

350 Fifth Avenue, 34th Floor
New York, NY 10118-3299
Tel: +1-212-290-4700
Fax: +1-212-736-1300; 917-591-3452

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Sebastian Coe, President
IAAF
6 Quai Antoine 1er
BP359 - MC 98007 Monaco
Email: iaf@iaaf.org

RE: Eligibility Regulations for The Female Classification

Dear Lord Coe:

We write to express concern regarding the IAAF's 2018 Eligibility Regulations for the Female Classification (Athlete with Differences of Sexual Development). As you may know, Human Rights Watch is an international organization that monitors human rights abuses in more than 90 countries worldwide, including violations of international human rights standards as they relate to mega-sporting events. We have worked closely with the International Olympic Committee and FIFA, among other global sporting bodies, to support their upholding the human rights of athletes and fans.

We are concerned that the IAAF's new eligibility regulations discriminate against some women athletes. While the objective of ensuring that each athlete is qualified to compete in the appropriate category in sports competitions may be legitimate, any such regulation designed to achieve this end must be justified as both necessary and proportionate: that is that there needs to be a rational connection between the regulations and the objective they are designed to meet and they should be minimally impairing on any right to freedom they regulate. IAAF provides that for a woman athlete to compete in the female category for events from 400 meter to the mile—including 400m, hurdles races, 800m, 1500m, one-mile races and combined events over the same distances—she should have naturally occurring blood testosterone level below five (5) nmol/L. If a woman is determined to have blood testosterone of five (5) nmol/L or higher, the new regulations mandate that in order for her to compete in the female category, she must:

- a) reduce her blood testosterone level to below five (5) nmol/L for a continuous period of at least six months
- b) thereafter maintain her blood testosterone level below five (5) nmol/L continuously (ie: whether she is in competition or out of competition) for so long as she wishes to remain eligible.¹

Despite claims from IAAF that the regulations will not prevent any women from competing in athletics, they do effectively force some women with intersex traits (or differences of sex development) to chose between undergoing medically unnecessary intervention to lower their testosterone levels or be precluded from participating in international sport. In this regard, it is not

¹ IAAF, "IAAF Introduces New Eligibility Regulations for Female Classification," April 26, 2018, <https://www.iaaf.org/news/press-release/eligibility-regulations-for-female-classifica>.

meaningful for the IAAF to say that women with DSD who refuse the proposed medical intervention can participate in male or yet-to-be-created intersex categories, or national or unregulated events. There is no escaping the reality that the regulations have the effect of coercing some women to undergo medically unnecessary procedures to alter their hormone levels. As outlined in the attached analysis, we believe the IAAF regulations encourage violations of internationally-protected human rights, including the rights to privacy, health, bodily integrity, dignity, and non-discrimination.

Our own research on the experiences of people with intersex traits has found, institutional and medical treatment of this population is frequently motivated by prejudice presented as science.² The history of non-consensual “normalizing” procedures conducted on and promoted for people with intersex variations, such as procedures to reduce the size of the clitoris, change the size and shape of the vagina, and remove gonads³, has been thoroughly de-bunked as unscientific, unethical, and in violation of international human rights law. The discriminatory treatment of female athletes with intersex traits in sporting events similarly runs afoul of fundamental rights protections.

The UN Special Rapporteur on the right to health has expressed concern that “international and national sporting federations have...introduced policies banning women with testosterone levels exceeding a certain threshold from participating in competitive sport.” He noted that “there is insufficient clinical evidence to establish that those women are afforded a ‘substantial performance advantage’ warranting exclusion.”⁴ As you may be aware, the science behind the IAAF’s regulations remains deeply contested, with numerous recent studies and reviews of the evidence disputing the claims of performance advantage.⁵

The Special Rapporteur called on sporting organizations to:

...implement policies in accordance with human rights norms and refrain from introducing policies that force, coerce or otherwise pressure women athletes into undergoing unnecessary, irreversible and harmful medical procedures in order to participate as women in competitive sport.⁶

² Human Rights Watch, “*I Want To Be Like Nature Made Me*”: Medically Unnecessary Surgeries on Intersex Children in the US, July 2017, <https://www.hrw.org/report/2017/07/25/i-want-be-nature-made-me/medically-unnecessary-surgeries-intersex-children-us>.

