

PROTECTING HUMAN RIGHTS, COMPETITIVE EQUITY, AND SPORTS INTEGRITY IN BINARY ATHLETIC COMPETITION IN A NONBINARY WORLD*

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Abstract: *This article describes the history and evolution of the International Olympic Committee (IOC) guidelines and International Federation (IF) rules regarding the eligibility of female athletes with sex variations and transgender female athletes to participate in sport at the international and Olympic level. In doing so, this article discusses the Chand and Semenya Court of Arbitration for Sport (CAS) decisions, which demonstrate a balancing of human rights and competitive equity in sport. This article discusses the 2021 “IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations” and recommends that a combination of the IOC Framework and tripartite Chand/Semenya CAS legal framework should be used moving forward, as it appropriately balances an athlete’s human rights with preserving the competitive equity of sport. Lastly, this article discusses eligibility rules for female athletes with sex variations and transgender female athletes from a U.S. perspective, including how they are used in Olympic sports, professional sports, college sports, and high school sports.*

Key words: *gender, transgender, sport, Olympics, CAS, IOC, human rights, competitive equity*

Introduction

This article initially describes the history and evolution of the International Olympic Committee (IOC) guidelines and International Federation (IF) rules regarding the eligibility of female athletes with sex variations (e.g., hyperandrogenism and other differences of sex development) and transgender female athletes to participate in Olympic and international women’s sports competitions

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and events, as well as their rationales. In doing so, it reviews the *Chand* and *Semenya* Court of Arbitration for Sport (CAS) jurisprudence, establishing and applying the legal framework for balancing these athletes' human rights with the rights of other female athletes to competitive equity, along with the rights of the IOC and IFs to protect competitive integrity in elite-level international women's sport.

Next, this article considers the "IOC Framework On Fairness, Inclusion and Non-Discrimination On the Basis Of Gender Identity and Sex Variations" (November 2021) and determines that the IOC Framework appropriately balances the foregoing rights as well as recommends some modifications to the *Chand/Semenya* legal framework for future CAS adjudications of legal challenges to IF athlete eligibility rules for women's sports competitions and events.

The article then describes the contractual obligation of a U.S. National Governing Body (NGB) to comply with its IF's athlete eligibility rules for female sports, the federal law protecting Olympic sport athletes from sex discrimination, and the legal process for resolving disputes regarding athlete eligibility rules for female Olympic sports. It also reviews U.S. judicial precedent regarding the exclusion of transgender female athletes from professional and non-Olympic sports. It notes that, consistent with the 2021 IOC Framework, the National Collegiate Athletic Association (NCAA) recently adopted a new sport-specific transgender student-athlete participation policy for each of its 21 women's intercollegiate sports, which incorporates the corresponding U.S. NGB athlete eligibility rules for that sport. Because of its consistency with U.S. judicial precedent, the authors suggest that American sports arbitrators and courts should apply the *Chand/Semenya* legal framework (with their proposed modifications) when resolving future disputes regarding the eligibility of female transgender athletes (e.g., University of Pennsylvania swimmer Lia Thomas) or female athletes with sex variations to participate in domestic female sports competitions and events.

Historical IOC Athlete Eligibility Guidelines for Female Olympic and International Sports Competition, IF Rules, and CAS Jurisprudence

The IOC and IFs are private sport governing bodies with global monolithic and plenary power to determine athletic eligibility requirements for Olympic and international sports, subject to compliance with applicable national laws (generally Swiss law because the IOC and most IFs are headquartered in Lausanne, Switzerland) and transnational laws (e.g., European Union Law, particularly the Treaty of Rome's competition and freedom to provide services provisions; European Convention on Human Rights).

An IF's statutes, including its athlete eligibility rules, must comply with the Olympic Charter for the sport(s) under the IF's governance to be part of the

Olympic Games or Olympic Winter Games. Subject to this requirement, Rule 25 of the Olympic Charter (2020) provides that each IF have the independence and autonomy to govern its sport. Rule 26 (1.1) and (1.5) states that an IF's role includes establishing and enforcing "in accordance with the Olympic spirit, the rules concerning the practice of their respective sports and to ensure their application" as well as "responsibility for the control and direction of their sports at the Olympic Games."

The Olympic Charter (2020) expressly provides that the "practice of sport is a human right" without discrimination based on "sex," "sexual orientation," or "birth or other status."¹ This is not an absolute right because an athlete's participation in Olympic and international sports is conditioned upon "fair play" as well as compliance with other Olympic Charter requirements.² For example, Rule 43 of the Olympic Charter requires athletes to comply with the World Anti-doping Code (WADC)³ and the Olympic Movement Code on the Prevention of Manipulation of Competitions (CPMC),⁴ which collectively protect competitive equity and sport integrity.

Binary Male or Female Athletic Competition

Despite the Olympic Charter's foregoing anti-discrimination provisions, the IOC and IFs historically have generally conducted binary male or female only Olympic or international athletic competitions⁵:

- (a) Athletics competition events are, for reasons of fairness, divided into events for male and female athletes.

1. Fundamental Principles of Olympism 4 and 6, *Olympic Charter*, INTERNATIONAL OLYMPIC COMMITTEE, July 17, 2020, at 11 available at EN-Olympic-Charter.pdf.

2. International Olympic Committee (2020). *Olympic Charter*, pp. 11.

3. The WADC's (2021) purposes include to protect athletes' "fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athletes worldwide.". "Anti-doping programs seek to maintain the integrity of sport in terms of respect for rules, other competitors, fair competition, a level playing field, and the value of clean sport to the world."

4. Article 2.2 of the CPMC (2016) defines the "[m]anipulation of sports competitions" as "[a]n intentional arrangement, act or omission aimed at an improper alteration of the result or the course of a sports competition in order to remove all or part of the unpredictable nature of the sports competition with a view to obtaining an undue Benefit for oneself or others." INTERNATIONAL OLYMPIC COMMITTEE, *Olympic Movement Code on the Prevention of Manipulation of Competitions* (2018) at 16 available at Code-Prevention-Manipulation-Competitions.pdf (olympic.org)

5. A notable recent exception is the 4 x 100 metres mixed female and male medley swimming relay during the 2020/2021 Tokyo Olympic Games. <https://apnews.com/article/2020-tokyo-olympics-swimming-sports-36788bf9189349adbd1549de68f7e265>

- (b) Female athletes participate in female but not male events. Likewise, male athletes participate in male but not female events.
- (c) There is a substantial difference in athletic performance between elite males and elite female athletes. Male athletes are, on average, faster and more powerful than female athletes.
- (d) The division according to the sex of the athlete is therefore appropriate and is for the benefit of female athletes and their ability to engage in meaningful competition by competing on a level playing field.⁶

