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## An "Olympics" Approach: A More Equitable Approach to Athletics than Title IX Offers

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Marcia Federbush\*

Would a business be allowed by law to treat women and men employees like different species, with different philosophies, separate jobs regardless of workers' interests and abilities, separate pay scales, separate budget priorities, vastly different travel allowances and destinations, separate labor organizations, hugely disproportionate publicity for their work, different numbers and levels of expertise of supervisors, and separate seasons of work? I'll tell you the answer after I introduce myself and tell you why I deserve to be up here giving the group a treatise on the gender equity of the future.

I am Marcia Federbush. Honestly, in 1973 I wrote the country's first comprehensive Title IX complaint against a major university—[The University of] Michigan—*solely on grounds of gross discrimination in athletics*, when women had no intercollegiate sports and men had a \$2,611,000 program. Tell me if you want a copy.

In 1976, I gave a speech to the Michigan [Board of] Regents that brought women their first athletic scholarships. Remember, under the separate women's organization, AIAW (Association for Intercollegiate Athletics for Women), if a female had an athletic scholarship and the athletic director knew about it, she would be banned from sports for the rest of her undergraduate career, and her whole team would be disqualified for the entire school year. That is a danger of separation.

And in 1973–74, when the University wanted to cut *men's* gymnastics "in the name of gender equity," since they had to make up for the excesses of football, I gave several talks to the Regents and the Board in Control of Intercollegiate Athletics and wrote op-eds to the *Ann Arbor News* to convince the University to *save* men's gymnastics "in the name of gender equity," because gymnasts are the sons and daughters of the University and deserve to be treated equally as members of the University's overall *team*. They kept men's gymnastics because of the approach I'm going to talk about today.

I am about to tackle Eastern Michigan University (EMU), which has just eliminated men's tennis and soccer—sports that both sexes have loved participating in for years, which are being kept

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for women. That can't be what equal opportunity is about. To me, it's like saying male students can't take calculus or home building because there are too few women in the courses. Now, EMU reports that it has a sixty-seven to thirty-three student enrollment ratio in favor of females, but a sixty to forty ratio of athletes in favor of men. This is going to be harder than the gymnastics case. For a publicly funded, coed university to have this disproportion, it might as well be a women's school that lets some men in. EMU may be counting their evening students, mostly female, who are getting continuing education credits in EMU's top-notch School of Education. Students working full time in the daytime can hardly take part in the regular athletics program.

It isn't hard to convince boards that cutting men's sports while keeping the same ones for women violates our deepest sense of fairness. A humane legal concept of "gender equity" would build *partnership* between the sexes, not rivalry, friction, and indeed hostility, as is happening too often now. I'll get to that.

Later, in 1997, when Michigan's athletic department said it had to cut men and add women, it didn't even *try* to cut out a whole men's team again, but instead cut several men from many teams and added a huge number of women to crew—plus thirteen men to football!

I won't take up more of my talk time telling you about my activities in Michigan's public schools—unless you beg me later.

I'm going to be the kid who shouts "the emperor has no clothes." I'm going to criticize Title IX's regulations with regard to the conceptions of equal opportunity and "gender equity." Incidentally, we're not supposed to say out loud that the regulations leave anything to be desired, because Congress might use that as an excuse to get rid of Title IX. Instead, I'll say I'm going to point the direction for the future as I see it. Perhaps someday regulations will require what I'm advocating.

## I. THE CURRENT STATE OF GENDER INEQUITY IN ATHLETICS UNDER TITLE IX

Assuming that the kinds of differences for women and men in employment that I opened with affected females negatively, they probably couldn't happen in the workplace or in non-athletic areas of education if there were a good feminist on board willing to file a complaint. But these types of disparities are rampant and presumably fully allowable for the sexes in athletics under Title IX

in the country's colleges. A few years ago, a prominent male attorney on this Symposium's program, who normally represents employers, was hired to perform the University's athletic department Title IX evaluation. He found some need for change, like the living accommodations for women versus men on trips. But he thought the salary picture was just fine. Now, at that time, every men's coach made thousands more than the comparable women's coach, except for one, the women's gymnastics coach, who was the first female coach in the University of Michigan's history to earn more than her male counterpart (whom the department wanted to get rid of). Lots of somewhat dirty schools, I'm sure, get clean bills of health.

There is a big difference between the main foci of the regulations and the simple, basic, idealistic Title IX law, which reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ."<sup>1</sup> If that were carried out as written, no male could be excluded from participating in volleyball, which is usually available only for women. At Rutgers and the Big East Conference, men also play volleyball, as indeed they should. But the law's wording doesn't address the critical issue in dealing with sex discrimination: How does a school create equal opportunity for two groups that have real average differences?