³ Medical literature has documented that some female athletes underwent medically unnecessary gonadectomy surgeries as part of their efforts to comply with the 2011 IAAF regulations. See: Patrick Fenichel, et. al., “Molecular diagnosis of 5 α -reductase deficiency in 4 elite young female athletes through hormonal screening for hyperandrogenism,” *The Journal of Clinical Endocrinological Metabolism*, June 2013. 98(6):E1055-9. doi: 10.1210/jc.2012-3893.

⁴ Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2016. “Sport and healthy lifestyles and the right to health.” Report No.: A/HRC/32/33. http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/33

⁵ The New York Times has summarized one of the most recent critiques; several others are listed below. Jeré Longman, “Did Flawed Data Lead Track Astray on Testosterone in Women?,” *The New York Times*, July 12, 2018, <https://www.nytimes.com/2018/07/12/sports/iaaf-caster-semenya.html>; Roger Pielke, et. al., “Serious Problems Found in a Partial Replication of Berman and Garnier (2017),” July 9, 2018, https://drive.google.com/file/d/1v-AENZFjP8vvlLmfqw3e_Qtmn-xLKxzt/view; Katrina Karkazis and Gideon Meyerowitz-Katz, “Opinion: Why the IAAF’s latest testosterone study won’t help them at CAS,” *World Sports Advocate*, <http://www.cecileparkmedia.com/world-sports-advocate/hottopic.asp?id=1525>; Peter H Sónksen, et. al., “Hyperandrogenism controversy in elite women’s sport: an examination and critique of recent evidence,” *British Journal of Sports Medicine*, <http://dx.doi.org/10.1136/bjsports-2017-098446>; Amanda Menier, “Use of event-specific tertiles to analyse the relationship between serum androgens and athletic performance in women,” *British Journal of Sports Medicine*, <http://dx.doi.org/10.1136/bjsports-2017-098464>; Simon Franklin, et. al., “What statistical data of observational performance can tell us and what they cannot: the case of Dutee Chand v. AFI & IAAF,” *British Journal of Sports Medicine*, <https://bjsm.bmj.com/content/52/7/420>.

⁶ Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2016. “Sport and healthy lifestyles and the right to health.” Report No.: A/HRC/32/33. http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/33

The Court of Arbitration in Sport (CAS), has ruled that the IAAF's 2011 regulations, substantively similar to the 2018 regulations,

...discriminate against women and discriminate based on a natural physical trait. Such discrimination is, unless justified, contrary to the Olympic Charter, the IAAF Constitution and the laws of Monaco. Accordingly, if the Hyperandrogenism [testosterone] Regulations cannot be justified, specifically as a reasonable and necessary response to a legitimate need, then they should be declared invalid.⁷

In the absence of a clear scientific consensus that women with higher than typical natural testosterone have a substantial and unjustifiable performance advantage, there is no basis for these regulations as a necessary and proportionate response. As such, attempts by the IAAF to suggest that the regulations' requirements are analogous to weight divisions or age criteria are misleading and false. In this regard, age categories conform perfectly to an athlete's physiological endowment and no athlete can be coerced into competing in a category in which she does not belong. With respect to weight categories, an athlete who chooses to change her body to conform to a specific category does so in the absence of invasive testing and implicit questioning of an essential characteristic of her identity as a human being. Instead of upholding the legitimate objective of ensuring that each athlete is qualified to compete in the appropriate category in sports competitions, the IAAF's new regulations violate internationally-protected fundamental rights and discriminate against women on the basis of both their sex and their sex characteristics, violating their privacy, and having the effect of coercing them into unnecessary medical procedures.

We urge the IAAF to urgently revoke these regulations.

