



Tackling Areas of High Risk in Your Athletics Department

FICURMA Annual Compliance Conference 2026

Concurrent Session – Athletics

8:30-10:00am

Speakers: Joel Nielsen and Kasey Havekost, Bricker Graydon Wyatt LLP



DISCLAIMER

This isn't legal advice!

But please ask questions if you have them.



Learning Outcomes

1. Gain takeaways on how comply with Title IX athletics requirements.
2. Better understand the current landscape as it relates to Title IX athletics gender equity including its applicability to name, image, and likeness.
3. Learn about how litigation is shaping Title IX athletic compliance.



AGENDA

- Title IX Gender Equity
 - Background
 - Athletic participation (the “three prong test”)
 - Athletic scholarships
 - Benefit and treatment areas (the “laundry list”)
- Title IX and NIL
- Current Title IX Athletics Cases

Title IX Gender
Equity:

Background



The Law

- Title IX Regulations
 - It prohibits schools that receive Federal funding from discriminating based on sex in their programs or activities, including its athletic program.
- "Dear Colleague" letters and guidance from OCR
- Case law
- OCR Case Resolutions

Why it is a good time to “play offense”

Influx of complaints
(and anyone can file a
complaint with OCR)

Institutional
restructuring due to
financial
challenges (may impact
athletics programs)

It can be tricky...

- Title IX Coordinators have the ultimate responsibility
 - But Athletics often has the data...
- Decisions – good and bad – flow downward to administrators and coaches
 - Having a plan and oversight is KEY!
- Compliance is a “snapshot in time”
- Rules, regulations, and requirements are dense and complicated



How to proactively tackle this issue



**Control your own
destiny...**

be proactive in
complying with Title IX.

**Document your
compliance...**

have a written Gender
Equity Plan.

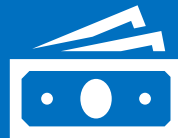
Overview of your Legal Duties

- Must meet compliance with all three “buckets”:

Accommodation
of Interests and
Abilities



Athletic
Scholarships



Benefit &
Treatment
Areas



Overall program analysis

- Title IX regulations require that a school offer equivalent benefits, opportunities, and treatment to its men's and women's teams overall.
- Not sport-to-sport comparison (e.g., men's basketball to women's basketball, baseball to softball)

Men's
OVERALL
PROGRAM

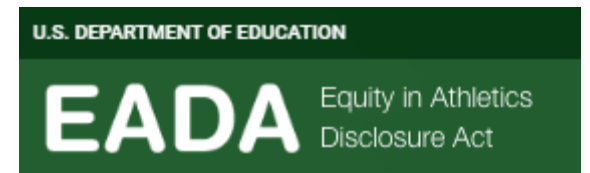


Women's
OVERALL
PROGRAM

A note on EADA...

- Can be used to evaluate (1) athletic participation opportunities and (2) financial aid
- EADA & Title IX
 - Although it may not fully reflect, it is pretty close
 - Example: Title IX participants
 - In lawsuits, Plaintiffs often rely on EADA data and courts have used these numbers to issue preliminary injunctions

You can use the questions below to help assess your school's provision of scholarships and athletic financial assistance. Your school's athletic director or other school leaders may be able to provide you with the information needed to answer these questions. Also, the Department's Office of Postsecondary Education maintains the [Equity in Athletics Data Analysis \(EADA\) website](#), which publishes information provided by all coeducational schools that have an intercollegiate athletic program and participate in Federal Student Aid programs. Data on the EADA website may be helpful¹¹ in answering the questions below. But please note that OCR does not rely solely on this data or any one data point to determine compliance with Title IX.



Title IX Gender
Equity:

Athletic
Participation





The KEY Takeaway

- Do not add, eliminate, or transition a varsity sport WITHOUT doing an athletic participation analysis

The “three prong test”

- Your school has flexibility in choosing one of these options:
 1. **Substantial Proportionality:** whether the percentage of athletic participation compared to full-time undergraduate enrollment is "substantially" proportional
 2. **History and Continuing Practice:** whether you are adding opportunities for the underrepresented sex
 3. **Interests and Abilities of Students:** whether you are fully accommodating the interests and abilities of the underrepresented sex



Prong 1

- Ask: Are the percentage of women and men participants on athletic teams equal to – or “**substantially proportionate**” to—the percentage of women and men enrolled full-time as undergraduates at your school?

