Title IX Compliance & Athletics for K-12 Schools and Districts

Training and Certification Course
Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.
The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary Title IX practitioners encounter in their roles including slang, profanity, and other graphic or offensive language.
Overview and History of Title IX and Athletics
Accommodation of Interests and Abilities
Other Athletic Benefits and Opportunities
Red Flags
Sexual Harassment in Sports
Inter- and Intra-Squad Dating
Case Studies (Time Permitting)
TITLE IX REGULATIONS

- Congress passed Title IX of the Education Amendments in 1972
- Since 1980, the Department of Education’s Office for Civil Rights (OCR) has had primary responsibility for enforcing Title IX
- November 2018: OCR proposed the most detailed and comprehensive Title IX regulations to date\(^1\)
- August 2020: Significantly amended, due-process oriented Regulations took effect (proposed in Nov. 2018)
- June 2022: OCR published the Notice of Proposed Rule Making (NPRM) outlining proposed changes to the Title IX regulations
- On July 12, 2022, the NPRM was published in the Federal Register and the 60-day comment period began

NPRM PROCESS TIMELINE

- Official publication in the Federal Register July 12, 2022
- Review and comment period
  - 60-day comment period ends September 12, 2022
  - Submit comments to the Department of Education’s Office for Civil Rights (OCR)
- Final Rule expected to be issued in Spring 2023
- Effective Date approximately Summer/Fall 2023
- Watch for ATIXA webinars and other opportunities 😊
- There will be a separate NPRM for Athletics
PREPARING FOR IMPLEMENTATION

- Must continue to fulfill obligations under the current regulations for the 2022-2023 academic year.
- Anticipate OCR will expect schools to implement the new Title IX regulations before the start of the 2023-2024 academic year.

Steps to Take Now:
- Prepare to educate your community on the changes
- Identify stakeholders that will need to be involved in making policy decisions (e.g., whether to have hearings)
- Determine how you will manage policy changes
- Plan for the training needs for your community
- Consider state laws, court decisions, and other regulations that may affect your institutional approach
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....”

—JUNE 23, 1972
“TOO STRONG FOR A WOMAN”

Bernice “Bunny” Sandler story
HISTORY OF TITLE IX AND ATHLETICS

- Athletics is not mentioned in the 1972 Title IX statute
- Proposed regulations (1974) did and created a fire-storm
- Regulations passed in 1975 and athletics was given three years to comply
- Dec. 11, 1979, HEW issued the “Intercollegiate Athletics Policy Interpretation”
  - Contained the “Three-Part Test” to determine Title IX compliance with student interests and abilities
Civil Rights Restoration Act restored Title IX’s application to athletics.

1984

“Clarification on Intercollegiate Athletics Policy Guidance: The Three-Part Test”

1990s

1988

The OCR studied the efficacy of the Three-Prong Test and institutions’ compliance with it.

1996

“Additional Clarification” from the OCR that weakened the Three-Part Test

2003

The OCR again examined the Three-Part Test and restated that it remained unchanged.

2005

The OCR rescinded its 2005 guidance.

2010

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<th>Title</th>
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<tr>
<td>Sept. 17, 2008</td>
<td>Criteria for a Sport</td>
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*Denotes rescinded guidance
OCR GUIDANCE (CONT.)

June 15, 2016  Career & Technical Education
Feb. 22, 2017  Transgender Students (withdrew 5/2016 DCL guidance)
Jan. 14, 2021  Q&A on Single Sex Scholarships, Clubs, and other Programs
May 19, 2021  Notice of Interpretation: Enforcement of Title IX in Light of *Bostock v. Clayton County*
July 20, 2021  Q&A on Title IX Regulations on Sexual Harassment

*Denotes rescinded guidance*
RECENT REGULATIONS & REQUIREMENTS

2020 Title IX Regulations

- Effect on athletics interim actions
- Effect on investigations and jurisdiction

NCAA Campus Sexual Violence Policy – Annual Attestation

- Policy training and compliance
- Dissemination of information
- Annual education for all student-athletes, coaches, and staff
- Prior conduct disclosure form for all prospective, continuing, and transfer student-athletes
- Prior conduct check
- Policy regarding gathering information from previous institution(s)

Source: NCAA Sexual Violence Policy (April 2021)
K-12 schools and districts are NOT members of the NCAA, so the attestation requirements do NOT apply to them.

