INVESTIGATOR APPLIED TRAINING

Presented by

William McCants, A.L.M, M.S., J.D., Director of ODR
Jennifer Kirshenbaum, J.D., ODR Investigator
Nicole Newman, J.D., ODR Investigator
Ilissa Povich, J.D., ODR Senior Investigator
Eric Jordan, J.D., ODR Associate
Clare Hanlon, J.D., ODR Fellow
Jessica Shaffer, J.D., ODR Fellow
What do we need to learn from Complainant during initial review?

Encourage Complainant to be as specific as possible, understanding that flexibility is essential as narrative approaches may vary and may not be linear/chronological

• Who: names, title, School or unit, other contact information
• What: specific description of the behavior, Complainant’s response, the outcome of the incident or incidents
• Where: specific location: building, floor, room, outside; where within that location?
• When: date/time of each incident
• Effect of harassment on Complainant:
  • Academic or work performance?
  • Participating in University programs or activities?
  • Social impact?
  • Ongoing interaction with Respondent?
  • Physical or emotional health?
Observations During Your Meetings with Parties

• Note demeanor, including changes when certain topics discussed

• Offer a break

• Reassure party that you are asking questions to better understand their information, however they choose to provide it.
Other Preliminary Information

- **Check internal records** regarding other disciplinary actions or incidents of notice re: Respondent, if any

- Check with School or unit Title IX Resource Coordinators and central Title IX Office who may possibly have notice of similar conduct
  - Does Respondent work/teach/attend class at other Schools?
  - Has the employee worked in other buildings? Other departments within the University?
Questions to Consider

- How does the information provided fit within the definition of sexual harassment or other sexual misconduct that applied at the time of the conduct?

- If true as alleged, would it be a violation of the applicable policy(ies)?

- Any indication that the scope of the possible harassment (e.g., Interim Title IX Sexual Harassment Policy)/hostile environment (e.g., Interim Other Sexual Misconduct Policy) may be broader than what was originally written in the complaint?

- Might local rules apply/also apply to certain conduct? (check with School or unit)
THE TITLE IX RULE WAS EFFECTIVE ON AUGUST 14, 2020, AND IS NOT RETROACTIVE

According to a U.S. Department of Education, Office for Civil Rights Blog posting on August 5, 2020:

“The Department will only enforce the Rule [i.e., the new Title IX regulations] as to sexual harassment that allegedly occurred on or after August 14, 2020. With respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school’s Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred. In other words, the Rule governs how schools must respond to sexual harassment that allegedly occurs on or after August 14, 2020.”
Investigative Planning and Identifying and Evaluating Evidence
Witnesses

Should have information about the allegations:

• Others who may have seen or heard any aspect of the incidents
• Could parties hear others talking? Any sense others were nearby?
• Anyone either party may have told or texted immediately following the incident/next day/later
Witnesses, cont.

- Those identified by each of the parties
- Those identified by other witnesses
- Those Investigative Team identifies as potential witnesses
- Supplement list during investigation as new leads become known
Witnesses, cont.

Witness questions

• Sketch out areas of evidence you expect to gather from them
• Focus on disputed facts
• Focus on what is needed to prove/disprove Policy(ies) violation and understand the breadth
• If possible, review written/physical evidence first
• List of questions, but be prepared to follow up on new avenues/adjust to different narrative approaches

Witness order

• Relationship to parties and other witnesses may impact interview order
• Availability – work schedule/upcoming vacation
• Ordering to reduce need to circle back
Other Evidence

• Based on allegations, where would you likely find evidence?