% full-time undergraduate male = % male participants

% full-time undergraduate females = % female participants

Athletic participants

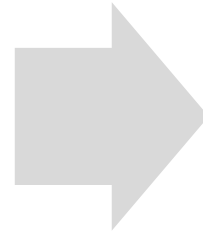
1. Can you count the *sport*?

- Sport on EADA/Traditional Sport?
Yes.

- Emerging sports? *Likely yes.*
 - Keep records of how it meets the requirements

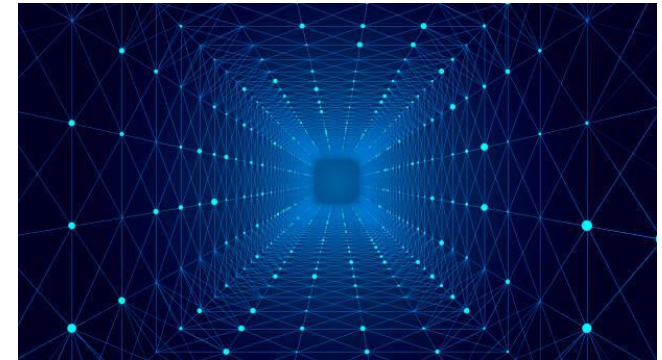


- Other sports? *It depends...*
 - 1. Are you in a jurisdiction that recognizes it?
 - 2. **Evaluate under 2008 DCL guidance**
 - Keep records of how it meets the requirements



2. Can you count the *participants*?

- Counting participants has become increasingly complicated....



How close is close enough?

- Now you know how to count, what is “substantially proportionate”?
- What is the “safe harbor”?
- Two data points to consider:

1. Participation gap

- How many additional opportunities are required for the underrepresented sex in order to achieve perfect proportionality?

2. Percentage differential

- What is the difference between the full-time undergrad population vs. athletic participants?

Percentage Differential

- Courts in the past have looked at this number
- Calculation
 - $\% \text{ full-time undergraduate male} - \% \text{ male participants} = [\text{percentage differential}]$
 - $\% \text{ full-time undergraduate females} - \% \text{ female participants} = [\text{percentage differential}]$
- Based on case law, if percentage differential is:
 - Over 10% = unlikely compliant
 - Between 3.5% and 10% = less clear, but unlikely compliant
 - Below 3.5% = likely compliant

Participation Gap

- The most the important data point for courts
- How many additional opportunities are required for the underrepresented sex in order to achieve perfect proportionality?
 - If sufficient to field a “viable team” = non-complaint ✗
 - If not sufficient to field a “viable team” = compliant ✓
- Million dollar question: what is a “viable team”?
 - OCR examples:
 - 62 part. gap → can fit a viable team → not compliant ✗
 - 6 part. gap → cannot fit a viable team → compliant ✓
 - So what about 6-62 part. gap?

Participation Gap – Magic Number?

- *Balow v. Michigan State*
 - So what about 6-62 part. gap?
 - Used viable team at issue – women's swimming and diving
 - **31 part. gap is enough to sustain a viable team** because the smallest swimming & diving team in the Big Ten Conference was 21 females

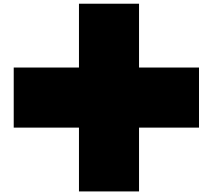


Key Takeaways – Prong 1

- Challenging because of the changing demographics
 - Rise of female students since 1970
- If relying on this prong:
 - Do an internal count – don't just rely on EADA data
 - Have rigorous and well-document procedures in place that support the roster numbers being used
 - Calculate the participation gap
 - **Consider having a roster management policy**
 - Consult with legal counsel and/or experts

Prong 2

- In evaluating “**history**,” OCR looks at the institution’s record for:
 - adding teams, (within the last 3-4 years)
 - increasing participants on existing teams, and
 - the institution’s response to requests to add teams.