Ethics and legal experts, as well as athletes, recognize and accept the paramount importance of maintaining competitive equity and sport integrity in binary elite-level athletic competition. Dr. Thomas Murray, president emeritus of the Hastings Center (an independent, interdisciplinary bioethics research institute), states: “[T]he essence of competitive sport is that a contest is ‘fair and meaningful’ in the sense that ‘its outcome is uncertain and will be determined by factors that are prized and valued by the sport (e.g., talent and dedication) and not by other factors.’”⁷ “[I]t is inevitable that lines must be drawn to ensure fair and meaningful play,” and “a sport and its stakeholders have the right . . . to draw lines to ensure that their competitions emphasise such values and make them the determinant of success.”⁸

Professor Doriane Lambelet Coleman, Duke Law School, explains:

[T]he division of competitive athletics into male and female categories reflects the widely held view that women are entitled to parity with men in the distribution of sporting opportunities. This commitment to equality facilitates female empowerment and has numerous consequential benefits for both individual women and society at large. [I]t is well understood that if there were not a separate category for girls and women based on inherent differences between the sexes, the best athletes would always be boys and men. The commitment to female equality in competitive sport is therefore a profoundly important, but also fragile, commitment.⁹

Paula Radcliffe, an elite level female long distance runner, notes, “the overriding need for athletes to feel that they are competing on an equal footing and that competition is fair and meaningful” with the consequent need for sport rules and athlete eligibility requirements “designed to ensure success is determined solely by talent and dedication, and not by ‘unfair’ advantage.”¹⁰ “If men and

6. *Chand v. Athletics Federation of India & International Association of Athletic Federations* (2015) 24 July CAS 2014/A/3759, at para. 35.

7. *Id.*, para 275.

8. *Id.*, paras 276 and 277.

9. *Semenya v IAAF & Athletics South Africa v. IAAF* (2019) 30 April CAS 2018/O/5794 and 2018/O/5798, at para 391.

10. *Id.*, para 335.

women competed in one category . . . competition would not be fair and meaningful because the men would always outperform women.”¹¹

The biological basis for binary female and male only sports competitions is that males generally have a higher naturally occurring post-puberty level of testosterone, which provides males with outcome-determinative physical advantages vis-à-vis females in elite-level athletic competition:

It is accepted by all parties that circulating testosterone has an effect from puberty, in increasing bone and muscle size and strength and the levels of haemoglobin in the blood. After puberty, the male testes produce (on average) 7 mg of testosterone per day, while the female testosterone production level stays at about 0.25 mg per day. The normal female range of serum testosterone . . . produced mainly in the ovaries and adrenal glands, is 0.06 to 1.68 nmol/L. The normal male range of serum testosterone concentration, produced mainly in the testes, is 7.7 to 29.4 nmol/L.

. . .

Testosterone may not be the only factor that results in an increase in lean body mass, higher levels of haemoglobin and increased sporting ability, but the expert evidence explains that it is the primary factor. . . .

Based on our collective expertise and experience, [42] specialists in the sports science and sports medicine communities consider the following to be indisputable scientific facts:

1. The main physical attributes that contribute to elite level athletic performance are:
 - power generation . . .
 - aerobic power . . .
 - body composition . . .
 - fuel utilization . . . and;
 - economy of motion.
2. Biological males and biological females are materially different with respect to these attributes. . . .
3. The primary reason for these sex differences in the physical attributes that contribute to elite (>99th percentile) athletic performance is exposure in gonadal males with functional androgen receptors to much higher levels of testosterone during growth and development (puberty), and throughout the athletic career. . . .
4. Therefore, the primary driver of the sex difference in elite athletic performance is exposure in biological males to much higher levels of testosterone during growth, development, and throughout the athletic career.¹²

11. Id, para 336.

12. Semenya CAS award, paras 489 and 491.

Neither the IOC nor any IFs have established eligibility guidelines or rules that exclude male athletes with superior genetic traits or inherent physical characteristics that provide a natural competitive advantage from participation in any male sports or athletics. For example, there is no upper limit on an athlete's natural testosterone levels for eligibility to participate in male sports (although increasing one's testosterone level exogenously by taking prohibited substances violates the WADC). Athletes who transition from female to male generally have been permitted to compete in male Olympic and international sports competitions without any restriction other than self or legal verification of their male identity.

Historically, athlete eligibility requirements (for particular female athletes having a "male" appearance or physique) to participate in female Olympic or other international sports competitions initially included visual inspection of an athlete's genitalia to ensure no visible external male gonads or genetic testing to establish that the athlete did not have a male (i.e., Y) chromosome.¹³ In contrast to the more liberal eligibility requirements for athletes to participate in male sports competitions, historically there have been additional requirements (or recommendations) that athletes who transition from male to female must (or should) satisfy, as well as the promulgation of IF rules establishing a generally applicable maximum limit on a athlete's natural testosterone levels for eligibility to participate in female sports competitions or events.

2003 Stockholm Consensus

The "Statement of the Stockholm Consensus on Sex Reassignment in Sports (2003)," which was developed by a seven-person ad hoc committee of medical experts convened by the IOC Medical Commission, recommended that athletes undergoing post-puberty sex reassignment from male to female be eligible to participate in female sports competitions only if surgical anatomical changes have been completed, including external genitalia changes and gonadectomy (eligibility should begin no sooner than two years thereafter); legal recognition of female sex; and verified hormonal therapy appropriate for the female sex for a "sufficient length of time to minimise gender-related advantages in sport competitions."

Chand v. IAAF

In April 2011, to maintain competitive balance in international women's athletics events, the International Association of Athletic Federations (IAAF), the IF for the sport of athletics, adopted Hyperandrogenism Regulations effectively creating a rebuttable presumption that a female athlete is eligible to participate

13. James L. Rupert (2011), "Genitals to Genes: The History and Biology of Gender Verification in the Olympics", in: Canadian Bulletin of Medical History, Volume 28:2, p.348.

in international competitions only if she has “androgen levels below the normal range” of male total testosterone levels, defined as ≥ 10 nmol/L testosterone. In other words, the athlete’s naturally occurring total serum testosterone levels must be less than 10 nmol/L to participate in any IAAF international women’s track and field events unless she proves her body is resistant to androgens and therefore her naturally elevated testosterone levels in the normal male range do not provide her with any competitive advantage or an IAAF-appointed Expert Medical Panel, after a three-stage medical assessment process, recommends conditions under which the athlete may participate in women’s events that are accepted by the IAAF Medical Manager.¹⁴

