

Title IX Athletics

Q & A

Q **What is your opinion about reporting the number of participants on the EADA report? If we follow the instructions, it is a different number of participants than we believe is the correct count of participants under Title IX. Despite that, the EADA information is being used to target institutions for complaints and compliance reviews. Any suggestions?** (NCAA Division I Senior Woman Administrator)

A Yes. I suggest you do both — follow the EADA instructions in the designated places, and then list your correct participation where there is space to comment. The EADA continues to be misleading in regard to the Title IX requirements. This article summarizes the problems with the EADA for all areas, not just for participation. The Equity in Athletics Disclosure Act (EADA) was passed by Congress so that prospective students are aware of an institution's commitment to providing equitable athletic opportunities for female and male students. Institutions of higher education that participate in the federal student aid programs (which is just about all postsecondary schools nationwide), offer intercollegiate athletics programs, and have both female and male undergraduate

students, must complete the annual online EADA survey for participation, coaching, scholarships, recruitment expenditures, and budgets. The EADA Report for each institution must be published by October 15 each year and must be made available upon request. By the end of October, institutions must submit their EADA data to the U.S. Department of Education (DOE). The Office of Postsecondary Education within the DOE then posts this information for anyone to view. A different DOE office, the Office for Civil Rights (OCR), has nationwide enforcement authority for Title IX.

The EADA instructions state that "The data that you report in this survey . . . may not be the same as data used for determining compliance with other Federal or state laws, including Title IX of the Education Amendments of 1972." Also, the instructions clarify that the numbers for the EADA Survey will not necessarily match NCAA survey data. Despite these statements, the EADA information is routinely interpreted as reflecting an institution's compliance with Title IX. Furthermore, while OCR knows that the EADA information is unreliable for determining Title IX compliance, OCR uses EADA information to target institutions for investigations. Moreover, advocates have written letters to individual institutions accusing those institutions of violating Title IX. As the advocates' letters state, their accusations are based on EADA information.

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Participation

What Title IX says: Under Title IX, participants are those who are on the squad list and on the team as of the first date of competition who receive coaching, practice, and are eligible to participate in games. Also included are participants joining the team after the first date of competition. Athletes who are practicing and receiving coaching but are preserving eligibility as redshirts for academic or physical reasons are also counted. Athletes who still have eligibility but cannot practice or participate because of injury *and* who receive an athletic scholarship are also counted.

What the EADA says: The EADA instructions state that individuals who joined the team after the day of the first scheduled contest should not be included as participants.

What Title IX says: Individuals joining after the first contest are counted under Title IX policy. As may be obvious, if OCR did not count those athletes joining the team after the first date of competition, institutions could easily manipulate their participation numbers to show compliance with the Title IX requirements for participation opportunities (test one of the three-part test—participation proportionate to enrollment) when, in fact, participation is highly disproportionate.

EADA: The EADA instructions state that “male practice players who are listed on the women’s team roster as of the day of the first scheduled contest should be counted as participants on the women’s team.” The instructions note that the “participant” count will not differentiate between the male and female participants, but the number of “opposite sex” participants must be specified in the caveat box on the survey.

Title IX: There is no purpose for this, and the total participation count can be misleading when counting male practice squad athletes as participants on the women’s teams. Under Title IX, male athletes who practice with women’s teams are not intercollegiate athletes and should not be counted.

EADA: The EADA instructions state that a “scheduled scrimmage meets the definition of a team’s first scheduled contest if the score counts.” The instructions continue by stating that if “the scrimmage is played just for fun or practice and the result of the scrimmage doesn’t matter in the long run, it wouldn’t count.”

Title IX: OCR has not clarified what is meant by the first date of competition under Title IX. I have suggested that institutions use the date of the first contest that counts toward the maximum number of contests permitted for that sport by the governing athletics association. For example, an exhibition game in which a basketball team may compete would not be the first date of competition. The first date would be the game that counts toward the maximum number of 27 games as permitted for basketball by the governing athletics association. The EADA instructions appear to allow institutions to choose whichever date works best for counting participants, which of course, allows for the manipulation of numbers that can be misleading for Title IX compliance.

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Coaching

EADA: The EADA states that “Volunteers who served as assistant coaches are assistant coaches for the purposes of this survey.”

Title IX: Volunteer coaches are not counted when evaluating coaching availability, except in rare circumstances.

EADA: Graduate students who are given reduced tuition for assistant coaching positions should be classified as volunteer assistant coaches.

Title IX: Graduate students who receive any compensation for coaching are considered as assistant or head coaches, and their availability is counted under Title IX.

EADA: The EADA instructions include over a dozen pages providing direction for calculating the average salary per coach.

Title IX: The average salary per coach has no use for determining Title IX compliance. Under the athletics provisions, OCR calculates whether total dollars for coaches’ salaries are proportionate to participation. This is to determine whether the institution allocates sufficient resources to provide coaches who are equally available and equally qualified in the overall women’s and men’s programs. The fact is, if coaching availability and qualifications are equitable, then the student-athletes are not being disadvantaged on the basis of sex. Consequently, OCR only cites concerns for coaches’ salaries under the Title IX athletics requirements when there are concerns for availability and/or qualifications.