Sincerely,



Liesl Gerntholtz
Executive Director
Women's Rights Division
Human Rights Watch



Minky Worden
Director of Global Initiatives
Human Rights Watch

⁷ CAS. 2015. "CAS2014/A/3759 Dutee Chand v. Athletics Federation of India (AFI) & The International Association of Athletics Federations (IAAF)." Lausanne, Switzerland: Court of Arbitration for Sport: 143-144. Available at http://www.tascas.org/fileadmin/user_upload/award_internet.pdf.

Annex: Human Rights Analysis

Non-consensual “normalizing” procedures conducted on and promoted for people with intersex variations, has been repeatedly de-bunked as unscientific, unethical, and in violation of international human rights law.⁸

In 2016, the United Nations Special Rapporteur on the right to health, a psychiatrist, condemned sporting authorities’ policies that “have resulted in intersex people — those born with sex characteristics that do not fit with typical binary sex categorization — experiencing multiple rights violations,” including coercion to undergo sex testing. As the Special Rapporteur noted, “Sex testing has frequently been conducted to avoid the apparent threat of ‘sex fraud’ (participating under an assumed gender to obtain a competitive advantage). However, no single test ‘determines’ gender.” On the contrary, he noted: “[W]omen athletes have undergone chromosomal testing, only to discover that they do not possess two X chromosomes. This has led to stigmatization and to spurious exclusion from competitive sport.”

Human Rights Watch understands that independent scientists have offered considerable critique of the of the scientific basis upon which IAAF issued the 2018 regulations, and we understand at least one member of the IAAF disciplinary committee has resigned because he disagreed with this policy and deemed it “most likely unlawful.”⁹

Privacy and Dignity Rights

The IAAF explanatory note accompanying the new regulations insists that “persecution or campaigns against athletes simply on the basis that their experience does not conform to gender stereotypes are unacceptable” and says that the regulations are not “intended as any kind of judgement on or questioning of the sex or the gender identity of any athlete.” However, these assertions fail to recognize that the IAAF regulations are themselves a form of persecution.

⁸ The United Nations Committee on the Elimination of Discrimination against Women has found such procedures to be in violation of human rights law twice: CEDAW, “Concluding observations on the sixth periodic report of the Netherlands,” CEDAW/C/NLD/CO/6, November 18, 2016; CEDAW, “Concluding observations on the combined fourth and fifth periodic reports of Switzerland,” CEDAW/C/CHE/CO/4-5, November 18, 2016.

The United Nations Committee Against Torture, the monitoring body for the Convention Against Torture (CAT) has condemned medically unnecessary non-consensual surgeries on people with intersex variations six times. CAT has referenced several of the Conventions in its analysis of intersex surgeries. These are: article 2 (legislative, administrative, judicial or other measures to prevent acts of torture), article 10 (education and information regarding the prohibition against torture included in the training of...medical personnel), article 12 (systematic review [of] methods and practices with a view to preventing any cases of torture), article 14 (legal redress for torture) and article 16 (prevention of acts of cruel, inhuman or degrading treatment) in its analysis of intersex surgeries. Some patterns emerge in the committee’s critique of state practices and recommendations for action.

Concluding observations of the Committee against Torture, Germany, CAT/C/DEU/CO/5 (12 December 2011); Concluding observations on the seventh periodic report of Switzerland, CAT/C/CHE/CO/7, 7 September 2015; Concluding observations on the sixth periodic report of Austria, CAT/C/AUT/CO/6 (27 January 2016); Concluding observations on the fifth periodic report of China with respect to Hong Kong, China, CAT/C/CHN-HKG/CO/5 (3 February 2016); Concluding observations on the combined sixth and seventh periodic reports of Denmark, CAT/C/DNK/CO/6-7 (4 February 2016); Concluding observations on the seventh periodic report of France, CAT/C/FRA/CO/7 (10 June 2016).