In *Chand*, Dutee Chand, a female Indian 200 and 400 metre sprinter, challenged the validity of the IAAF’s Hyperandrogenism Regulations after she was provisionally suspended from participating in any athletics events ostensibly because medical testing determined her hyperandrogenism. A CAS panel of arbitrators established a tripartite shifting burdens of proof legal framework for determining the validity of IF rules that discriminate based on sex or gender by restricting the eligibility of female athletes with high levels of naturally occurring testosterone to participate in international competitive athletics events. It determined that the athlete initially must prove the regulations are prima facie discriminatory contrary to “a higher ranking rule or otherwise” (e.g., the IOC Charter, the IAAF constitution, or the laws of Monaco, where the IAAF is domiciled) by a balance of probabilities.¹⁵ If she does so, then the IAAF must prove its regulations “are necessary, reasonable and proportionate for the purposes of establishing a level playing field for female athletes”¹⁶ by a balance of probabilities. Without any clear reasons, the panel rejected the athlete’s contention that the IAAF must prove the Hyperandrogenism Regulations are justified to its comfortable satisfaction. It concluded that the IAAF’s establishing of the regulations “pursuant to its stated objectives . . . alone does not support a justification [for] discrimination.”¹⁷ If the IAAF does so, the “burden shifts back to the [a]thlete to disprove the bases of that justification” by a balance of probabilities.¹⁸

At the outset, the CAS panel noted it is undisputed that Dutee Chand is a “woman” assumed to have “an endogenous [i.e., natural] level of testosterone greater than 10 nmol/L although the actual level has not been established” who

14. Chand award, paras 41-62.

15. Id, paras 443 and 449.

16. Id, para 450.

17. Id, para 444.

18. Id, paras 445 and 447.

“has not undergone the three-stage medical assessment process including a physical examination provided for in the Hyperandrogenism Regulations.”¹⁹

The Preface to the Hyperandrogenism Regulations provides context and explains their purpose: “Since 1928, competition in Athletics has been strictly divided into male and female classifications and females have competed in Athletics in a separate category designed to recognize their specific physical aptitude and performance. The difference in athletic performance between males and females is known to be predominantly due to higher levels of androgenic hormones in males resulting in increased strength and muscle development.”²⁰ The Explanatory Notes state that the IAAF’s role “is first and foremost to guarantee the fairness and integrity of [its] competitions” and that the “Regulations stipulate that no female with [hyperandrogenism] shall be eligible to compete in a women’s competition if she has functional androgen levels [testosterone] that are in the male range.”²¹

The panel determined that the athlete met her burden of proving the hyperandrogenism regulations are *prima facie* discriminatory by requiring “female athletes to undergo testing for levels of endogenous testosterone when male athletes do not,” as well as by placing “restrictions on the eligibility of certain female athletes to compete on the basis of a natural physical characteristic (namely the amount of testosterone that their bodies produce naturally).”²²

Given the record evidence, the panel concluded that the IAAF did not

19. *Id.*, para 36.

20. *Id.*, para 43.

21. *Id.*, para 67. Regarding whether naturally elevated levels of testosterone in the normal male range provide female athletes with an unfair competitive advantage in elite women’s athlete competition, the IAAF submitted the following evidence: Joanna Harper, a medical physicist who competed in male distance running events for more than 30 years before transitioning to a transgender female who not competes in the female category, testified that transgender women experience “extreme and rapid” changes in speed after reducing their testosterone levels, after transgender surgery the body produces less endogenous testosterone, which accords with “reduced athletic ability”; and that “the best way to achieve a level playing field for female athletes is ‘to require all woman athletes to be hormonally similar.’” *Id.*, paras 326-333. Ms. Radcliffe, an elite female long distance runner, testified she would have “genuine concerns about fairness” about competing against females with testosterone levels in the male range, which “make the competition unequal in a way greater than simple natural talent and dedication. *Id.*, paras 334-338. Professor Maria Jose Martinez Patino, a former elite-level female athlete, Spanish national athletics coach, and IOC Medical Commission independent expert, testified that the Hyperandrogenism Regulations “ensure equality in sport by enabling female athletes to compete on a level playing field in conditions that are fair and equal.” *Id.*, para 322.

22. *Id.*, para 448.

prove, by a balance of probabilities, that the Hyperandrogenism Regulations “are necessary and proportionate to pursue the legitimate objective of regulating eligibility to compete in female athletics to ensure fairness in athletic competition,”²³ because they only “exclude female athletes that are shown to have a competitive advantage of the same order as that of a male athlete,”²⁴ and that “competition against hyperandrogenic females to whom the existing Regulations apply is unfair due to superior sport performance caused by high levels of testosterone.”²⁵

Because the necessary data is not currently available and additional evidence regarding “the quantitative relationship between androgen levels in hyperandrogenic females and increased athletic performance” is required before the IAAF can satisfy its foregoing burden of proof,²⁶ the CAS panel suspended the IAAF’s implementation of the Hyperandrogenism Regulations for two years from the 24 July 2015 date of its award. It stated that the regulations would be declared void if the IAAF does not submit such evidence (“in particular, the actual degree of athletic performance advantage sustained by hyperandrogenic female athletes as compared to non-hyperandrogenic female athletes by reason of their high levels of testosterone”²⁷) within the two-year time period.

2015 IOC Consensus Statement

In November 2015, twenty medical and legal experts participated in an IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism, which resulted in publication of a three-page document with the same title (November 2015 IOC Consensus Statement).²⁸ Noting “a growing recognition of the importance of autonomy of gender identity in society,” since the 2003 Statement of the Stockholm Consensus on Sex Reassignment in Sports, it provided transgender guidelines “to be taken into account by sports organisations [e.g., IFs] when determining eligibility to compete in male and female competition.” In a significant departure from the Stockholm Consensus, it stated that requiring surgical anatomical changes as a condition of a transgender athlete’s participation “is not necessary to preserve fair competition and may be inconsistent with developing legislation and notions of human rights.”

23. Id, para 536.

24. Id, para 531.

25. Id, para 537.

26. Id, paras 531 and 532.

27. Id, at 112.

28. https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf

The following guidelines were provided: Athletes transitioning from female to male are eligible to compete in male sports without any restrictions; Athletes transitioning from male to female are eligible to compete in female sports if her declared gender identity is female and her total serum testosterone level has been below 10 nmol/L for at least 12 months prior to her first female sport competition and remains below this maximum level throughout the period she participates in female sports (which will be monitored by testing and result in a 12-month suspension for non-compliance); Regarding the participation of female transgender athletes, it states that the “overriding sporting objective is and remains the guarantee of fair competition.”

Regarding hyperandrogenism in female athletes, in response to the *Chand* CAS award, the Consensus Statement recommended that participation eligibility rules should protect “women in sport” and promote fair competition; the IAAF “is encouraged to revert to CAS with arguments and evidence to support the reinstatement of its hyperandrogenism rules (i.e., to be eligible to participate in women’s athletics events, an endogenous total serum testosterone level below 10 nmol/L unless the individual female athlete is androgen insensitive/resistant); and “[t]o avoid discrimination, if not eligible for female competition[,] the athlete should be eligible to compete in male competition.”

Semenya v. IAAF

In March 2018, the IAAF informed the *Chand* CAS Panel of its intention to replace its Hyperandrogenism Regulations with new Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) (DSD Regulations), which would become effective on 1 November 2018. Thereafter, the *Chand* arbitration proceeding was terminated.

