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The IAAF hyperandrogenism regulations and discrimination

The International Association of Athletics Federations (IAAF) recently released rules and guidelines designed to prevent women with elevated androgen levels from competing, which the International Olympic Committee (IOC) is also planning to adopt. Shawn Crincoli, an Associate Professor of Law at Touro Law Center, explains why the rules and guidelines are highly likely to violate non-discrimination laws in a number of jurisdictions.

There is no basis for the International Association of Athletics Federations (IAAF)'s confidence in the legal validity of its newly issued hyperandrogenism rules regulating the eligibility of women in sports'. Contrary to IAAF claims that the new rules are 'challenge proof', the hyperandrogenism regulations (HA regulations) pathologise healthy female bodies and label them as excessively androgenic - or in other words, as too masculine - and are hardly immune to challenge. There is a high likelihood that the HA regulations violate the non-discrimination laws of a number of jurisdictions. Furthermore, there is no basis in law for the IAAF's suggestion that failing to regulate the overproduction of androgens would open the federation up to legal attack from other female athletes, nor that such regulation is necessary to guarantee the fairness of competition for all female participants. The IAAF's assertion that the HA regulations have been supported by 'lawyers and human rights experts' and thus are 'challenge proof' ring hollow; given the IAAF's prior exclusion of atypical athletes, whether the differences stemmed from sex, gender or disability - a history that

no independent judicial arbiter would ignore.

The primary failure is that the new rules treat men and women differently from one another without demonstrating an acceptable rationale supporting the regulation of androgens in women, but not men. This unequal treatment is the hallmark of discrimination based on sex. Second, even if one were to accept that permissible sex segregation of sport also justifies differential treatment, the HA regulations seek to discriminate against specific women on account of their naturally occurring physiology by labelling their endocrinological make-up as insufficiently female. To do so is not only an affront to the biological diversity represented in the female population; it is also an imposition of an artificial standard on women to meet a particular sex stereotype, which in some jurisdictions is a recognised sub-category of discrimination prohibited by law.

The HA regulations pathologise only women

The HA regulations have been issued to regulate women but not men. All bodies produce hormones and all bodies produce sex hormones. Androgenic hormones - the best known of which is testosterone - are produced by both male and female bodied athletes, albeit in different amounts and proportions. Despite the fact that both male and female athletes produce androgens, the HA regulations dictate that only women who produce androgens at a level deemed to be excessive are ineligible to compete with other women. There is no such adopted set of rules with respect to men who produce higher levels of androgens than other men. Indeed, there isn't even a concept of excessiveness or having 'too much'

when it comes to men naturally producing androgens³.

If naturally producing excessive androgens creates an unfair competitive advantage for an athlete or presents a safety issue, then the HA regulations should be adopted to govern both male and female athletes. It is telling that no such rule has been forthcoming to deem men with excessive androgens as ineligible, nor even to label men who naturally produce higher levels of testosterone as having a medical condition of hyperandrogenism. The IAAF and IOC have failed to explain why atypically high levels of androgens are acceptable within men's sport and not acceptable within women's sport. Equality and non-discrimination laws dictate that when distinctions based on sex are made, the burden falls on the regulating body to justify a *bona fide* rationale for the disparate treatment. Neither the federation nor the IOC has issued any evidence demonstrating why women with high levels of androgens should not be allowed to compete with other women, even though men with high levels of androgens may compete with other men. Merely referencing that androgens have performance enhancing effects and attributing the existence of women's sport classification to testosterone distribution levels hardly meets this burden of proof.

The HA regulations attempt to redefine what is female

The HA regulations aim to create two classes of women: females with 'acceptable' levels of androgens and females with 'unacceptable' levels. There is no basis for this classification other than based on sex stereotypes of how many 'male hormones' a woman may produce before her ability to participate in sport as a woman is questioned.