• Always remember responsibility to conduct a prompt and equitable investigation for both parties
Community Relationships in ODR Investigations
Sexual Harassment Resources

Title IX Office
Title IX Resource Coordinators

Ombudsman

Harvard Resources

ODR

HUPD

HUHS

CAMHS

Chaplains
Examples

• Administrative/Review/Conduct/Disciplinary Boards; HR, Resident or Assistant Deans
• Title IX Resource Coordinators, Designees, Liaisons
• Office of Sexual Assault Prevention and Response (OSAPR)
• Harvard University Police Department (HUPD)
• Harvard University Health Services (HUHS)
# Title IX Resource Coordinator Role vs. Designee Role

<table>
<thead>
<tr>
<th>Notice of Incident</th>
<th>Title IX Resource Coordinator</th>
<th>Designee</th>
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<tr>
<td></td>
<td>• Responds to notice</td>
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<td>• Implements supportive measures</td>
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<td>Informal Resolution</td>
<td>• Might handle informal resolution following the filing of a formal complaint (Interim Title IX Sexual Harassment Policy)</td>
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<tr>
<td></td>
<td>• Informed of complaint by University Title IX Coordinator</td>
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<td>• Updated throughout process by ODR</td>
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<td></td>
<td>• Implement supportive measures</td>
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<td>• Monitor supportive measures</td>
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<tr>
<td>Formal Complaint</td>
<td>• Initial Review of Complaint</td>
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<td></td>
<td>• Investigation (participation varies as decided by the Schools using the Designee Model)</td>
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<td>• Case planning meetings</td>
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<td>• Interviews</td>
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<td></td>
<td>• Site visits</td>
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<td></td>
<td>• Review of other evidence</td>
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<td></td>
<td>• Participate in drafting Investigative Report (making recommended findings of fact)</td>
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<tr>
<td>Investigation Complete</td>
<td>• Receives Investigative Report</td>
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Office of Sexual Assault Prevention & Response

• Identifying strategies for addressing or responding to experience(s) of harm;

• Identifying strategies or skills for coping with experience(s) of harm;

Accompaniment

• OSAPR staff provide medical and/or legal accompaniment between 9-5 Monday - Friday or as scheduled
HUHS

• Services/resources for parties
• Expert witnesses: ODR has interviewed experts about, e.g.,
  • Intoxication and incapacitation
  • Sexually transmitted infections
  • Bruising and other manifestations of physical injury
  • Sleep disorders
LGBTQ+ Communities

Terminology & Best Practices
Harvard Policies & Guidelines
Harvard University Interim Title IX Sexual Harassment Policy

Harvard University is committed to maintaining a safe and healthy educational and work environment in which no member of the University community is, on the basis of sex, including sexual orientation or gender identity, excluded from participation in, denied the benefits of, or subjected to discrimination in any University program or activity. Sexual harassment, including sexual violence, is a form of sex discrimination in that it denies an individual equal access to the University’s programs or activities.
Discrimination on the basis of race, color, sex, gender identity, sexual orientation, religion, creed, national origin, age, ancestry, veteran status, disability unrelated to job requirements, genetic information, military service, pregnancy, or any other legally protected basis is unlawful and intolerable to the University.

https://hr.harvard.edu/staff-personnel-manual/general-employment-policies/discrimination-policy-and-review-procedure
Guidelines for Gender Inclusivity in the Workplace

- Privacy and confidentiality
- Names, gender, and pronoun usage
- Workplace attire
- Access to restroom and locker room facilities

https://dib.harvard.edu/guidelines-gender-inclusivity-workplace
LGBTQ+ Terminology
Important Note About Language

• Terms:
  • can mean different things to different individuals
  • may be reclaimed by certain segments of LGBTQ+ communities, but not by others

• There is no one “LGBTQ+ community”
Gender Definitions & Terms

**Gender:** the attitudes, feelings, and behaviors that a given culture associates with a person’s biological sex; a social construct.

**Gender identity:** a person’s gender-related identity, appearance, or behavior, whether or not that gender-related identity, appearance, or behavior is different from that traditionally associated with the person’s physiology or assigned sex at birth.

**Gender expression:** the manner in which a person represents or expresses gender to others, often through behavior, clothing, hairstyles, activities, voice, or mannerisms.

Gender Definitions & Terms, cont.

Transgender: an umbrella term used to describe a person whose gender identity or gender expression is different from that traditionally associated with the assigned sex at birth.

Cisgender: a term used to describe a person whose gender identity corresponds with the sex the person was identified as having at birth.

Gender Definitions & Terms, cont.