The Introduction to the DSD Regulations states the IAAF’s recognition that, while biological sex is usually aligned with the conventional male and female binary, “some individuals have congenital conditions that cause atypical development of their chromosomal, gonadal, and/or anatomic sex (known as differences of sex development, or DSDs, and sometimes referred to as ‘intersex’)” resulting in “some national legal systems now recognis[ing] legal sexes other than simply male and female.”²⁹ It notes the existence of “a broad medical and scientific consensus . . . that high levels of testosterone circulating in athletes with certain DSDs can significantly enhance their athletic performance.”³⁰ Therefore the regulations, which exist “solely to ensure fair and meaningful competition within the female classification, for the broad class of female athletes,” allow trans athletes to compete in the female events

29. Semenya award, para 426.

30. Ibid.

currently “most clearly affected” by their participation only if they meet certain eligibility conditions.³¹

Pursuant to the DSD Regulations, a “Relevant Athlete” who has one of six DSDs with a circulating testosterone level of ≥ 5 nmol/L and sufficient androgen sensitivity for her levels of testosterone “to have a material androgenizing effect³² is eligible to participate in “Restricted Events” (i.e., 400m, 800m, and 1500m races; 400m hurdles races; and all other track events between 400m and 1 mile) in the female classification at international competitions *only* if she satisfies three conditions: 1) is legally recognized as a female or intersex; 2) reduces her circulating testosterone level to < 5 nmol/L for a continuous period of at least six months; and 3) stays below this maximum level of testosterone “for so long as she wishes to maintain eligibility” to participate in these events. The DSD Regulations do not require any surgical intervention to reduce or maintain her testosterone level. A “Relevant Athlete” who does not satisfy these eligibility criteria may compete in the female classification in all track and field events that are not international competitions, in the male classification in any events in all competitions, and in any intersex track and field competitions.³³

Regulation 1.2 states that the DSD Regulations “operate globally” and “are to be interpreted and applied not by reference to national or local laws, but rather as an independent and autonomous text.”³⁴ Regulation 5.2 requires that resolution of any disputes between an athlete or her National Federation (NF) is subject to the exclusive jurisdiction of the CAS,³⁵ and Regulation 3.18(d) prohibits the athlete from bringing proceedings in any court or other legal forum.³⁶

In June 2018, South African middle-distance runner Caster Semenya (who won the gold medal in the women’s 800 metres event at the 2012 and 2016 Olympic Games) and Athletics South Africa (ASA) filed requests for arbitration challenging the DSD Regulations that were consolidated into a single CAS arbitration proceeding, *Semenya v IAAF & Athletics South Africa v. IAAF*. They sought a declaration that the DSD Regulations are invalid because they discriminate on the basis of birth (i.e., natural biological traits), sex, and gender and are not a necessary, reasonable, and proportionate means of maintaining competition among female athletes in the “Restricted Events.” More specifically, they argued

31. Ibid.

32. Id, paras 431, 433, and 434.

33. Id, para 436. Many NGBs (i.e., National Federations) adopt and follow their respective IF athlete eligibility rules for national competitions.

34. Id, para 427.

35. Id, para 450.

36. Id, para 448.

that it is not necessary to discriminate based on DSD to have fair competition in those women's international track events because "from a scientific perspective there is no sensible basis for distinguishing between DSD and other genetic variations and mutations that improve athletic performance"³⁷ and no empirical data proves that women with a natural testosterone level ≥ 5 nmol/L have a greater athlete performance advantage than women below this threshold.

In response, while stating its commitment to "the principle of equal treatment and non-discrimination,"³⁸ the IAAF asserted that the DSD Regulations do not discriminate because they treat like individuals alike (i.e., biologically male athletes who are legally recognized or identify as males or females) in determining their eligibility to participate in the "Restricted Events." The IAAF also contended that even if the regulations are found to be discriminatory based on gender or sex, different eligibility requirements for biologically male athletes identifying as females are necessary, reasonable, and proportionate to its legitimate objective of protecting the right of biologically female athletes to fair competition in the "Restricted Events."

The CAS Panel observed that the following facts and issues are undisputed: Ms. Semenya is a woman, who was determined to be a female at birth, has always identified as a female, is legally recognized as a woman, and has always run in IAAF events in the female category.³⁹ It is necessary to divide international elite competitive athletics into separate female and male categories and to have "a protected class of female athletes"⁴⁰ as well as that "any rules regulating who may participate in the female category must be rational, objective and fair."⁴¹

It recognized that this case "involves incompatible, competing, rights" and that "[i]t is not possible to give effect to, or endorse, one set of rights without restricting the other set of rights:"

[O]n one hand is the right of every athlete to compete in sport, to have their legal sex and gender identity respected, and to be free from any form of discrimination. On the other hand, is the right of female athletes, who are relevantly biologically disadvantaged vis-à-vis male athletes, to be able to compete against other female athletes and not against male athletes and to achieve the benefits of athletic success, such as positions on the podium and consequential commercial advantages."⁴²

37. Id, para 52.

38. Id, para 293.

39. Id, para 454.

40. Id, para 461.

41. Id, para 462.

42. Id, para 460.

Applying the *Chand* legal standard to the parties' evidence and arguments in this case, the *Semenya* Panel initially determined that Claimants proved that the DSD Regulations discriminate based on sex because they impose eligibility conditions only on athletes legally recognized as female or intersex, but not on legally recognized male athletes. The regulations also discriminate based on birth because of their application to "a subset of the female/intersex population" based on their "innate biological characteristics."⁴³ It, therefore, rejected the IAAF's assertion that the DSD Regulations do not discriminate because all "biologically male" athletes (whether legally male or female) are treated the same for purposes of their eligibility to participate in "Restricted Events."

The Panel then considered whether the IAAF satisfied its burden of proving by a balance of probability that the DSD Regulations (specifically their application to legally recognized females with a 46 XY DSD, particularly 5-ARD⁴⁴) are necessary, reasonable, and proportionate to ensure "fair competition in the female category of elite competitive athletics," an undisputed "legitimate objective."⁴⁵

Ms. Semenya asserted that *Chand* requires that the DSD Regulations be "necessary to exclude women athletes with DSD from the female category" because of "an advantage comparable to that of male athletes," which is negated by the following evidence: her fastest time in the 800 metres has been beaten by almost 3,000 men and her times are consistently 9-14% slower than men's performances in this event; and her average 1.03% faster time than the second place finisher in the women's 800 metres "is not a statistical outlier in comparison to other track events during the same time."⁴⁶

The Panel rejected her contention by interpreting *Chand* more broadly:

[T]he necessity of the DSD Regulations turns on the question identified in *Chand*, namely whether the degree of the performance advantage that Relevant Athletes enjoy by virtue of their elevated testosterone levels is so significant as to require the imposition of restrictions on their eligibility to compete against other female athletes who do not enjoy that testosterone-based advantage.⁴⁷

In reaching this conclusion, the Panel majority effectively rejected expert testimony on her behalf by Adjunct Professor Ross Tucker, University of Capetown, that, "what constitutes an 'unfair advantage' is 'to a large degree philosophical'"

43. Id, para 547.

44. "Individuals with 5-ARD have what is commonly identified as the male chromosomal sex (XY and not XX), male gonads (testes not ovaries) and levels of circulating testosterone in the male range (7.7-29.4 nmol/L), which are significantly higher than the female range (0.06-1.68 nmol/L)." Id, para 497.