The rules condition eligibility on a woman possessing 'androgen levels below the male range (measured by testosterone levels in serum)', demonstrating that the critical determining factor is to eliminate those women who are deemed to be too much like men. The HA regulations also carve out an exception for women with medical conditions that create androgen insensitivity, because they too meet the criteria the IAAF seeks to impose: a ban on women with too much bio-available testosterone.

Androgens, despite being medically categorised as male sex hormones, are naturally occurring hormones in the female body. There is tremendous diversity in the individual amount of these hormones within the general population. A woman with lower levels of androgens or higher levels of oestrogen (female sex hormones) is not 'more' woman than a woman with higher levels of androgens or lower levels of oestrogen. It is rare, but not unheard of, for some women to produce more androgens than some men do.

Elite athletes do not represent the population mean in terms of biology or physiology in many respects, and some of these differences can translate to measurable advantages or disadvantages in sport. There is no such thing as a correct biological amount of androgens for a female to be a woman; there is only data that show the statistical distribution of androgens that can be produced by the female body, just as there is a population distribution of height, VO2 max4, and so forth. Accordingly, a female-bodied athlete cannot produce 'excessive' androgens. She can only produce an amount that is a statistical outlier, just as there are statistical outliers in other physiological categories. The

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federation and IOC, though, do not seek to declare athletes ineligible based on being outliers who are too tall, possess too much muscle tissue of a particular type, or have excessive lung capacity, even if these differences represent significant advantages in sport.

The IAAF's HA regulations aim to create an artificial baseline at which a woman has too many male sex hormones to be allowed to compete with women. Since other forms of naturally occurring statistical outlier advantages are unregulated, it is clear that the regulations are another attempt to define what is female - and what is not female enough - for inclusion in women's sport. It relies on the sex stereotype that while it is okay for women to be taller or have greater lung capacity, it is not okay for females to have 'too much' testosterone, based on a comparison to the average level of androgens naturally occurring in the male population.

Equality laws do not allow for this back door effort to classify some females as excessively masculine so as to be excluded from opportunities afforded to other women. It is only stereotype, not medical reality, which suggests there is something wrong or improper in a woman who possesses high levels of testosterone; and it is only stereotype, not medical reality, that would aim to define too much testosterone in women by reference to how much a man produces. Just as one may not treat men and women unequally, some jurisdictions have non-discrimination laws prohibiting policies that regulate men and women based on sex stereotypes or that condition opportunity for women based on whether they meet a particular standard of femininity.

The HA regulations may be challenged 'as applied'

It stands to follow that an individual athlete may have a stronger 'as applied' case, in the event that enforcement of the rules are not even-handed and with due process. The new rules require athletes to undergo hyperandrogenism testing as a condition of their participation in sport, and the IAAF suggests that the Athlete Biological Passport system can help ensure privacy through the process. Yet as the IAAF and IOC recognise, the biological passport system is not currently in use and likely will not be for several years. Nor is the WADA testing system set up to accurately detect or sanction naturally occurring hormones.

The HA regulations list multiple routes in which an athlete may be referred as a case to an Expert Medical Panel. However, there is no one test identified which triggers the application of the HA regulations and there are no safeguards or guarantees that the application of these rules will be done in a manner than protects the athlete's privacy and dignity rights. One method of triggering an HA investigation is 'confidential information that is received by the IAAF Medical Delegate or IAAF Medical Manager'. In short, there is nothing in the newly issued regulations to prevent the so-called witch-hunt that can occur when a female athlete is challenged by competitors as looking or seeming too masculine. Thus, depending on enforcement, there is a chance that a female athlete could demonstrate discriminatory enforcement of the HA regulations as well.

No legal issue stems from an absence of HA regulations

The IAAF has attempted to justify the HA regulations as a necessary step in preventing legal attack from

other female athletes. There is no legitimacy to this claim. It is hard to imagine the basis for a legal challenge that the IAAF or IOC failed to exclude an individual athlete. Such a challenge would have no more chance of success than if female athletes sought to have competition limited to only women under 182cm or with a VO2 max under 55 ml/kg/min.