**Queer**: an umbrella term that includes lesbians, gay men, bisexuals, transpeople, intersex persons, and others within the LGBTQ+ communities.*

**Gender non-conforming**: Qualities of a person or persons whose gender expression differs from stereotypical or social expectations.

**Genderqueer**: A term to describe a person who self-identifies their gender as outside the gender binary, between or beyond genders, or some combination of genders.

**Intersex**: a person whose chromosomes are neither XX or XY, e.g., XXY.

Sexual Orientation: a term for the sexual, romantic, physical, and/or spiritual romantic attraction one feels for others.

- Includes one’s attraction, sexual behavior, and identity
- Transgender people may have any sexual orientation, like cisgender people

Terms:
- Asexual
- Lesbian, Gay (L,G)
- Bisexual (B)
- Pansexual
- Queer or Questioning (Q)
- Straight/Heterosexual
- And more….

Harvard Medical School Center for Primary Care (2017).
Contextualizing These Communities
Anti-LGBTQ+ Hate Crimes

Gender-identity hate crimes grow

Karl Gelles/USA TODAY
Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct, Harvard, Figure 3 (Sept. 2019): “TGQN” Students
Penetration by physical force or inability to consent. Focusing on incidents of penetration since entering Harvard University, among undergraduates, 10.2 percent of women and 2.7 percent of men reported this type of victimization. There is a statistical difference between undergraduate women and men. Among graduate/professional students, 3.4 percent of women and 0.5 percent of men reported they experienced this type of victimization. There is a statistical difference between graduate/professional women and men. Among TGQN students, 7.4 percent reported they were a victim. There is not a statistical difference between TGQN students and undergraduate women.
Key Takeaways
Key Takeaways

✓ Name and pronouns
✓ Privacy
✓ Diversity of experiences
✓ Language: best practices
Contact Information

Caysie Carter Harvey, EdM
Smith Campus Center, Suite 901
1350 Massachusetts Avenue
Cambridge, MA 02138
caysie_carter@harvard.edu
p: (617) 496-5490
titleix.harvard.edu
The “Neurobiology of Trauma”
Neurobiological changes resulting from a traumatic experience can lead to flat affect or “strange” emotions or emotional swings
  • Wide range of emotions are in fact normal
  • Story may come out fragmented or “sketchy”; does not necessarily mean evasiveness or lying


SOURCE: Campbell & Patterson, 2011
Neurobiology of Trauma

• “We know of no scientific studies that support the contention of neurobiological response differences between perpetrators and victims.”

• “[I]t is clear that the influence of stress and emotion on the brain are complex and multifaceted, leading at times to the enhancement of memory and at other times to the disruption of encoding and retrieval processes.”

Neurobiology of Trauma, cont.

• “[T]he mind does not operate like a video recorder, infallibly encoding our experiences, traumatic or otherwise. And recollection is not like a replay of one’s experience. Rather, autobiographical recall entails reassembly of encoded elements of the event distributed throughout the brain. Terror during trauma focuses one’s attention, strengthening memory for the most salient features of the experience, and occasionally at the expense of less salient ones[.].” – Professor Richard McNally, Harvard Department of Psychology, “What is PTSD?” The Guardian, 5 October 2016

• “Our memories are not perfect reconstructions of the past. Instead, remembering a past event is a combination of processes, piecing together many separate details, and making inferences to fill in the gaps to create a coherent whole. . . . Our current drives, biases, stereotypes, and expectations can all affect that inferential process . . . [C]onverging evidence demonstrates that experiences of trauma . . . are also vulnerable to memory distortion.” – Professor Deryn Strange, John Jay College of Criminal Justice, Psychology Today, May 23, 2016

• “Trauma survivors can furnish narratives of their experiences, albeit with varying degrees of coherence. Although initial narrative coherence is related to recovery from PTSD, both narrative coherence and recovery may be results of a third variable such as cognitive ability.” – McNally, Remembering Trauma, p. 136 (2003)
Neurobiology of Trauma, cont.