45. Id, para 556.

46. Id, para 568.

47. Id, para 569.

and suggesting that “insurmountable advantage” provided by naturally occurring conditions is the appropriate standard for excluding female athletes from participation in elite level women’s sports competition.⁴⁸

On the other hand, the Panel accepted Ms. Semenya’s assertion that “the criterion for reasonableness is whether the restrictions imposed by the DSD Regulations are rationally connected to their objective of ensuring fair competition for female athletes in elite athletics.”⁴⁹

A majority of the Panel found that “a preponderance of the evidence is that female athletes with 5-ARD and other 46 XY DSD have high levels of circulating testosterone in the male range and that this does result in a significantly enhanced sport performance ability, which ‘translates in practice to a significant performance advantage’ in the ‘Restricted Events.’”⁵⁰ The majority found that the totality of the scientific evidence “provides adequate support for the IAAF’s claim that female athletes with a 46 XY DSD enjoy a significant performance advantage over other female athletes, which is of such magnitude as to be capable of subverting fair competition in the female category.”⁵¹ The majority found that the 5 nmol/L upper limit of endogenous testosterone in the DSD Regulations (a 50% reduction from the Hyperandrogenism Regulations’ 10 nmol/L maximum) “was not arbitrary” because this level is significantly higher than the normal testosterone range of 0.06-1.68 nmol/L for XX females. Female athletes with a level of testosterone above 5 nmol/L are either male-to-female transgender, or have a 46 XY DSD and are not taking testosterone-suppressing medication, unless they are taking exogenous testosterone or have a testosterone-secreting tumor in their adrenal glands or ovaries.⁵² Based on these findings, the majority concluded that the DSD Regulations are necessary and reasonable to achieve this legitimate objective.⁵³

The Panel majority also determined that the DSD Regulations’ requirements that a 46 XY DSD athlete be medically assessed for androgen sensitivity (with the benefit of any doubt being resolved in the athlete’s favor) and to take oral contraceptives to lower her testosterone level below 5 nmol/L (which would be effective and not result in side effects different from those experienced by XX women who take them) are not “disproportionate” means of preserving fair competition in the Restricted Events.⁵⁴

48. Id, paras 272-277.

49. Id, para 583.

50. Id, paras 535 and 536.

51. Id, para 53.

52. Id, paras 610-611.

53. Id, paras 583 and 584.

54. Id, paras 599 and 604.

On 25 September 2020, in *Caster Semenya & ASAF v. IAAF (2019)*, the Swiss Federal Tribunal (SFT) rejected Semenya and the ASA's joint request for the court to vacate the CAS Panel majority's upholding of the DSD Regulations on the grounds it "violate[s] essential and widely recognized public policy values, including the prohibition against discrimination, the right to physical integrity, the right to economic freedom and respect for human dignity." The SFT recognized that natural characteristics can distort the fairness of competitions and confirmed that "it is above all up to the sports federations to determine to what extent a particular physical advantage is likely to distort competition and, if necessary, to introduce legally admissible eligibility rules to remedy this state of affairs." Its ruling prevented Semenya from participating in the women's 800-metres race at the Tokyo Olympic Games because she refused to take medication to reduce her natural testosterone level below 5 nmol/L.

On 18 February 2021, Ms. Semenya filed a proceeding with the European Court of Human Rights⁵⁵ alleging that the DSD Regulations violate several provisions of the European Convention on Human Rights, including Articles 3 (prohibition of inhuman or degrading treatment), 8 (right to respect for private life), and Article 14 (prohibition of discrimination), which is pending.

2021 IOC Framework and Its Recommended Role in Future CAS Adjudications of the Legality of IF Athlete Eligibility Rules for Women's Sports Competitions and Events

In November 2021, the IOC published its "IOC Framework On Fairness, Inclusion and Non-Discrimination On the Basis Of Gender Identity and Sex Variations" (IOC Framework)⁵⁶, which establishes ten principles that IFs and other sports organizations should consider "in establishing and implementing eligibility rules for high-level organised competition" and "ensuring safe and fair competition [for] inclusion and non-discrimination on the basis of gender identity and sex variations."⁵⁷ It was developed after extensive consultation with athletes; IFs and other sports organizations; and human rights, legal, and medical experts. The IOC Framework replaces the IOC's 2015 Consensus Statement.

In comparison to the 2015 IOC Consensus Statement, the IOC Framework is considerably more liberal in its support of inclusive participation by athletes with

55. *Semenya v. Switzerland*, (application no. 10934/21), which was communicated to the Government of Switzerland on 17 May 2021 for its submission of observations after the non-contentious phase of the case. See Notification of the application *Semenya v. Switzerland* (1).pdf.

56. https://stillmed.olympics.com/media/Documents/News/2021/11/IOC-Framework-Fairness-Inclusion-Non-discrimination-2021.pdf?_ga=2.113955331.583514125.1647147885-1085195548.1646427317

57. *Id.*, p.2 ("Principles").

sex variations and/or transgender status (e.g., Laurel Hubbard, a transgender female, participated in the Tokyo Olympic Games as a member of New Zealand's women's weightlifting team), while explicitly recognizing the need to ensure "a level playing field, where no athlete has an unfair and disproportionate advantage over the rest."⁵⁸ Sex variations and/or transgender status cannot be deemed or presumed to provide "an unfair or disproportionate competitive advantage."⁵⁹ Any restricted (i.e., exclusionary) athlete eligibility criteria must be based on "robust and peer reviewed research" demonstrating that participation in the specific sport, discipline or event provides "a consistent, unfair, disproportionate competitive advantage in performance."⁶⁰ If eligibility criteria based on this principle prevents an athlete from competing in it, the athlete "should be allowed to participate in other disciplines and events for which [he or she] are eligible in the same gender category."⁶¹

Unlike the 2015 IOC Consensus Statement, the IOC Framework does not recommend any maximum testosterone thresholds for eligibility to participate in any elite level women's sports or establish any specific objective medical or scientific criteria for determining whether an athlete's participation should be permitted or prohibited. Nor does the IOC Framework require or prohibit IF consideration of a female athlete's individual medical or physical characteristics in determining her eligibility to participate in women's sports competition or particular events.