- In assessing “**continuing practice**,” OCR examines:
 - the institution’s current policy for adding teams and
 - an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.

Key Takeaways - Prong 2

- You **MUST** have a long-term plan on program expansion (Gender Equity Plan)



- → If you don't have a plan, prepare one.
- → Include benchmarks to expand women's participation (adding teams, **roster management**) and rough timetable

- You **MUST** have a history of adding women's participation opportunities



- → Look at the last time you added a women's team. If more than 4 years have passed, be cautious (especially if you have added or are looking to add a men's team).
- → Look at your women's sports participation over the past decade. If this number has dropped, be cautious (especially if your men's participation has gone up).

- You **MUST** have a policy regarding requesting the addition of varsity sports.



- → If you don't have one, prepare a policy and procedure.
- → If you have one, effectively communicate it (website, handbook, etc.) and make sure you document responses to sport requests.

- Collect information from your students and others on campus including club and intramural sports

Prong 3

- This is the most complicated because the metrics are nuanced
- Usually referred to as the "survey" prong
- Question – is there enough (1) demand/interest, (2) skill/talent, and (3) competition at your school among [women/men] to sustain a viable team or sport?
 - → If the answer is “no” to *any* of these questions, your school can likely use Prong 3
 - → If the answer is “yes” to *all* three questions, your school likely cannot use this option.

Competition + Interest + Ability

Competition

Are there other schools in your area or **region** currently competing in the sport?

Look at normal competitive region; the average mileage to away events and conference opponents

Interest

Is there an unmet **interest** in a particular sport that is not offered at your school?

*Look at participation in club sports, intramural and recreation programs; requests from students/parents; **surveys**; high school and community participation in the College's normal recruitment area*

Ability

Is there enough **talent and skill** among women in the student body to sustain a team in the sport?

Look at whether students have experience or accomplishments playing the sport; administrators/coaches believe that there's enough talent to support a team; high participation in other sports that require similar skills

Surveys

- How to assess student's interests and abilities
- Note that you not have to administer a survey to rely upon prong 3
- OCR has released guidance on this prong because it has been controversial
 - Does not consider nonresponses to surveys as evidence of lack of interest or ability in athletics.
- Cross campus commitment





Key Takeaways – Prong 3

- Collect good information
 - Surveys can be complicated. Using an expert might be beneficial.
- Document the analysis
 - If you decide not to add a sport that has been requested, you should document the reasons you made that decision, which should include the results of assessing the abilities of interested students and viability of the sport.

Title IX Gender
Equity:

Athletic
Scholarships



Scholarships

- OCR considers whether the total amount of athletic scholarship aid a school makes available to men and women is “**substantially proportionate**” to their participation rates
- “substantially proportionate” = **within 1%**
 - However, this is subject to adjustment of disparities that are legitimate and non-discriminatory
 - What does this mean? Outside 1% might be okay if:
 - Actions are taken to promote athletic program development
 - Differences between in-state and out-of-state tuition
 - Unexpected fluctuations in participation (someone quits)



The Calculation

- Calculation –

- Male

- Male participation = 59%
 - Male scholarship dollars awarded = 57.8%
 - Difference = 1.2%

- Female

- Female participation = 41%
 - Female scholarship dollars awarded = 42.2%
 - Difference = 1.2%

If institution
can show they
have legitimate
non-
discriminatory
reasons for the
0.2% difference

Complaint.

Key Takeaways - Scholarships

- Analyze this each year
- Document legitimate, non-discriminatory disparities
- Keep copies of policies, procedures, and criteria for awarding scholarship including how determinations are made
- Exercise oversight of coaches

Title IX Gender Equity: Benefit and Treatment Areas



Benefit and Treatment Areas

The “Laundry List”

An illustration of a woman with dark curly hair, wearing a light green long-sleeved shirt and yellow pants, holding a long, white, wavy scroll that extends from the top left towards the bottom center of the slide.