In the earliest stages after the passage of Title IX, from 1972 to 1974, Office for Civil Rights (OCR) personnel were trying to create pure guidelines that wouldn't let any male or female be turned away from an opportunity of a federally funded school because of sex. They asked: Should the sexes be coached together in overlapping activities? Should all sports be open to both sexes? What happens if one sex threatens to overtake the other? But the final "clarification" to the regulations' three main criteria for compliance that allow the sexes to remain quite separate but equitably represented. For you newcomers, they are:

- (1) that the *proportions* of female and male athletes at a federally funded secondary or post-secondary school should reflect the *proportions* of men and women in a school's total population (plus or minus about five percent, as of now);
- (2) that if proportionality doesn't seem to be happening, the school has to demonstrate that it is truly

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1. 20 U.S.C. § 1681(a) (1994).

devoting efforts to achieving the representational goal; and

- (3) that if the school can't prove either (1) or (2), it must demonstrate that it is *effectively accommodating the interests and abilities of students of both sexes*, as determined by polling.<sup>2</sup>

But ensuring proportionality barely touches the surface of what "equal opportunity" needs to be about. It merely deals with numbers and percentages. In the name of proportionality, those of you who coach women's track and crew are apt to become the repositories of so many students of every degree of skill, in order to make up for football, that the two or three coaches can barely pay attention to all of them. An equal opportunity focus is lost when there's an obsession with numbers. Yesterday, attorney Curt Levey charged that insistence on proportionality is really asking for that forbidden word, "quotas." By criterion (2), a school that's not yet in compliance can cry, "Oh, how hard we have tried!" From having been involved in Title IX complaints and having worked for the Equal Employment Opportunity Commission (EEOC) in Detroit for fifteen years, I know that OCR investigators are too often ready to believe the protestations of school officials. OCR's decision that finally came down ten years after I filed that early complaint included resolutions to all the complaints filed against the University up until then. The agency said that at first it believed the University of Michigan did not give equal publicity and support to women and men. But after reading athletic director Don Canham's response, they now believed that the University *did* provide equal publicity and support for women and men. And certainly by criterion (3), the sports that are being cut for men who don't want to play football, like tennis, soccer, gymnastics, swimming, and now wrestling, do indeed "accommodate the interests and abilities" of men as well as women. So this criterion is simply untruthful. The courts forget to ask *why* the men have so many more participants or why football can keep 115 players and 85 scholarships. And polling is not a scientific or equitable way of deciding which opportunities should be available to one or both sexes. It should have been clear that women everywhere were interested and capable in golf, even if they didn't request it in a poll. But many schools for years provided it for men but not for women. Students shouldn't have to beg for a *desirable opportunity that's available to the other sex*.

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2. Title IX of the Education Amendments of 1972; A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) (emphasis added).

By the Equal Pay Act,<sup>3</sup> Title VII,<sup>4</sup> the Brown decision of 1954,<sup>5</sup> the 14th Amendment,<sup>6</sup> our beloved Equal Rights Amendment,<sup>7</sup> state civil rights acts, and the parts of Title IX covering the rest of education,<sup>8</sup> females and males are to be treated as much as possible like members of a common human population, subject to the same standards. At the EEOC we required that employers provide equal treatment for women and men, along with their various racial, ethnic, age, and other subgroups. That is the usual definition of equal opportunity under all of the above laws. Exaggerated differences in numbers alerted us in a systemic case that there was likely to be a need to investigate. There is no reason that twenty-eight years after the passage of Title IX and thirty-seven years after the passage of the Equal Pay Act, athletics in publicly funded education is still given very special treatment under all the major equal opportunity laws.

The NCAA (National Collegiate Athletic Association) only started thinking about equal opportunity in sports in about 1993. The best definition they could come up with was that if one sex doesn't complain about what the other sex has, then there must be gender equity. But one sex barely knew it deserved an intercollegiate athletics program at the University of Michigan until 1973 and didn't complain much before then. And when male students' sports are cut that are being saved for women, men complain like mad, but their sports are still eliminated. Now, the NCAA is sometimes wrong. In 1975, John Fuzak, the President of NCAA, told Congress that new federal regulations requiring equal treatment of men and women in athletic programs are "calculated . . . to destroy those popular and successful college sports [such as football and basketball.]"<sup>9</sup> He said one right thing, though; he called equal opportunity equal treatment of men and women.<sup>10</sup>

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3. Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1998).

