

Discriminatory and Unworkable: **A brief on the Fédération Internationale de Natation (FINA)'s** **“Policy on Eligibility for the Men’s and Women’s Competition** **Categories”**

Key Takeaways:

- FINA implements new policy in June 2022 that effectively excludes transgender women athletes from competing in aquatic sports unless they transitioned prior to the onset of puberty or age 12, whichever is later. FINA is defending its policy by saying it is "scientifically-based" and that it "protects competitive fairness". Its proposed solution to its exclusionary policy is the creation of an open category for elite aquatic sports.
- This policy is not in accordance with the International Olympic Committee's Framework on Fairness, Inclusion, and Non-Discrimination on the basis of Gender Identity and Sex Variations. The implications of this transphobic and exclusionary policy are that "fairness" and inclusion are competing goals, and that the bodies of both cisgender and transgender women athletes will and should be subject to violations of personal privacy to confirm participation eligibility.
- Egale Canada stands firmly in opposition to this policy, and others like it, for marginalizing, excluding, and eroding the human rights of trans athletes globally.

Background

In November 2021, the International Olympic Committee (IOC) issued its Framework on Fairness, Inclusion, and Non-Discrimination on the basis of Gender Identity and Sex Variations. This Framework encouraged international federations recognized by the IOC to develop eligibility criteria reflecting “the specificities of particular sports but that include to the maximum extent possible athletes who, without regard to their sex or sex-linked traits, identify as women” (FINA, 2022, p. 1).

On June 20, 2022, partially in response to the IOC Framework, the Fédération Internationale de Natation (FINA) implemented a new policy called, “Policy on Eligibility for the Men’s and Women’s Competition Categories.” According to FINA (2022, p. 5), the objectives of this policy are threefold: (a) “maintain the separation of Aquatic sports into men’s and women’s categories according to scientifically-grounded, sex-based criteria”; (b) “provide opportunities for transgender and 46 XY DSD athletes to compete in FINA competitions in the category that reflects their gender identity based on eligibility criteria that are consistent with and do not undermine FINA’s goals for the women’s category”; and (c) “provide a clear, fair, respectful, and confidential process by which athletes may establish their eligibility for FINA competitions.”

In its 24-page policy, FINA effectively excludes most transgender athletes from competing in the women’s category (male-to-female transgender athletes [transgender women] and athletes with 46 XY DSD whose legal gender and/or gender identity is female), unless they “can establish to FINA’s comfortable satisfaction that they have not experienced any part of male puberty beyond Tanner Stage 2 or before age 12, whichever is later” (p. 7). In other words, only athletes who transitioned *prior* to the onset of puberty or age 12, whichever is later, are eligible to compete in the women’s category under this new policy. Male athletes, including athletes with 46 XY DSD and transgender men, are also subject to several stipulations in order to be eligible to compete in the men’s category. For one, they must provide an “assumption of risk” form in the disciplines of Water Polo and High Diving and obtain a Therapeutic Use Exemption (TUE) for any hormone treatment involving testosterone or other anabolic substances as part of female-to-male gender affirming care (FINA, 2022). In order to compete in the women’s category, athletes who have previously used testosterone as part of gender-affirming hormone treatment must establish that “testosterone use was for less than a year in total and did not take place during pubertal growth and development” and that “testosterone levels in serum (or plasma) are back to pre-treatment normal” (p. 7).

In response to its policy’s exclusionary impacts, FINA goes on to propose an open competition category, which would be open to all athletes regardless of legal gender, gender identity, or gender expression (FINA, 2022). Within this policy, FINA notes it will establish a new working group that will spend the next six months looking at the most effective ways to set up this new category.

Implications of FINA’s policy

FINA states in the introduction of their policy that separate sex competition between biological males and biological females is necessary for the attainment of the following three objectives:

1. ensuring equal opportunity for both male and female athletes to participate and succeed in sport programs and competitions;
2. ensuring competitive fairness and physical safety within its competition categories; and
3. developing the sport and promoting its popular appeal and commercial value.

The main implication of FINA's eligibility policy, then, is that transgender women athletes who transitioned after beginning puberty and/or any athletes whose serum or plasma testosterone levels are at or above 2.5 nmol/L present a threat to equal opportunity, competitive fairness, physical safety, sport development, and the promotion of aquatic sports' appeal and commercial value. Liew (2022) argued that this harmful discourse frames trans women athletes as aggressors or potential frauds/cheats. Further, the message of such specific biomarkers conferring an athletic advantage is out of step with the IOC Framework, which "discourages continued reliance on a testosterone proxy as the exclusive basis for eligibility for the women's category" (FINA, 2022, p. 2).

The overarching message of this transphobic and exclusionary policy is one that pits "fairness" against inclusion, as well as one that normalizes heightened medical scrutiny of both cisgender and transgender women athletes. This policy and its framing is harmful to all athletes. Further, its proposition to create an 'open competition' only serves to "other" and marginalize all trans athletes but those who transitioned pre-puberty.

What is being said about this decision?