That said, NOT attesting to the issues requested may result in the student-athlete not being permitted to participate.

Some institutions are moving toward “serious misconduct” policies and may ask broader questions – these can be referred to the dean of students or student conduct office as well.

Source: NCAA Interim Name, Image, and Likeness Policy (2021)
NAME, IMAGE, AND LIKENESS

- Individuals can engage in name, image, and likeness (NIL) activities that are consistent with the law of the state where the school is located. Colleges and universities may be a resource for state law questions.

- High school athletes who attend a school in a state without an NIL law can engage in this type of activity without violating NCAA rules related to name, image, and likeness.

- Individuals can use a professional services provider for NIL activities.

- Student-athletes should report NIL activities consistent with state law or school and conference requirements to their school.

Source: NCAA Interim Name, Image, and Likeness Policy (2021)
Three-Part Test and the 13 program components are typically not as problematic for Intramurals and clubs because those programs are typically self-initiated and benefits provided by the institution are typically fewer.
The journey starts by asking those affected how they see and are impacted by the conditions, rules, and resources.

EQUITY acknowledges systemic impediments with targeted fixes

EQUALITY requires a level playing field that doesn’t yet exist

JUSTICE eliminates systemic barriers

AGENCY individuals know that access is their right

Title IX requires a school/district to:

- Provide **equal opportunities** for female and male students to become interscholastic athletes
  - Analyzed by means of a three-part test (“Prongs”)

- Provide **equitable** treatment of **participants** in the overall girls’ program as compared to the overall boys’ program
  - Analyzed according to thirteen (13) different program components (The “Laundry List”)

Title IX does not require a school/district to:

- Provide the same funding to the overall girls’ and boys’ programs
- Provide the same funding to boys’ and girls’ teams for the same sport
- Provide specific benefits to teams
- Offer the same number of teams for boys and girls
- Offer the same sports for boys and girls
- Provide the same benefits to boys’ and girls’ teams in the same sport
- Compete at a specific level

ATHLETIC OVERSIGHT – GENDER EQUITY

- The oversight of compliance remains the responsibility of the school/district’s Title IX Coordinator (TIXC)

- Compliance in athletics may be delegated but for most K-12 recipients, this will be the responsibility of the school/district athletic director(s)
  - Need for outside education on the various areas of TIX
THE THREE-PART TEST: ACCOMMODATION OF INTERESTS AND ABILITIES

- Proportionality
- Program Expansion
- Full Accommodation
THREE-PART TEST (1979)

1. Opportunities for males and females substantially proportionate to their respective enrollments; OR

2. Where one sex has been underrepresented, a history and continuing practice of program expansion responsive to the developing interests and abilities of that sex; OR

3. Where one sex is underrepresented and cannot show a continuing practice of program expansion, whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by that present program
COUNTING PARTICIPANTS

- For purposes of Title IX compliance, a participant is defined as those athletes who:
  - Regularly receive institutionally-sponsored support normally provided to athletes
  - Regularly participate in organized practices or team meetings and activities during the season
  - Are listed on the eligibility or squad list
  - Are injured, but continue to receive other support on the basis of athletic ability

Participants also include those who:

- Are listed on a team's squad or eligibility list AND are on the team as of the team's first competitive event
- Join the team during the season*
- Are a walk-on
- Are a member of the JV, freshman, “B” team, etc.
- Quit or were cut after the first competitive event
- Are a Redshirt athlete
- Are a mid-year transfer eligible to participate in the spring

*Season begins on the date of a team’s first competitive event and concludes on the date of the final competitive event.