4. 42 U.S.C. § 2000e (1994).

5. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

6. U.S. CONST. amend. XIV.

7. U.S. CONST. amend. XIX.

8. 20 U.S.C. §§ 1681–1688 (2000).

9. *Sex Discrimination Regulations: Hearing Before the House Subcomm. on Postsecondary Educ. of the Comm. on Educ. and Labor*, 94th Cong. 100 (1975) (statement of John A. Fuzak, President, Nat'l Collegiate Athletic Ass'n).

10. *See id.* at 109.

## II. AN "OLYMPICS" APPROACH TO GENDER EQUITY IN ATHLETICS

If we were to define equal opportunity for the sexes at its finest in publicly funded French, math, or auto mechanics, we'd want to maximize the likelihood that students of both sexes, of the various racial, ethnic, and other populations in the school, would participate in the offerings. Why should it be particularly different for school sports? In athletics, until that day when teams are organized by factors other than sex, we'd want to maximize the likelihood that components of both sexes, containing the many races, ethnic backgrounds, and other groupings of the school, would represent their school in the same or similar sports, known to be enjoyed by both sexes, as the equally valued sisters and brothers of the school's overall *teams*, at the same meets when feasible. This idea is what *Sports Illustrated* called the "Olympics Approach" when I initially proposed it in 1972. Having the sexes work together conceptually as a "team" increases the likelihood that they will, among other things:

- communicate with each other;
- travel together in the same or same means of transportation;
- cheer for, support, respect, and commiserate with each other;
- receive joint support from students and the public and equal coverage from the media;
- contribute jointly to bringing in revenue; and
- receive coaching of comparable quality, or even simultaneous coaching.

And we'd want to ensure that women's and men's coaches, certainly in the same or similar sports, were paid by a common scale, taking into account the substantially similar skill, effort, and responsibility required by the Equal Pay Act for coaching both sexes in the sport. When is the last time you saw these factors as criteria for athletic pay, except in schools like [the University of] Iowa, where former Athletic Director Christine Grant made sure that the women's and men's basketball coaches received equal pay for substantially similar work? This says to the community and the student body, "We give our women and men athletes equal support because we love our daughters and sons equally, and we're going to make sure that you do, too." I hear that crowds fill the stands there

with 13,000 people for women's games. In the absence of joint meets, schools have the obligation to publicize the accomplishments of both sexes comparably in the same or similar sports.

The main problem with Title IX's regulations in athletics is that they put no priority on treating the sexes, as nearly as possible, as members of the same population, *working as partners toward common goals*. This is a concept of "gender equity"—words that don't occur in Title IX, as far as I can see. When I say that components of each sex should represent the school's overall teams in the same or similar sports in which both sexes are known to enjoy participating, this applies to most college opportunities: swimming, diving, water polo, basketball, golf, volleyball, gymnastics, archery, tennis, soccer, crew, lacrosse, track and field, weight lifting, cross country, rugby, fencing, baseball/softball, bowling, badminton, equine sports, riflery, and now ice hockey, wrestling, and martial arts (for now, I'll leave out any form of football). Tennis and soccer, then, would be thought of as a school's tennis and soccer teams, each with a men's component or squad and a women's component or squad—or some forms of strictly coeducational ones. In the name of fairness or equity, if any of these sports is offered for one sex, it should automatically be provided for both, with the same encouragement and procedures. Where the sexes can compete on an equal footing, as for example, in diving, riflery, and equine sports, there really should be mixed squads. And maybe someday, athletes will be grouped by combined quartiles of height/weight/performance skills instead of sex. To NCAA's credit, it is asking that schools encourage "coed" teams; that is, I suppose, teams with a women's squad and a men's squad.

Admittedly, the Olympic Games have not actually been fair to women; for instance, by not letting them run a twenty-six-mile marathon until 1984, play field hockey until 1980, compete in synchronized swimming until 1984, or, in general, make up more than thirty percent of Olympic athletes. But to the public, the Olympics set forth a common-sensical, familiar *model* of equal opportunity, by having both the women and the men represent the country as its *team* in most sports, apparently receiving equal training, publicity, support, and opportunity to perform. If the Olympics can have the male and the female players of a country represent the country's team in a sport with equal pride, why can't publicly funded education expect, as a matter of course, that the sisters and brothers of a school will represent the school as equally prized members of its teams in all feasible sports? The Mid-America

Conference (MAC) is doing something like that, by holding lots of doubleheaders now.