Consistent with Rule 25 of the Olympic Charter, the IOC Framework recognizes that "it must be in the remit of each sport and its governing body to determine how an athlete may be at a disproportionate advantage against their peers, taking into consideration the nature of each sport." It states that sport governing body eligibility rules for women's competition categories should provide confidence that no athlete "has an unfair and disproportionate competitive advantage (namely an advantage gained by altering one's body or one that disproportionately exceeds other advantages that exist at elite-level competition)."⁶² By recommending that athlete eligibility criteria should "reflect any relevant ethical, human rights, legal, scientific, and medical developments in this area" and "include the affected stakeholder's feedback on their application,"⁶³ the IOC Framework's approach is more comprehensive than the 2015 IOC Consensus

58. Id, p.1 ("Introduction"); Id, p.3 ("Fairness").

59. Id, p.4 ("No Presumption of Advantage").

60. Id, p.4 ("Evidence-Based Approach").

61. Ibid.

62. Id, p.3 ("Fairness").

63. Id, p.6 ("Periodic Review").

Statement, which recommended a ≤ 10 nmol/L maximum testosterone level for transgender females and supported it as the eligibility criterion for female athletes with hyperandrogenism who are androgen-sensitive to participate in elite women's sports.

The IOC Framework explicitly recommends CAS arbitration as the legal forum in which an athlete should be permitted to contest IF or other sports organization eligibility rules and decisions excluding them from a sports competition or event based on sex variations, physical appearance, and/or transgender status.⁶⁴ It does not explicitly reference or approve the *Chand/Semenya* CAS jurisprudence or either panel's application of it to the particular eligibility requirements that female athletes must satisfy to participate in women's sport competitions or events. On the other hand, the IOC Framework's principles implicitly support the general legal framework these arbitration awards establish and apply in resolving such disputes. Read together, these principles acknowledge that when eligibility criteria regulate participation in women's and men's categories of sport competition, "respect for internationally recognised human rights" (e.g., "inclusion and non-discrimination") requires that athletes "not be excluded solely on the basis of their transgender identity or sex variations" without medical or scientific evidence of a resulting "unfair or disproportionate competitive advantage" (i.e., "an advantage gained by altering one's body or one that disproportionately exceeds other advantages that exist at elite-level competition").

The IOC Framework is consistent with the *Semenya* CAS Panel's determination that IF eligibility conditions or requirements applicable only to athletes legally recognized as female or intersex (but not to legally recognized male athletes) discriminate based on sex and birth because of an athlete's "innate biological characteristics." It recommends that athletes not be excluded from participating based on sex variations, physical appearance, and/or transgender status without "robust and peer-reviewed" medical or scientific evidence that their participation in the particular sport or event would provide "a consistent, unfair, disproportionate competitive advantage." This recommendation also is consistent with the *Chand/Semenya* CAS jurisprudence requiring an IF to prove that a challenged eligibility rule is "necessary, reasonable, and proportionate" to its legitimate objective of protecting the right of biologically female athletes to fair competition in specific sports events.

The January 2022 "Joint Position Statement of the International Federation of Sports Medicine and European Federation of Sports Medicine Associations on the IOC Framework On Fairness, Inclusion and Non-Discrimination On the Basis Of Gender Identity and Sex Variations"⁶⁵ expresses concerns that IF adop-

64. Id, p.5.

65. Fabio Pigozzi, Xavier Bigard, et al. (2021), "Joint position statement of the International

tion of the IOC Framework's principles will result in unfair competition in women's sports. It notes that the scientific, biological or medical aspects necessary to ensure fair competition in women's elite sport are not considered, which is contrary to the 2015 IOC Consensus, the scientific evidence, and the subsequent assessment of numerous sports medicine associations/commissions. The IOC Framework states there should be "no presumption of advantage" because of an athlete's sex variations or transgender status, which the Joint Position Statement interprets as meaning "due to high concentrations of testosterone in the male range of 9.2-31.8 nmol/L."

According to the Joint Position Statement, "there is little doubt that high testosterone concentrations, either endogenous or exogenous, confer a baseline advantage for athletes in certain sports" and "to uphold the integrity and fairness of sport that these baseline advantages of testosterone must be recognized and mitigated, as has been called for previously." It also points out that most IFs lack the necessary resources or expertise to ensure compliance with the IOC Framework's principle that athlete eligibility restrictions should be "based on robust and peer-reviewed research that demonstrates a consistent, unfair, disproportionate competitive advantage in performance," which could result in athlete "self-identification that all but equates to no eligibility rules." In other words, if athletes have "a free choice to compete in any gender classification, sport would lose its integrity and near-universal support."

The Joint Position Statement recognizes the primacy of ensuring fair competition in elite-level international women's sport competition, as does the IOC Framework. Although the IOC Framework does not recommend a maximum level of testosterone for female athletes with sex variations or transgender status for eligibility to participate in women's sports, it does not prohibit or state that such a requirement is disfavored. Rather, it recommends an "evidence-based approach" requiring such a restriction to be "based on robust and peer-reviewed research," which currently exists according to the Joint Position Statement.

The IOC Framework recognizes that each IF should determine whether and how a female athlete may have an unfair competitive advantage, which is consistent with the Olympic Charter's provision that each IF have the independence and autonomy to govern its sport. Moreover, the *Semenya* CAS Panel majority ruling permits an IF to adopt athlete eligibility rules more restrictive than the then-current IOC guidelines (e.g., it upheld the IAAF DSD Regulations' ≤ 5 nmol/L maximum testosterone level, which is significantly lower than the IAAF Hyperandrogenism Regulations ≤ 10 nmol/L maximum testosterone level sup-

Federation of Sports Medicine (FIMS) and European Federation of Sports Medicine Associations (EFSMA) on the IOC framework on fairness, inclusion and non-discrimination based on gender identity and sex variations", in: BMJ Open Sport & Exercise Medicine. <https://bmjopen-sem.bmj.com/content/bmjosem/8/1/e001273.full.pdf>.

ported by the 2015 IOC Consensus). Therefore, the Joint Position Statement's concerns, while legitimate, may be unfounded based on close analysis of the IOC Framework's foregoing principle and existing CAS jurisprudence.

Recommendations

Based on the IOC Framework's principles for balancing the inherently conflicting rights of all athletes to compete in sport without discrimination based on their individual legal sex and gender identity; rights of female athletes who are biologically disadvantaged vis-à-vis female athletes with male levels of natural testosterone to competitive equity; and rights of the IOC and IFs to protect competitive integrity in elite-level international women's sport, the authors have the following recommendations.

In determining whether a challenged IF athlete eligibility rule is "necessary, reasonable, and proportionate" to its legitimate objective of protecting the right of biologically female athletes to fair competition in elite-level international sports events, the appropriate question should be whether a female athlete's transgender identity or sex variations provide her with "an unfair and disproportionate competitive advantage (namely an advantage gained by altering one's body or one that disproportionately exceeds other advantages that exist at elite-level competition)." To provide an affirmative answer to this question, an IF should prove the particular athlete has "a significant performance advantage over other female athletes, which is of such magnitude as to be capable of subverting fair competition in the female category," which is essentially the same as the standard established by the *Semenya* Panel majority. But the IF would not be required to prove the athlete has "a competitive advantage of the same order as that of a male athlete" (the apparent *Chand* standard) or an "insurmountable advantage" provided by naturally occurring conditions (as one of Ms. Semenya's experts suggested).