The following are not participants:

- Unfilled team slots or positions
- Club, intramural and recreation program participants
- Cheerleaders
- Athletes who quit or are cut BEFORE first competitive event of the season
- Sport participants out of season (e.g., spring football)
- Scrimmage or practice squads
- Student managers, student coaches, student trainers
- Students who are academically ineligible
- Mid-year transfers if no spring season

PART 1: PROPORTIONALITY

Opportunities for males and females substantially proportionate to their respective enrollments

- **Substantially proportionate** accounts for natural fluctuations in enrollment and participation rates, but schools must adjust if shifted enrollment or participation shifts persist

- The OCR uses a case-by-case analysis, rather than a rigid statistical requirement (e.g., within 1% of student body)

- The OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team

COMPUTING SUBSTANTIAL PROPORTIONALITY
NUMERICAL EXAMPLE: STUDENT ENROLLMENT IS 50% MALES & 50% FEMALES

Unduplicated Measure

- 300 participating athletes
  - Head count only
  - Not counting two- and three-sport athletes, two and three times
- 180 male athletes; 120 female athletes
- 120/300 = 40% female athletes; however, 50% of student body are females
- Unduplicated measure = 10% female differential

Duplicated Measure

- 300 participating athletes
  - Count two- and three-sport athletes each time
  - Count all filled participation slots
- There are 400 filled participation slots
  - 250 slots filled by males
  - 150 slots filled by females
- 150 females/400 = 37.5% of slots filled by females
- There is a 12.5% female differential
PART 2: PROGRAM EXPANSION

In analyzing a history of program expansion, the OCR considers:

- A school/district’s record of adding teams, or upgrading teams’ status, for the underrepresented sex
- A school/district’s record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex

PART 2: PROGRAM EXPANSION (CONT.)

- A school/district’s affirmative responses to requests by students or others for addition or elevation of sports
- A school/district’s current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the effective communication of the policy or procedure to students
- A school/district’s current implementation of a plan of program expansion that is responsive to developing interests and abilities

PART 3: FULL ACCOMMODATION

Whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by that present program

The OCR will consider whether:

- There is sufficient unmet interest to support a varsity or JV team
- There is sufficient ability to sustain a varsity or JV team
- There is a reasonable expectation of competition for the varsity or JV team

PART 3: FULL ACCOMMODATION

Determining unmet interest:

- Requests from athletes, students, coaches, and other constituents
- Vibrant club team – why not elevated to varsity status?
- Surveys (annual)
- What is offered in your conference, region, feeder schools?

LEVELS OF COMPETITION

- Equivalently Advanced Competitive Opportunities
- Upgrades of Competitive Opportunities
LEVELS OF COMPETITION

The OCR assesses compliance by examining:

- Whether the competitive schedules for boys’ and girls’ teams, on a program-wide basis, afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities

  OR

- Whether the school/district can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex

OTHER ATHLETIC BENEFITS AND OPPORTUNITIES

- Equipment and Supplies
- Scheduling (Games and Practice Times)
- Travel and Per Diem Allowance
- Coaches
- Tutors

- Locker Rooms and Other Facilities
- Medical and Training Services
- Housing and Dining Services
- Publicity
- Recruitment of Student Athletes
- Provision of Support Services
Key factors in examining the equivalence for boys and girls:

- Quality of equipment and supplies
- Amount of equipment and supplies
- Suitability of equipment and supplies
- Maintenance and replacement of the equipment and supplies
- Availability of equipment and supplies

SCHEDULING OF GAMES AND PRACTICE TIMES

Key factors in examining the equivalence for boys and girls:

- Number of competitive events per sport
- Number and length of practice opportunities
- Time of day competitive events are scheduled
- Time of day practice opportunities are scheduled
- Opportunities to engage in available pre-season and post-season competition