Equipment and
Supplies

Scheduling Games and
Practice Time

Travel and Daily
Allowance

Coaching

Academic tutors

Locker Rooms and
Fields, Courts, or Other
Facilities for Practice
and Competition

Medical and Training
Facilities and Services

Housing and Dining
Services

Publicity

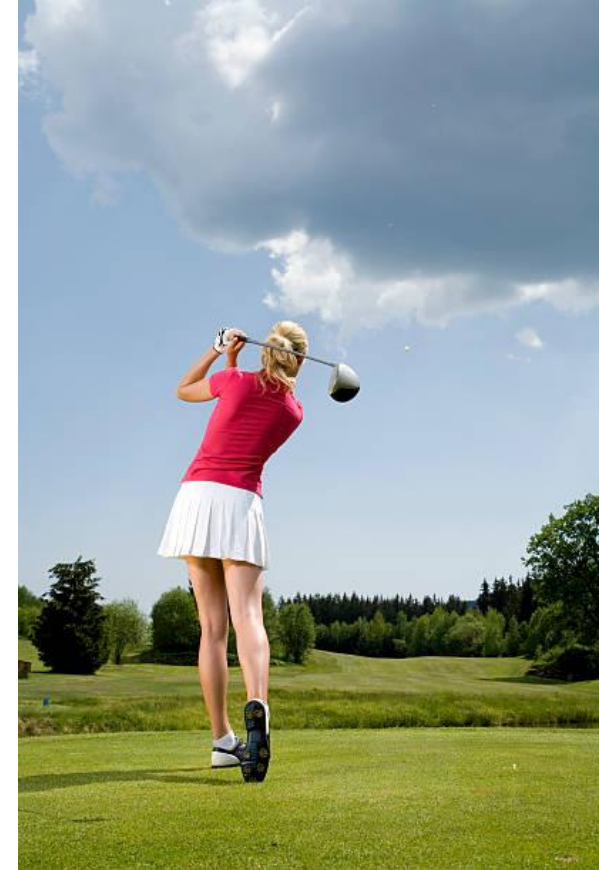
Recruitment

What is a disparity?

- There are going to be differences amongst the men's and women's program, but when is it a big enough difference to be a compliance concern?
 - Disadvantage based on gender
 - Depends on how many student-athletes it impacts
 - Depends on the benefit
- A disparity in of itself is likely not a Title IX violation, but a pattern or practice of multiple disparities may indicate discrimination and may rise to the level of a violation

A few more notes...

- You can consider the nature of particular sports
- You (and your coaches) can make reasonable professional decisions, but it cannot be discriminatory
 - Example: less expensive equipment
 - If the reason is “tradition” or “that is the way it has always been done” you may want to reconsider



Title IX and the Money

- Funding does not have to be the same for the men's and women's overall program
 - Not dollar-for-dollar matching
 - But there are two program components where funding does matter: athletic scholarships & recruitment
- What matters is the tangible benefits provided to students
 - Evaluate what students *receive*, regardless of the source of the funds
 - Budget is intent



Donations and Fundraising

Donations

- If an entity provides benefits that creates a disparity, the school is on the hook to offset that disparity
 - Solution: Reallocate funds 
- If the benefits bring you closer to compliance, likely no disparity

Fundraising

- Men's and women's programs have equitable opportunities to fundraise (allow teams to use facilities, etc.)
- Fundraising creates a disparity...
 - Challenging because some coaches effort is not rewarded while other coaches lack of effort and lack of donors is not penalized.



Key Takeaways– Benefits and Treatment Areas

- Keep your eyes and ears open
- Meet with your student-athletes and coaches
- Monitor how coaches are spending their budget
 - Monitor fundraising efforts and successes
 - Have conversations with donors
 - Be prepared to provide offsetting benefits
- Have administrators travel with teams
- Identify and remedy immediate compliance concerns



Recap and Themes

Do not add, eliminate, or transition a varsity sport WITHOUT doing a Title IX analysis – especially an athletic participation analysis

Have a written Gender Equity Plan

- Document! Document! Document!
- One that is current, supported by top leadership at the institution, and reviewed by department leadership continuously
- Have an administrator as a “point of contact/responsibility”
- In-house plan (committee) or external plan?
- Importance of start and end date

Control your own destiny

Federal judges and OCR investigators are not afraid to tell you how to run your athletic department.