Because of its worldwide monolithic authority to govern the sport, the IF should be required to prove the foregoing requirement to the CAS panel's comfortable satisfaction (i.e., "greater than a mere balance of probability but less than proof beyond a reasonable doubt"), which is the same legal standard established by the WADC for proving that an athlete has committed an anti-doping rule violation (ADRV).⁶⁶ The *Chand* CAS Panel provided no reasoned explanation for rejecting the athlete's requested comfortable satisfaction standard and instead adopting the lower balance of probability evidentiary burden of proof that the IAAF was required to satisfy (as did the *Semenya* CAS Panel). If an IF's eligibility rules preclude or restrict participation in women's sports competition because of a female athlete's naturally occurring testosterone level because of one of more DSDs, the IF's burden of proving her exclusion is "necessary, rea-

66. WADC, Article 3.1.

sonable, and proportionate” to protect fair competition in elite-level women’s international sports events should be the same as required to establish an ADRV for the presence of exogenous testosterone in her system. The IOC Framework’s general principles for ensuring inclusion, non-discrimination, and fair competition in women’s sport are the same regarding IF eligibility rules for female transgender athletes or female athletes with sex variations. Therefore, to provide consistent legal treatment of both categories of female athletes, the IF should be required to prove to the CAS Panel’s comfortable satisfaction that the exclusion or restricted participation of transgender female athletes generally is “necessary, reasonable, and proportionate” to ensure fair competition in elite-level international sports events because such athletes have “a significant performance advantage over other female athletes, which is of such magnitude as to be capable of subverting fair competition in the female category.”

In summary, the three-part *Chand/Semenya* legal framework for determining the validity of IF eligibility rules for female athletes based on their sex variations or transgender status should be modified as italicized : 1) the athlete has the burden of proving by a balance of probability that the eligibility rule discriminates against female athletes based on sex, sexual orientation, or birth (no proposed change); 2) if she does so, the IF must prove *to the comfortable satisfaction of the CAS panel* that its eligibility rule is “necessary, reasonable, and proportionate” to its legitimate objective of protecting the right of biologically female athletes to fair competition in the particular elite-level international sports competition or event because female transgender identity/status or sex variations generally provide “*an unfair and disproportionate competitive advantage (namely an advantage gained by altering one’s body or one that disproportionately exceeds other advantages that exist at elite-level competition)*,” and 3) if it does so, the athlete has the burden of proving by a balance of probability that *application of the eligibility rule or its restriction(s) to exclude her from participating in particular elite-level international women’s sports or events is not necessary to further the IF’s objectives*.

U.S. Legal Process for Resolving Disputes Regarding Athlete Eligibility Rules for Female Olympic Sports and Judicial Precedent Regarding Non-Olympic Sports

Olympic Sports

In the U.S., there is no general human or legal right to participate in sports at any level of competition. The USOPC and U.S. NGBs for Olympic and international sports must comply with the athlete eligibility requirements established by the Olympic Charter and IOC rules as well as CAS awards interpreting and applying them. Each NGB has a contractual obligation to adhere to its IF’s athlete

eligibility requirements for elite-level international sport competitions, which the USOPC also must effectively follow when entering Team USA athletes in the Olympic Games, Olympic Winter Games, and other international multi-sport competitions (e.g., Pan American Games). The USOPC and its recognized NGBs also must comply with the Ted Stevens Olympic and Amateur Sports Act (ASA),⁶⁷ a federal law expressly requiring each NGB to provide all athletes with an equal opportunity to participate in sport without discrimination based on “sex”⁶⁸ and imposing an affirmative legal duty to encourage and support athletic participation opportunities for women.⁶⁹ The ASA requires each NGB’s athlete eligibility criteria for Olympic and international sports competition not to be “more restrictive than” those of the IF for its sport.⁷⁰

The ASA requires the USOPC to establish a procedure for “swift and equitable resolution” of disputes regarding the opportunity of an athlete to participate in the Olympics and other international athletic competitions such as the Pan-American Games and world championships for the various sports.⁷¹ Section 9 of the USOPC’s Bylaws prohibits an NGB from denying an otherwise qualified athlete the opportunity to participate in these elite-level competitions and provides an aggrieved athlete with the right to submit a dispute with her or his NGB to domestic arbitration, which currently is conducted before a sole arbitrator in accordance with the Commercial Rules of the American Arbitration Association (AAA). Because there presently is no Section 9 jurisprudence regarding the validity of eligibility rules restricting female athletes with sex variations or transgender female athletes from participating in elite-level international women’s sports competitions or their application to individual female athletes, it is likely that a AAA arbitrator would follow and apply the *Chand/Semenya* CAS legal framework in resolving a U.S. athlete’s dispute with her NGB.

Although an NGB has plenary domestic authority to govern the participation of U.S. athletes in Olympic and other international athletic competition in a sport, it has no authority to govern other levels of competition such as intercollegiate and professional sports, which are autonomously and separately governed by other U.S. sports associations or leagues. The ASA’s prohibition against sex discrimination is inapplicable to intercollegiate and professional sports governing bodies, which must comply with other applicable national and state laws prohibiting discrimination against college and professional athletes based on sex

67. 36 U.S.C. §220051, et seq.

68. 36 U.S.C. §220522(a)(8).

69. 36 U.S.C. §220524(6).

70. 36 U.S.C. §220522(a)(14).

71. 36 U.S.C. §220509(a).

or sexual orientation. Unless proven to be necessary to maintain the sport's competitive balance (or to protect other athletes' health and safety), U.S. courts have ruled that applicable federal or state human rights laws prohibit an American sport governing body from establishing or enforcing athlete eligibility requirements that discriminate based on sex, gender, or sexual orientation, which includes categorically prohibiting transgender female athletes from participating in female-only sports or requiring them to satisfy unreasonable requirements as a condition of participation.

Professional Sports

In *Richards v United States Tennis Association* (USTA) (1977) 400 N.Y.S.2d 267, a New York state court enjoined the USTA from requiring a transgender female athlete, Dr. Renee Richards, to submit to a sex-chromatin test used by the IOC to confirm she is a "normal female," as a condition of being allowed to qualify and/or participate in the United States Open Tennis Tournament as a woman. After undergoing a sex change operation to become a female, she subsequently entered nine women's tennis tournaments, winning two tournaments and finishing as runner-up in three others. As the justification for requiring her to submit to a sex-chromatin test, the USTA asserted "there is a competitive advantage for a male who has undergone 'sex-change' surgery as a result of physical training and development as a male" and "the Olympic sex determination procedures, are a reasonable way to assure fairness and equality of competition when dealing with numerous competitors from around the world." Determining that the "only justification for using a sex determination test in athletic competition is to prevent fraud, i.e., men masquerading as women, competing against women," the court found no evidence that requiring her to take this test (which created an irrebuttable presumption of one's sex based on their chromosomes) is necessary to maintain the competitive integrity of women's tennis. Based on expert testimony that she is a female, "her muscle development, weight, height and physique fit within the female norm," and will have no unfair advantage competing against other women, the court ruled that requiring her to pass the sex-chromatin test to participate in the women's U.S. Open "is grossly unfair, discriminatory and inequitable, and violative of her rights" under New York's Human Rights Law.