For K-12 Athletics:
the number of times students compete is a major benefit

Key factors in examining the equivalence for boys and girls:

- Modes of transportation
- Housing furnished during travel
- Length of stay before and after competitive events
- Per diem allowances
- Dining arrangements

COACHING

Key factors in examining coaching:

- Opportunity to receive coaching
  - Relative availability of full-time coaches
  - Relative availability of part-time and assistant coaches
  - Relative availability of teaching assistants
  - Volunteers

- Assignment of coaches
  - Training, experience, and other professional qualifications
  - Professional standing

Key factors in examining coaching:

- Compensation of coaches
  - Rate of compensation (per sport, per season)
  - Duration of contracts
  - Conditions relating to contract renewal
- Experience
- Nature of coaching duties performed
- Working conditions
- Other terms and conditions of employment

For K-12 Athletics: OCR considers coaching a big deal

Key factors in examining the equivalence for boys and girls:

- Academic Tutoring
  - Availability of tutoring
  - Procedures and criteria for obtaining tutorial assistance
- Assignment of Tutors
  - Tutor qualifications
  - Training, experience, and other qualifications
- Compensation of Tutors
  - Hourly rate of payment by nature subjects tutored
  - Pupil loads per tutoring season
  - Tutor qualifications
  - Experience
  - Other terms and conditions of employment

LOCKER ROOMS, PRACTICE AND COMPETITIVE FACILITIES

Key factors in examining the equivalence for boys and girls:

- Quality and availability of the facilities provided for practice and competitive events
- Exclusivity of use of facilities provided for practice and competitive events
- Availability of locker rooms
- Quality of locker rooms
- Maintenance of practice and competitive facilities
- Preparation of facilities for practice and competitive events

MEDICAL AND TRAINING FACILITIES AND SERVICES

Key factors in examining the equivalence for boys and girls:

- Availability of medical personnel and assistance
- Health, accident, and injury insurance coverage
- Availability and quality of weight and training facilities
- Availability and quality of conditioning facilities
- Availability and qualifications of athletic trainers

Key factors in examining the equivalence for boys and girls:

- Housing provided
- Special services as part of housing arrangements (e.g., laundry facilities, parking space, cleaning service)

Generally, not an issue in K-12

PUBLICITY

Key factors in examining the equivalence for boys and girls:

- Availability and quality of sports information personnel
- Access to other publicity resources for boys’ and girls’ programs
- Quantity and quality of publications and other promotional devices featuring boys’ and girls’ programs

RECRUITMENT OF STUDENT ATHLETES

Key factors in examining the equivalence for boys and girls:

- Whether coaches or other professional athletic personnel in the programs serving male and female athletes are provided with substantially equal opportunities to recruit.

- Whether the financial and other resources made available for recruitment in male and female athletic programs are equivalently adequate to meet the needs of each program.

- Whether the differences in benefits, opportunities, and treatment afforded prospective student athletes of each sex have a disproportionately limiting effect upon the recruitment of students of either sex.

RECRUITMENT OF STUDENT ATHLETES (CONT.)

- **K-12 Issue**: whether coaches have access to students to recruit to their team (e.g., teach-coaches vs. non-teach coaches)

  Others are generally not a K-12 issue

The administrative and clerical support provided to an athletic program can affect the overall provision of opportunity to male and female athletes, particularly to the extent that the provided services enable coaches to perform better their coaching functions.

**Key factors:**

- Amount of administrative assistance provided to boys’ and girls’ programs
- Amount of secretarial and clerical assistance provided to boys’ and girls’ programs

OTHER CONSIDERATIONS

- Transgender Athletes
  - Title IX and Equal Protection Clause
  - Current state of federal regulations
  - Withdrawal of Obama-era protections
  - State laws
  - Current litigation in Idaho and Connecticut

- Consider:
  - Sex-segregated sports teams
  - Locker rooms/bathrooms
  - School/District-wide policies
RED FLAGS TO LOOK FOR AND ASK ABOUT

- Proportionality
- Program Expansion
- No Unmet Interest
- Retaliation
- Equal Pay
- Hostile Environment
- Donations
- Fundraising
“Our proportionality is within 5 percentage points - close enough!”