Title IX and NIL



The answer is...

- “Publicity” component?
 - Provide equitable support to both men’s and women’s teams
- Athletic financial aid?
 - Provide proportionate NIL money to female and male student athletes
- Separate component area?
 - See *Schroeder, et al. v. University of Oregon*

Remember, as part of its broad prohibition on sex discrimination, a “school may not aid or perpetuate discrimination by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees.” 34 C.F.R. § 106.31(b)(6)



Key Takeaways

- Review your practices and determine whether staff members are spending equal time with female and male athletes on NIL (education, facilitation, etc.)
- If you have a collective, try and forecast challenges with increasing communications between NIL collectives and coaches and staff

Current Title IX Athletics Cases



The Cases

- *Crowther v. Board of Regents of the University System of Georgia*, No. 25–183
- *Kelly v. California Baptist University*, No. 26-cv-01450, C.D. California
- *Schroeder v. University of Oregon*, No. 23-cv-01806, D. Oregon
- *Myers v. Stephen F. Austin State University*, No. 25-cv-00187, E.D. Texas
- *Niblock v. University of Kentucky*, No. 19-cv-00394, E.D. Ky.
- SDSU Settlement (*Fisk v. Board of Trustees of the California State University*, No. 22-cv-00173, S.D. Cal.)

Private Right of Action? (1 of 2)

- *Crowther v. Board of Regents of the University System of Georgia*, [No. 25–183](#)
- Core Issue: Whether Title IX allows employees (e.g., coaches) to bring sex discrimination claims, or if claims are limited to Title VII
- Background: Former women's basketball coach alleged unequal resources vs. men's program and claims her termination followed complaints about disparities
- The Eleventh Circuit ruled that there is **no private right of action** for employees under Title IX
- U.S. Supreme Court granted review to resolve circuit split

Private Right of Action? (2 of 2)

- Why It Matters
 - Could significantly expand or limit Title IX liability for athletics departments
 - May allow coaches/staff to bring equity-based claims (not just student-athletes)
- Institutional Risk Implications
 - Increased scrutiny on resource allocation across men's and women's programs
 - Greater need for documenting equity decisions and responding to complaints

Kelly v. California Baptist University

- Male student-athletes challenged CBU's decision to eliminate three men's teams (wrestling, swimming/diving, golf) to achieve Title IX proportionality compliance. The cuts eliminated 69 roster spots and were intended to bring participation in line with the student body.
- Plaintiffs' argue that team eliminations constituted intentional sex discrimination against men
 - Also argue the validity of the three-prong Title IX test, citing recent Supreme Court precedent (*Loper Bright*)
- On June 3, 2026, the Court denied a preliminary injunction
 - Found plaintiffs unlikely to succeed because cuts brought the university into compliance with Title IX (Prong 1)
 - Rejected arguments that the three-prong framework is invalid or creates unlawful quotas
- Case remains pending; motion to dismiss under consideration
- Key Takeaway: Courts continue to uphold roster management decisions tied to proportionality compliance and remain reluctant to reject the established Title IX framework

University of Oregon Litigation

- Varsity beach volleyball and club women's rowing allege Title IX violations in equal treatment (facilities/resources), financial aid, participation opportunities
- Key Allegations
 - Beach volleyball: Significantly inferior facilities and support (off-campus venue, limited amenities, lack of promised upgrades)
 - Rowing: Failure to provide substantially proportional participation opportunities; seeks varsity status
- Court largely denied Oregon's motions to dismiss, allowing claims to proceed to discovery
- In May 2026, the court denied class certification for both teams (claims not typical of broader groups and court rejected reliance on comparisons to football due to its unique characteristics)
- Current Status / Takeaway: Case proceeding on individual claims, not as a class action. It also highlights ongoing litigation risk around facilities, resource allocation, and sport comparisons under Title IX.