High School Sports

Even for non-elite levels of athletic competition (e.g., high school sports or youth sports), U.S. courts have ruled that exclusion of all transgender female athletes from female sports must be proven to be necessary to maintain the integrity of female athletic competition. In *Hecox v Little* (2020) 479 F. Supp. 3d 930, a federal district court ruled that Idaho's Fairness in Women's Sports Act violates the federal constitution. This state law categorically prohibited transgender females from participating in female interscholastic sports competition

in Idaho as well as provided a process for challenging a female athlete's sex and a private cause of action against a school by any student deprived of an athletic opportunity or harmed because of a transgender female's participation on a female-only team. The court ruled that this law violates the federal Constitution's Equal Protection Clause (EPC) because it constitutes illegal sex discrimination based on gender identity and does not substantially further any important government objectives (e.g., promoting sex equality; providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities; and providing female athletes with opportunities to earn college scholarships and other accolades). For the same reasons, in *B. P. J. v West Virginia State Board of Education* (2021) WL 3081883, a federal court preliminarily enjoined the state school board from enforcing the "Save Women's Sports Bill," a West Virginia statute effectively prohibiting transgender female students from participating in any female college or high school sports offered by state public schools because the 11-year old sixth-grade girl plaintiff will likely succeed in proving this statute as applied to her violates the EPC and Title IX (a federal law prohibiting sex discrimination by educational institutions receiving federal funds).

Collectively, the *Richards*, *Hecox*, and *B. P. J* judicial precedent requires a U.S. sport governing body for professional or high school sports to prove that its eligibility rule or individualized application to a particular athlete that discriminates against female athletes based on their sex or sexual orientation is reasonably necessary to maintain competitive balance in female sports competition. These cases are consistent with the U.S. Supreme Court's 2001 landmark ruling that the federal disability discrimination laws, specifically the Americans With Disabilities Act (ADA),⁷² require a sport's governing body (including those that regulate professional sports at the highest level of competition) to make reasonable accommodations to provide a physically impaired athlete with an opportunity to compete in the subject sport. Because DSD substantially limits the major life activity of reproduction, it probably is a "physical impairment" and athletes with DSD are protected by the federal disability discrimination laws.

In *PGA Tour, Inc. v. Martin* (2001) 532 U.S. 661, the Court held that the PGA violated the ADA by refusing to permit Casey Martin, a professional golfer with a circulatory disorder inhibiting his ability to walk, to use a golf cart while playing without any individualized evaluation of whether it would provide him with a competitive advantage over other golfers who walked the course. Rejecting the PGA's allegation that "all the substantive rules for its 'highest-level' competi-

72. 42 U.S.C. §§ 12101 et seq. The ADA is patterned after the Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq., which applies to educational institutions that receive federal funds (which virtually all U.S. private and public schools do), therefore, the athletic programs of elementary, middle, and high schools as well as colleges and universities must comply with federal disability discrimination law as well as applicable similar state laws.

tions [is] sacrosanct and cannot be waived under any circumstances,” the Court ruled that allowing Martin to use a cart would not fundamentally alter the nature of professional championship golf. It refused to presume that permitting Martin to use a cart would be “possibly ‘outcome-affecting,’” effectively requiring the PGA to make an “individualized inquiry” based on medical evidence and to prove that his use of it would provide a competitive advantage over other golfers walking the course.

2022 NCAA Sport-specific Transgender Student-Athlete Participation Policy

On January 19, 2022, the NCAA Board of Governors adopted a new transgender student-athlete participation policy that permits, prohibits, or restricts their participation in intercollegiate sports in accordance with the corresponding U.S. NGB policy or rules for that sport, which is subject to ongoing review and recommendations by the NCAA Competitive Safeguards and Medical Aspects of Sports Committee to the NCAA Board of Governors consistent with the November 2021 IOC Framework.⁷³ NCAA President Mark Emmert stated: “Approximately 80% of U.S. Olympians are either current or former college athletes. This policy alignment provides consistency and further strengthens the relationship between college sports and the U.S. Olympics.”⁷⁴ It replaces the 2011 NCAA Inclusion of Transgender Student-Athletes Handbook,⁷⁵ which prohibited a transgender female student-athlete who is not taking gender transition hormone treatments from competing on a women’s intercollegiate team at any of the NCAA’s approximately 1,100 colleges or universities.

As a result of this new NCAA policy and effective immediately, transgender female athlete eligibility for each of the NCAA’s 21 women’s championship sports is to be determined by the NGB policy/rule for the particular sport. The NCAA effectively has delegated its authority to independently determine transgender female athlete eligibility (as well as presumably the eligibility of females with sex variations) to participate in intercollegiate sports. Therefore, in resolving disputes regarding the eligibility of these athletes to participate in NCAA intercollegiate sports competition, American sports arbitrators and/or courts may adopt and apply the *Chand/Semenya* CAS legal framework for Olympic and international sports, which generally is consistent with the *Richards*, *Hecox*, *B. P. J.*, and *Martin* jurisprudence.

73. <https://www.ncaa.org/news/2022/1/19/media-center-board-of-governors-updates-transgender-participation-policy.aspx>.

74. *Id.*

75. https://ncaaorg.s3.amazonaws.com/inclusion/lgbtq/INC_TransgenderHandbook.pdf.

Conclusion

As long as there is only binary female and male athletic competition, legal disputes between athletes who are characterized as biologically male or female with natural sex variations, female athletes with natural testosterone levels within the normal female range, and sport governing bodies will continue to arise. As the *Semenya* CAS Panel aptly observed, these cases necessarily involve “incompatible, competing, rights”, and “[i]t is not possible to give effect to, or endorse, one set of rights without restricting the other set of rights.” After careful consideration of these incompatible, competing rights (i.e., birth, individually determined gender or sex, participation in sport; competitive equity; and sports integrity) as well as CAS and U.S. jurisprudence, the authors conclude that the IOC Framework and the tripartite *Chand/Semenya* CAS legal framework (with some recommended modifications) appropriately balance these conflicting legitimate rights. Until there are additional categories of sports competition (e.g., among transgender female or intersex athletes), both provide principled and sound guidance to governing bodies for establishing athlete eligibility rules as well as sports arbitrators and courts in resolving future disputes regarding the legal validity or application of such rules to individual athletes at all levels of sports competition.

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