The fact that the IAAF and IOC were concerned about the complaints of other female athletes actually cuts against these bodies should an athlete challenge the HA regulations. The inclusion of the fear of being legally attacked by other athletes as motivation or justification for the rules serves as evidence that the IAAF and IOC are wilfully complicit in a majoritarian effort to suppress and eliminate an atypical minority - or even an atypical individual - from participation in sport.

HA regulations yet another effort to 'sex test' women

It would be incomplete to offer an analysis of the legal landscape surrounding these eligibility rules without placing them in the larger context of IAAF and IOC policies and decision-making. Any judicial body exploring the validity of the HA regulations would also investigate where the rules came from, how female athletes have been regulated by the IAAF and the IOC previously and how the historical context of sex testing and eligibility for women has occurred.

The *lex sportiva* of the atypical athlete is rife with examples suggesting that the IAAF and the IOC have erred on the side of exclusion. The IAAF and the IOC have a history of running roughshod over basic human rights of athletes, particularly when forced to handle complicated questions of sex, gender or disability. Without touching upon

the substance of the rulings, gross violations of procedure marred the handling of the eligibility of both South African track athletes Oscar Pistorius and Caster Semenya.

Accordingly, the IAAF's promulgation of the HA regulations must be taken in the context of the federation forcing women to undergo the humiliation of sex testing in various forms.

While much of high performance sport separates men and women into separate classifications, the reality is that human biology is not organised quite so neatly. Already struggling with how to treat and categorise athletes who do not fit the sex binary due to intersexual conditions, disorders of sex development (DSD) or gender identity disorders, the IAAF has added fuel to the fire with the new HA regulations. The regulations are a transparent effort to short circuit the difficult process of deciding participation in women's sport by resorting to endocrinology alone, particularly androgen production, as the determining line for deciding that a female is 'too manly' to compete in sport.

The IAAF's decision to move away from its deeply problematic prior policies, including its Gender Verification Policy and the Stockholm Consensus, is to be commended. The IAAF's desperation to shoehorn female eligibility into a hormone-based approach is not. The HA regulations seemingly resolve one issue - how to regulate male-to-female transsexual athletes consistent with laws that protect against gender identity discrimination - by trading inclusion on one instance against the exclusion of females with intersexual conditions, DSD or other atypical hormone profiles. Furthermore, the IAAF justifies this newly found reason for

exclusion by rooting the very existence of women's sport classifications in an explanation based on androgen production, a controversial and broadly generalised rhetorical move, one that seemingly grants the IAAF the ability to continue to police and pathologise women's bodies in the name of 'protecting' women's sport.

The IAAF Council has commented that its regulations should be seen as a 'living document that will be subject to review'. The IAAF would be wise to rescind the HA regulations as an unprecedented and discriminatory policy before a judge or arbitrator forces the federation to do so. Furthermore, rather than adopting the HA regulations wholesale, the International Olympic Committee (IOC) ought to denounce and distance itself from the HA regulations, which history will only view as yet another step in organised sport's efforts to control women's bodies and police the femininity of women in sport.

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1. IAAF to introduce eligibility rules for females with hyperandrogenism, <http://www.iaaf.org/aboutiaaf/news/newsid=59746.html> (April 12, 2011). The explanatory notes for the regulations were published on 1 May 2011 and can be found at: http://www.iaaf.org/mm/Document/AboutIAAF/Publications/05/98/76/20110430053520_httppostedfile_HA_Explanatorynotes-ENG-AMG-30.04.2011_24295.pdf.
2. See 'IAAF: hyperandrogenism rules are challenge proof', *World Sports Law Report* Volume 09 Issue 04, April 2011.
3. WADA and other doping controls aim to measure excessive levels or improper ratios for the purpose of identifying synthetic or artificial androgens, which is irrelevant to the question of naturally produced hormones, and, thus, beyond the scope of this article.
4. Oxygen use whilst exercising at full capacity.