Both opponents and proponents of FINA's policy have been quick to respond to its announcement. Opponents of the new FINA policy have called it unscientific, discriminatory, and unworkable. To the first point, there are continuing controversies concerning what constitutes a 'normal' serum testosterone level and how to determine physiological androgen sensitivity (Tannenbaum & Bekker, 2019). For instance, cisgender women can and do have higher natural testosterone levels than the upper limit set by FINA's new policy, and there are currently no valid, reproducible tests for androgen sensitivity (Bekker, 2022).

Many have also highlighted the discriminatory and unfeasibility of FINA's medical assessment outlined in the policy, which includes physical examination of external secondary sex characteristics and radiological imaging of internal sex organs. Specifically, the Tanner stage model, which relies on visual assessments, is subjective and relies on a narrow and problematic view of how a "normal" body should look (Bekker, 2022). Not only are such examinations prey to false interpretations but are also

an invasion and violation of personal privacy and human rights and police the bodies of all women (Tannenbaum & Bekker, 2019; OlympicTalk, 2022). Athlete Ally, a nonprofit LGBTQ athletic advocacy group, noted that not only are FINA's eligibility criteria unscientific, but also discriminatory and harmful, leading to the policing of *all* women's bodies, subjecting cisgender and transgender women alike to medical assessment to prove their "femaleness." Such violations have been flagged by Human Rights Watch and other human rights organizations (Mosier, 2022). Other advocacy organizations such as Equality Australia have added that bans on trans female athletes "risks violating international human rights principles of non-discrimination" (Hytner, 2022, para. #16). Other opponents have also noted the unreliable and unworkable approach of using genotypes as eligibility markers for anyone with a sex variation (Bekker, 2022, p. 1).

FINA's president, Husain Al-Musallam, has asserted that FINA's policy is based on science, and has framed it as a balancing act between protecting the rights of all athletes to compete with competitive fairness (OlympicTalk, 2022). Proponents of the policy similarly utilize a Fairness v. Inclusion argument. For example, some have argued that not considering male advantage (e.g., strength and speed conferred by relatively higher levels of testosterone) in considerations of fairness when determining athletes' categorization "is an argument for the abolition of female sport" (Devine, Pike, & Garvey, 2022, para. #4). The main argument here is that testosterone suppression does not mitigate the physical advantages male puberty creates, and that such advantages would "asymmetrically benefit trans women [...] at the expense of all female athletes including trans men and non-binary athletes" (Devine, Pike, & Garvey, 2022, para. #2; see also Marauchi, 2022).

How has FINA's decision impacted other sports governing bodies?

Since FINA's announcement, the International Rugby League has followed suit with a temporary ban on trans athletes, saying it will not finalize its trans inclusion policy until after it has canvassed players' opinions (Hytner, 2022). The USA Wrestling league has recently also instituted a similar ban (Yamada, 2022), while the Union Cycliste Internationale (UCI), cycling's governing body, has narrowed its eligibility criteria for transgender female athletes, including lowering the maximum plasma testosterone level permitted (Keane, 2022). At the national level, Ireland's Ladies Gaelic Football Association is working on a policy around transgender players after a team with a trans player beat a rival (Wilford, 2022) and England's Rugby Football League implemented a "Gender Participation Policy" which permits only those whose sex was recorded 'female' at birth to play in the female category (BBC, 2022). This ripple effect heralds blanket bans against trans athletes across numerous international and national sports governing bodies, leagues, and associations.

Fortunately, some have taken a more inclusive stance: World Triathlon recently outlined its transgender policy, which allows racing opportunities for trans women in elite or age-group triathlons (Roethenbaugh, 2022). Importantly, numerous associations, including the International Surfing Association, have not yet finalized a policy (Quarnstrom, 2022): it is therefore a critical time for advocacy on trans inclusion in sport. The decisions made in the coming months will shape the realities of trans athletes across the globe, and we still have the capacity to create a more equitable and inclusive sporting world.

Conclusion

FINA's most recent policy on eligibility for men's and women's categories in aquatic sports is now in effect. FINA states that its policy fulfils its commitment to "providing safe, fair, inclusive and non-discriminatory opportunities" for all athletes wishing to compete in its competitions (FINA, 2022, p. 1). However, its reliance on a binary and simplistic understanding of sex, as well as a reductive understanding of the sources of 'competitive advantage' in aquatic sports, elides the larger role that systemic discrimination, socioeconomic factors, family support, and other factors have on trans athletes' 'advantage.' Further, this decision supports broader legislative efforts and institutional decisions which marginalize, exclude, and harm trans people from full, equal, and equitable participation in sports and public life.

Egale Canada's concerns with FINA's policy are that it precludes trans athletes from competing in the category consistent with their gender identity, and that it reinstates the role of "scientific and medical experts" as arbiters of a binary understanding of sex. This reliance on certain biomedical measures harms cisgender and transgender athletes alike. Most concerning, however, is that the exclusionary arguments underpinning this policy (and those that have been implemented since) can easily be repurposed to ban trans people from other settings such as gyms, classrooms, and hospitals. Situated within a broader context of inequitable healthcare access, widespread marginalization and discrimination, and associated physical and mental health outcomes, the medical scrutiny of trans athletes—as outlined in this policy—only serves to further marginalize and erode the human rights of trans athletes.

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