Under the Title IX employment requirements, the average salary per coach is irrelevant. Both the Title IX athletics and employment provisions allow for an “abnormally high salary” to be paid to “a particular person [who] may possess . . . an outstanding record of achievement[.]” In effect, one coach who receives an extraordinarily high salary, which may be justified for specific individuals under Title IX, would skew any calculations for the average salary per coach.

Scholarships

EADA: The EADA instructions state that all dollars for athletically related aid should be totaled for women and totaled separately for men. The EADA instructions contain no mention of separating out fifth year or summer term awards.

Title IX: Under Title IX, summer term and fifth year aid should be reviewed separately from each other and separately from regular year aid. Not all athletes need or want fifth year aid (for those athletes who have exhausted their eligibility), and not all teams and athletes want to be on campus during the summer term. If an institution awards fifth year aid to all female and male athletes who want fifth year aid and qualify academically, that should be viewed as compliance under Title IX, even if the awards

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are highly disproportionate to participation. Similarly, if summer term aid is awarded to all athletes who want summer term aid and have met the appropriate academic standards, that too should be interpreted as compliance, even if rates of summer term dollars are disproportionate to women's and men's rates of participation.

OCR's very narrow standard for presumed compliance for scholarships is for total dollars to be proportionate to participation within one percentage point. In effect, if women are 48.3% of the total participants, then 47.3% to 49.3% of the scholarship dollars should be awarded to female athletes. Because fifth year and summer term aid may be disproportionate to participation and yet comply under Title IX, combining either type of aid, and more so combining both types of aid with regular year aid, simply skews the total athletic scholarship dollars. In short, the scholarship dollars listed on the EADA reports may suggest that many institutions do not comply when in fact those institutions do comply with Title IX.

Recruiting Expenses

EADA: The EADA instructions state that "expenses that were paid by individuals for recruiting but that weren't reimbursed by the institution" should not be included. The implication is that donated dollars that may be spent on recruiting should not be included in the accounting of recruitment expenditures.

Title IX: Under Title IX, donated dollars spent on any benefits for any team are viewed as dollars spent by the institution. Any other interpretation under Title IX or any of our civil rights laws would allow institutions to circumvent those laws. In following the EADA instructions, institution officials may calculate an erroneous result for the total dollars that determine compliance for the factor of financial resources under the recruitment program component.

Operating (Game Day) Expenses by Team / Per Participant

EADA: The EADA instructions state that game day expenses shall include: travel costs for lodging, meals, and transportation; equipment costs for uniforms and for coaches, athletes, support staff, and others; and costs for officials.

Title IX: Title IX compliance for travel and per diem benefits, equipment and supplies, support services, and officials is not determined by dollar amounts. Donated uniforms, which may not cost anything for the institution, are uniforms available to athletes that are viewed as being provided by the institution. The Title IX evaluation concerns quality and amount of equipment, but not dollars spent. Team travel benefits are determined by the modes of transportation, housing, and meals provided to athletes and not the dollars spent on these benefits. A team or teams may arrange for discounted air fares, complimentary lodging and/or meals. The Title IX consideration is that the team had the benefit of traveling by aircraft, not the cost of the air fares. The quality of lodging and the number of athletes assigned per room, and the quality and quantity of meals – fast food or fine dining – are evaluated, and not the dollar amount. Furthermore, the expenses outlined by the EADA tend not to be in the usual line items in institutions' athletics budgets. The result is that institution staff must make special efforts to collect and report the information in the manner instructed by the EADA.

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Total Expenses

EADA: The EADA instructions basically list everything that an institution might spend money on to provide an athletics program, with the exception of capital expenditures or debt service. It is likely simpler for institution staff to pull these figures together than others required by the EADA.

Title IX: Title IX contains no requirements for total program expenditures. Since the total expenses are supposed to include salaries and benefits, the “abnormally high” salary paid to a single coach may skew expenditures. In general, costs differ by the nature of sports and the numbers of athletes on the teams, and total expenditures can be misleading regarding Title IX compliance.

Total Revenues

EADA: The EADA instructions state that total revenues means all “revenues attributable to intercollegiate athletic activities.” “Total annual revenues means gross revenues.”

Title IX: Title IX contains no requirements for revenues or reporting or budgeting procedures.

Supplemental Information

EADA: The EADA report allows space for institutions to add supplemental information, which institution officials may use to clarify any information they choose. However, space is limited.

Title IX: Institution officials may wish to include the statement that the EADA format and instructions lead to the reporting of information that is not indicative of the institution’s compliance with Title IX.

Summary – Opinion

Currently, the EADA reports are misleading regarding Title IX compliance, and for that reason alone should be modified. The annual completion and submission of the EADA reports requires significant staff time and resources of both the institutions and the federal government. The EADA should be altered to reduce the staff time required to complete the reports and make it a much more useful tool for determining Title IX compliance and gender equity. (34 C.F.R. § 106.41(c); § 106.37(c); 1979 Intercollegiate Athletics Policy Interpretation, pages 71413-71423)