“We will reach proportionality through roster management!”

“It’s OK, we are cutting a boys’ and a girls’ team!”

“We absolutely have enough money to add a new boys’ team!”

“But no one has complained about our lack of girls’ sports!”

“We just added a girls’ team, so we are definitely in compliance.”
Gender imbalances on coaching staff

Closed hiring practices

Salaries not benchmarked (conference, geographic)

Booster clubs and donations for single sports

Complaints about hostile environment
How managed?
By whom?

Coaches raising money for only their team
DONATIONS

- **Booster clubs**: Groups of fans or donors who want to support a team or program

- **Donors**: Individuals who want to give to a team or program

- Booster club and donor contributions to schools can affect a school’s Title IX compliance
DONATIONS (CONT.)

- Can provide assistance to a school’s athletic programs
- Often, they only want to support a specific team or program or provide a specific service
- Oversight and guidance from the Title IX Office are necessary to ensure compliance
- Often involves educating the donor/club
- Ideally, they support **ATHLETICS**
FUNDRAISING

- Fundraising = Teams raising money on their own
  - For a specific opportunity
  - For equipment, uniforms, etc.
  - For special equipment, uniforms, etc.

- Private fundraising is permissible

- Title IX requires that male and female teams must have equal access and equal opportunities to comparable benefits and services no matter the source of money
Booster/Donor money can be looked at as clandestine financing for major school sports programs – most of which are overwhelmingly male.

- Impact of NIL at the college level

While funding may be unequal, the benefits and services for programs must be equal/equitable. If not, the Recipient has to make up the difference to equalize opportunities.

Nothing in the language of Title IX dictates that funding must be the same for the female and male overall programs or the female and male teams in the same sports. Lack of funds, however, cannot justify sex discrimination.

These contributions should be a big concern for schools.
ESPORTS
- Proportionality issues
- Harassment concerns
- Competitions in/out of school
- The Future
SEX DISCRIMINATION, SEXUAL HARASSMENT, SEXUAL VIOLENCE, AND INTIMATE PARTNER VIOLENCE AND SPORT

- Definitions
- Obligations
- Instructive Cases
- Pregnancy and Athletics
- LGBTQIA+ Issues in Competition
- Challenges
UNDEARTANDING THE THREE FORMS OF SEXUAL HARASSMENT

Sexual Harassment is

Unwelcome conduct of a sexual nature or that is sex or gender-based

Based on power differentials (quid pro quo)
The creation of a hostile environment
Retaliation

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INSTITUTIONAL OBLIGATIONS UNDER TITLE IX

Sexual Harassment

Investigate

Stop

Prevent

Remedy
## The IX Commandments

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<th>Thorough</th>
<th>Reliable</th>
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<td>Remedies</td>
<td>Act reasonably to stop discrimination</td>
<td>Act reasonably to prevent recurrence</td>
<td>Act equitably to remedy effects</td>
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INSTRUCTIVE CASES

*Simpson v. Univ. of Colorado Boulder*, 500 F.3d 1170 (10th Cir. 2007).
- Recruiting visits
- Off-campus parties
- Climate

*Williams v. Bd of Regents of Univ. of Georgia*, 477 F.3d 1282 (11th Cir. 2007).
- Recruit histories

*Jennings v. UNC Chapel Hill*, 482 F.3d 686 (4th Cir. 2007).
- Climate in locker room
- Player evaluation meetings
- Power of a coach
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<th>Key Points</th>
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<td>- Court determined actual participation outweighed number of teams offered</td>
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<td>- Unequal treatment and benefits for female athletes</td>
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<td>- Failure to accommodate female interests and abilities</td>
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- Unequal treatment and benefits for female athletes
  - Equipment and supplies, facilities, funding, publicity