I was preparing a presentation asking the Ann Arbor school board to pressure the state high school athletic association to have girls play their sports in the "right" seasons, along with boys, enabling them to play at the same meets now and then. One of the equity committee members who knew about the Olympics' treatment of women made me say "as in track," instead of "as in the Olympics." Five major girls' sports in Michigan are conducted out of the college seasons, when most recruiting is done. Basketball takes place in the fall and volleyball in the winter, when everybody knows that God made the seasons the other way around. But track is not so great either. Olympic runner Francie Kraker Goodridge and her husband John coached the women's and men's track teams at Wake Forest for years with totally joint programs. But Francie, as other women coaches, made thousands less than John.

As I've mentioned repeatedly, to make up for football, schools feel obliged by the regulations and the NCAA to go through all sorts of contortions that put the sexes at war with each other by cutting out cherished sports for men and allowing for larger numbers of scholarships and players for women. And they're overloading women's track and crew teams. Men's track is the comparative for women's track, not football; men's crew is the comparative for women's crew, not football. That's comparing apples to watermelons. A team is a team, and most sports have a certain number of players on the floor or field at a time, along with substitutes and extras to fill in when a player is incapacitated. With equal opportunity in mind, schools should set reasonable minimum and maximum numbers of players and numbers of scholarships, applicable to women and men alike. And athletic departments might use some affirmative effort throughout the season to make sure that women's squads always have the maximum allowable numbers of players from inside and outside the school. Students would probably agree that it's more reasonable to cut a few players from a men's team if necessary than to cut out an entire sport for men. The men's coach can be asked when necessary to aim toward a lesser number of allowable players and scholarships.

You'll remember how angry members of the Black Basketball Coaches Association were when the NCAA permitted women to have two more basketball scholarships than men. They felt that every qualifying college in the country would have two fewer

African American male players, drastically cutting the number of black men accepted to colleges on scholarships.

### III. THE FOOTBALL PROBLEM

Publicly funded colleges and universities shouldn't be allowing a so-called "private" organization, whose intent is to further men's football, to tell them how to create equal opportunity for their male and female students, any more than they should be signing onto any contracts between CBS and NCAA for billions of dollars to feature men's games on television that net the school great sums of money. Private companies should not be dictating to colleges which sports and which sex will be featured on television. Do *protest* the signing of this latest multiyear CBS contract written almost entirely for men's sports!

If football is the problem, then something has to be done about football—to get it either into the same ballpark as the other sports or out of the balancing picture altogether. Nothing compares to Division I or IA football—in numbers of spectators (our University's stadium holds almost 110,000), numbers of players, numbers and amounts of scholarships, numbers and pay of coaches, amount of publicity, and so on. Many secondary schools and colleges report that the numbers of females and males in athletics is approximately equal when football is subtracted from the calculation.

Most people will say, though it's not true ninety percent of the time, that football raises money for the rest of the athletic department. An activity whose major function is to raise money is called a business. So that the rest of the athletics program at a school will not have to suffer because of the presence and excesses of football, football, at least in Division I and IA universities, needs to be given a new IRS status as a charitable, fund-raising, semi-professional *business*, in which players receive *stipends* instead of scholarships and can take courses without charge because they are performing such a fine money-making service for the university. This way, football can be considered an *employer*, subject to *Title VII*, which governs employment, and will not be the factor that upsets the humaneness and balance in the rest of a school's athletic programming (and because it would be a charitable organization, season tickets could be taken off income taxes [as charitable donations]).

I gave a somewhat “tongue in cheek” speech before the University of Michigan Regents in about 1977 recommending that football become a business. The Regents actually listened intently. What was surprising was that a couple of months later, Athletic Director Don Canham spoke before the Regents threatening that if they didn’t grant him some request, he would make the football team “semi-professional.” A university owns or contracts out a number of businesses already: the sale of university products, like mugs and sweatshirts (which brings in about a million dollars a quarter at Michigan); food franchises at football and other games; the University’s “solar car” business; and often biology departments’ genetic engineering patenting companies. Perhaps football can be managed similarly, under a department of revenue-producing enterprises. Then women might want to complain under Title VII that the university is running a business featuring men. But at least the regular athletic program would be left alone! Football is going to have to be taken out of the standard athletics picture and put in some different economic classification if equal opportunity in its finest collegiate sense, for now, can become a reality. This isn’t the time to get even; it’s the time to get equity.

Overall, in education, where sports are known to be popular with both sexes, they should legitimately be provided for both with equal encouragement and procedures if they are offered to one.