⁹ “SA professor resigns from IAAF in protest at ‘Caster Semenya policy,’” *The Citizen*, May 1, 2018, <https://citizen.co.za/sport/south-africa-sport/sa-athletics-south-africa-sport/1911282/sa-professor-resigns-from-iaaf-in-protest-at-caster-semenya-policy/>

First, IAAF's suggested creation of an "intersex" category in sporting competitions would violate the regulations' own assurances of confidentiality. Forcing female athletes with intersex variations to compete in that category, in male events, or not compete at all, could immediately alert the public to the private physical traits of those who continue competing.

Second, regulations that call for scrutiny of women's naturally-occurring hormone levels – and that result in banning some women from competition on the basis of these levels— are at root a form of judgment and a questioning of women's sex and gender identity. The process involved in detecting and examining an athlete's intersex variation and testosterone levels is inherently subjective and degrading. Given that the mandated tests and procedures are medically unnecessary (they hold no therapeutic value for the patient), the IAAF's regulations effectively coerce athletes into medical testing and treatment that have no health benefit. In fact, evidence suggests that lowering natural hormone levels can have severe detrimental health effects.¹⁰

The Right to Health

The UN Committee on Economic, Social and Cultural Rights (CESCR) has indicated that the International Covenant on Economic, Social and Cultural Rights (ICESCR) proscribes any discrimination in access to health care and the underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of sexual orientation and gender identity. The CESCR committee emphasized in its General Comment 14 that:

The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body... and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation.¹¹

In a 2009 report to the United Nations General Assembly, the Special Rapporteur on the right to health stated: "Guaranteeing informed consent is fundamental to achieving the enjoyment of the right to health."¹² However, the special rapporteur observed that:

While informed consent is commonly enshrined in the legal framework at the national level, it continues to be compromised in the health-care setting... as a result of the power imbalance created by reposing trust and unequal levels of knowledge and experience inherent in doctor-patient and researcher-subject relationships. Structural inequalities exacerbated by stigma and discrimination result in individuals from certain groups being disproportionately vulnerable to having informed consent compromised.¹³

¹⁰ Rebecca Jordan-Young, et al., "Sex, Health, and Athletes," *British Medical Journal*, 2014, 348: g29264.

¹¹ United Nations Committee on Economic, Social and Cultural Rights, "General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)," <http://www.refworld.org/pdfid/4538838d0.pdf>.

¹² United Nations, Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/64/272, August 10, 2009, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/450/87/PDF/N0945087.pdf?OpenElement>.

¹³ *Ibid.*

Informed consent is not just a matter of asking patients whether they are amenable to individual clinical procedures. In a situation where strong incentives to undergo otherwise medically unnecessary procedures to lower hormone levels exist, the line between consent and coercion is blurred. The IAAF's regulations repeatedly mention that doctors involved in the testing of these athletes must obtain their informed consent. However due to the relationship between the procedures and the athlete's ability to compete as well as retain her privacy rights, the conditions for giving informed, voluntary consent are not realistic. In a 2015 article titled "Medical and ethical concerns regarding women with hyperandrogenism and elite sport," a group of medical and legal scholars argued:

Given that their eligibility to compete was clearly dependent upon agreeing to the procedures, the line between consent and coercion is blurred in this instance. The reported medical decisions rendered violate ethical standards of clinical practice and constitute a biomedical violence against their persons.¹⁴

The IAAF regulations state that "no athlete will be forced to undergo any assessment and/or treatment under these Regulations," but specify that any athlete who "does not meet the Eligibility Conditions (and any athlete who is asked by the IAAF Medical Manager to submit to assessment under these Regulations and fails or refuses to do so) will not be eligible to compete in the female classification."

Bodily Integrity

Some intersex (DSD) traits—such as atypical external genitalia—are apparent at birth. Others—such as gonads or chromosomes that do not match the expectations of the assigned sex—manifest later in life, often around puberty. Others—such as atypical hormone levels—are never apparent. All intersex conditions require specialized medical analysis to be properly diagnosed and understood; very few intersex conditions require therapeutic medical interventions to improve health.