Schroeder, et al. v. University of Oregon

- First challenge on how NIL fits into Title IX
- Phrased as it might be a separate component

601. Defendant fails to provide equal treatment and benefits to its female student-athletes in some or all the categories set forth in the Regulations and the Policy Interpretation, including but not limited to:

- The provision of equipment, uniforms, and supplies;
- Scheduling of games and practice time;
- Travel, transportation, and per diem allowance;
- Opportunity to receive coaching and academic tutoring;
- Provision of locker rooms, practice, and competitive facilities;
- Provision of medical and training services;
- Provision of housing and dining facilities and services;
- Publicity & sports information services;
- Administrative support;
- Recruiting resources and support;
- Name, Image, Likeness support; and
- Resources necessary to provide any of the foregoing benefits or to provide the female athletes with a genuine Division I athletic experience.



SFA Litigation

- Female athletes challenged SFA's decision to cut women's beach volleyball and bowling teams (along with golf programs), citing existing Title IX noncompliance
 - Data alleged significant disparity: women comprised a majority of enrollment but had substantially fewer participation opportunities
- Plaintiffs' claim that eliminations further exacerbate gender imbalance in participation opportunities
- Filed as a class action and sought emergency relief
- District court granted preliminary injunction, requiring SFA to preserve women's teams, but Fifth Circuit later vacated the injunction on procedural grounds (lack of specificity), not on the merits
- SFA has agreed to maintain certain women's teams during litigation, as the case is proceeding toward trial
- Key Takeaway: Courts remain willing to intervene in team eliminations where Title IX disparities are evident, even when cuts are tied to financial pressures

University of Kentucky Litigation

- Female athletes allege inequitable varsity opportunities, seeking addition of women's teams (lacrosse, field hockey, equestrian)
- Class Action – Represents current and future female athletes alleging disparities in participation opportunities, athletic aid and benefits
- District Court ruled that the University failed Prongs 1 & 2 (proportionality and expansion history) but that they met compliance under Prong 3 (there is insufficient student interest/ability)
- Court emphasized lack of verified interest data and limited varsity readiness of club teams
- Case on appeal at Sixth Circuit; oral arguments held in October 2025
- Reinforces importance of documented interest and ability evidence under Prong 3

How a recent SCOTUS case may upend Title IX guidance

- Recent SCOTUS decision that eroded Chevron deference
- *Loper Bright Enterprises v. Raimondo* (U.S. June 28, 2024)
- For example, this means that the courts deference/reliance on the 1979 Interpretation that sets forth the three part test could go away
- We are already seeing this argument 

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON
CIVIL ACTION NO. 5:19-CV-00394-KKC
-Electronically filed-

ELIZABETH NIBLOCK and ALA HASSAN, Individually
and on behalf of all those similarly situated

PLAINTIFFS

v.

**UNIVERSITY OF KENTUCKY'S MOTION FOR
RECONSIDERATION OF COURT'S PREVIOUS RULING
ON APPLICABILITY OF THE THREE-PART TEST**

UNIVERSITY OF KENTUCKY, MITCH
BARNHART and ELI CAPILOUTO

DEFENDANTS

Given the Supreme Court's decision in *Loper Bright v. Raimondo*,¹ the University moves this Court to reconsider its previous ruling on the applicability of the "three-part test" stated in the 1979 Policy Interpretation.² If necessary, the University suggests allowing both parties to file supplemental briefing.

SDSU Settlement

- Female student-athletes alleged systemic sex-based discrimination at San Diego State University, including disparities in financial aid and treatment
- Parties entered into a settlement
 - Two classes of athletes: Injunctive relief class (current/recent athletes) and Damages class (past athletes eligible for compensation)
 - University to pay \$300,000 in total damages to affected athletes
- Other Key Institutional Requirements:
 - Independent Gender Equity Review of athletics programs
 - Development and implementation of a Gender Equity Plan
 - Ongoing monitoring and public reporting through 2028
- Signals that Title IX compliance is actively enforced through litigation and settlement and establishes precedent for financial aid-related damages claims
- Key Takeaway: Even modest financial settlements can carry significant structural reform obligations, increasing compliance expectations for institutions

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