Hamilton High School (Arizona) – Criminal Case

- Hazing
- Sexual assault

Chicago Public Schools

- Sexual harassment

Gordon v. Utah

- Opportunity for females to play football
UNIQUE CHALLENGES: TITLE IX AND STUDENT ATHLETICS

- Athletic department hostile educational environment
- Insularity of teams and the athletic department
- Coaches texting athletes
- Protectionism of teams and the athletic department
- Coach-Athlete dynamics
  - Power-based
  - Trust-based
  - Recruitment
  - Performance meetings
UNIQUE CHALLENGES:
TITLE IX AND STUDENT ATHLETICS (CONT.)

- Coach-coach dynamics
- Male privilege
- Body image and focus on the body (especially girls)
- Student-athlete on student-athlete violence
- Power dynamics
- “Revenue” vs. non-revenue sports
- Must-win mentality
PREGNANCY AND ATHLETICS

- The law recognizes pregnancy as affecting only one gender
- The NCAA guidelines on management of pregnant athletes is a good document to review and follow
- The OCR speaks to pregnancy and parenting on the whole
  - A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student’s pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient. 34 C.F.R. § 106.40(b)(l).
PREGNANCY AND ATHLETICS (CONT.)

- **2007 Dear Colleague Letter** on Nondiscriminatory Treatment of Pregnant Students in Athletic Scholarships
- **2013 Guidance** on Supporting the Academic Success of Pregnant and Parenting
CURRENT LGBTQIA+ ISSUES IN COMPETITION

- International Olympic Committee (IOC)/United States Olympic and Paralympic Committee (USPOC) guidelines are the current standards adopted by the NCAA
- The OCR has stated they recognize sexual orientation, gender identity, and gender expression as protected characteristics (Title VII already does)
- State laws and rules regarding competition are being challenged in Federal Courts
  - Idaho, Arizona, Kentucky, Florida, West Virginia, Utah, Georgia, Iowa, Louisiana, South Carolina, Tennessee
  - At least 14 other states have proposed bills
- ATIXA will continue to update members on these issues
UNIQUE CHALLENGES: TITLE IX AND STUDENT ATHLETICS (CONT.)

- Culture of violence and aggressive behavior in sports
- Male bonding and group loyalty
- Sexualization and subordination of girls in boys’ team sports
- Approval of sexist language and attitudes
- Perception of “groupie culture”
- Celebrity sense
- Entitlement
MANAGING DATING RELATIONSHIPS AMONG TEAMMATES

Frame intra-team dating as part of broader relationship management issues that can distract a team from their competitive goals, such as:

- Best friends on a team being cliquey or having a big falling out
- Two teammates on one team dating the same person on another team
- One teammate getting dumped by their partner then a teammate starts dating the ex-partner
- Heterosexual dating on a mixed team
• Heterosexual dating on boys’ and girls’ teams that practice together and travel to competitions together
• Same-sex teammates dating on a boys’ or on a girls’ team
• Conflicts between teammates based on race
• Conflicts between teammates based on sexual orientation
• Conflicts between teammates based on religion
MANAGING DATING RELATIONSHIPS AMONG TEAMMATES (CONT.)

- Develop policy that applies to all relationship management issues rather than focusing on same-sex teammates dating
- Make policies about dating apply to all dating relationships not just same-sex dating
- Range of possible policies on intra-team dating:
  - Prohibit intra-team dating (Not recommended)
  - Ignore intra-team dating (Not recommended)
  - Proactively set expectations for intra-team dating and other dating relationships and interpersonal conflict on the team (Recommended)
- **Note:** most students do not use the term “dating” to describe their emotional and intimate relationships
CASE STUDIES

Time-permitting
Questions?
Thanks for joining us today.

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