Ling, Sophia. “Lia Thomas started a conversation about transgender rights. It’s time we dive into it”.

To read the full original version of this article, with references:

http://www.crdsc-sdrcc.ca/eng/documents/BenCivil_WhichLaneCanTheySwinIn_LongVersion.pdf