For women athletes with atypical testosterone levels, the process of undergoing medical examinations (in some cases, as the regulations stipulated, repeatedly) can be as humiliating as it is medically unnecessary. Following an examination of her eligibility based on a suspected intersex variation, South African sprinter Caster Semenya stated: "I have been subjected to unwarranted and invasive scrutiny of the most intimate and private details of my being."¹⁵ The 2011 IAAF regulations relied on deeply problematic stereotypes such as "deep voice" to identify athletes with intersex variations, and the 2018 regulations make no mention of criteria for identifying these athletes—leaving the system open for abuse.¹⁶

¹⁴ Peter Sonksen, et al. "Medical and ethical concerns regarding women with hyperandrogenism and elite sport." *The Journal of clinical endocrinology and metabolism*, Vol. 100, No. 3, 01.03.2015, p. 825-827.

¹⁵ Caster Semenya, "Caster Semenya's comeback statement in full," *The Guardian*, March 30, 2010, <https://www.theguardian.com/sport/2010/mar/30/caster-semenya-comeback-statement>.

¹⁶ Katrina Karkazis and Rebecca Jordan-Young, "The treatment of Caster Semenya shows athletics' bias against women of colour," *The Guardian*, April 26, 2018, <https://www.theguardian.com/commentisfree/2018/apr/26/testosterone-ruling-women-athletes-caster-semenya-global-south>.

The new regulations, while lacking criteria for identifying relevant athletes, do provide for absolute authority of the IAAF medical manager to investigate (i.e. conduct medically unnecessary testing) any athlete of their choosing.¹⁷ The regulations also encourage a range of individuals and institutions to report athletes of concern to the IAAF.¹⁸ National Federations are also obliged by the IAAF to identify potential athletes for investigation. Absent scientifically-validated criteria, but with guidelines for identifying athletes suspected to have intersex variations, and given the history of stereotype-based and deeply offensive criteria, the IAAF's 2018 regulations set up a system in which women athletes' bodies are under near-constant and arbitrary surveillance.

Non-Discrimination

The 2018 regulations state that “No stigmatisation or improper discrimination on grounds of sex or gender identity will be tolerated.”

However, stigmatization, stereotyping, and discrimination are intrinsic to the implementation of the regulations. Identifying relevant athletes through observation and suspicion creates a situation in which women athletes' bodies are scrutinized through subjective and discriminatory frameworks and common understandings. No such scrutiny is applied to men; the regulations have a discriminatory impact on women simply because they are women.

International human rights bodies have commented on the need to improve women's place in society through sport by eschewing stereotypes. In its 2017 general recommendation No. 36 on the right of girls and women to education, the UN Committee on the Elimination of Discrimination against Women noted that the Convention on the Elimination of Discrimination against Women “calls on States parties to ensure that girls and women have the same opportunities [as boys and men] to actively participate in sports and physical education.” These rights are enshrined in articles 10 and 13 of the convention. The committee noted with concern that “based on prevailing stereotypes, positive outcomes for women's empowerment and gender equality in this sphere are constrained by discrimination in all areas of sports and physical activity” and that “Media representations of women in sports also influence prevailing stereotypes.”¹⁹

¹⁷ “The IAAF Medical Manager may investigate at any time [...] whether any athlete who has not advised the IAAF Medical Manager in accordance with clause 3.1 may be a Relevant Athlete whose case requires assessment under these Regulations.”

¹⁸ “...sources, such as (for example, but without limitation) the athlete herself, the team doctor of the National Federation to which the athlete is affiliated, results from a routine preparticipation health examination, and/or information/data (including but not limited to blood testosterone levels) obtained from the collection and analysis of samples for anti-doping purposes.”

¹⁹ Committee on the Elimination of Discrimination against Women General recommendation No. 36 (2017) on the right of girls and women to education, CEDAW/C/GC/36,

https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/I_Global/CEDAW_C_GC_36_8422_E.pdf.