• “Much of what people think they know about trauma is far more conjectural than empirical.”
• “Put succinctly, the presence of trauma is not a substitute for the absence of evidence.”
• “Missing information should not be held against someone, if it is missing as the result of trauma, but trauma itself does not provide a rationale for bolstering credibility in the absence of evidence.”

Association of Title IX Administrators Position Statement, Trauma-Informed Training and the Neurobiology of Trauma, August 16, 2019
Cultural Sensitivity

Cultural Factors May Impact ODR Investigations
Harvard’s Diverse Geographic Representation

  - approximately 10,285 students and scholars
  - 155 countries
Harvard College Class of 2023 Statistics
Source: https://college.harvard.edu/admissions/admissions-statistics

By Geography
- International Students: 12.8%
- Non-International Students: 87.2%

By Race or Ethnicity
- African American: 12.2%
- Asian American: 2.4%
- Hispanic or Latino: 25.3%
- Native American or Pacific Islander: 14.3%
- Other: 45.8%
International Representation in ODR Cases

Since 2014, Complainants and Respondents have been from the following countries (other than the U.S., including first-generation immigrants):

- Argentina
- Australia
- Brazil
- Bulgaria
- China
- Costa Rica
- El Salvador
- England
- France
- Haiti
- Ireland
- Jordan
- Kenya
- Mexico
- New Zealand
- Peru
- Poland
- Russia
- Scotland
- Somalia
- South Korea
- Turkey
- Zimbabwe
Translation and Interpretation

• Might be requested based on objectively demonstrable need by, e.g., a staff member (i.e., because for Harvard students a certain level of English fluency is typically required as a condition of admission) participant in an investigation
  o translation of written documentation
  o verbal interpretation during interview

• The party or witness must request a translator or interpreter; ODR as a neutral cannot suggest that the party or witness may need either
Translation and Interpretation, cont.

ODR may secure a neutral English translation if the English translations provided by the respective parties are in what ODR deems to be material conflict. ODR also sometimes secures a neutral English translation of a non-English communication translated into English by only one party, for ODR’s reasons such as sampling for accuracy. Moreover, ODR will not seek a neutral English translation of a non-English communication that both parties have translated into English, if ODR has not deemed the difference between the parties’ English translations to be material, even if a party nevertheless asserts that the difference is, in their own view, material.
Translation and Interpretation, cont.

Also note that ODR will generally not credit any bracketed commentary inserted by parties into their own English translations of non-English documents. Each party is, on the other hand, always free to seek neutral English translations of their own, by a qualified professional translator (with documentation thereof), at the party’s own expense. **ODR will always independently reach out to a translator secured by a party, in order to verify both the professional qualifications of the translator and the neutrality of the translation process.** ODR will inform both the party and the party’s translator that the party’s translator’s response to ODR’s questions is voluntary, but if the party’s translator does not choose to respond to ODR, ODR will not rely on the translation.
Variance in Cultural Norms

Cultural norms ODR has encountered:

- Propriety of hugging a co-worker, peer, or subordinate
- Propriety of kissing a co-worker, peer, or subordinate on one or both cheeks (as a greeting)
- Cultural stigma surrounding infidelity
- Proper amount of physical space between individuals in the workplace/eye contact
- Pursuit of romantic relationships
- Drinking behavior
- Discussion of feelings
- Interpretation and use of certain words, messages, symbols, including “jokes”
- Gender roles, e.g., “appropriate” careers

This is why it is so important that ODR looks at both objective and subjective factors with regard to unwelcome conduct.
Additional Considerations for International Students

What issues arise with respect to international students and undocumented students who experience sexual violence?

• Title IX protects all students located in the United States, regardless of their country of origin
  ○ Must ensure all students are aware of their rights
• Student visas may require full course load; prior approval required for reduced course load
• Invoking immigration status or threatening deportation may be seen as retaliatory
Conducting Interviews

What We Know from Experience
Interviewing Parties and Witnesses
Framing Interviews with the Parties

• Outline briefly how the interview will be conducted with some indication of the objective.

• The names of witnesses and the content of interviews that may be relied on by ODR in findings of fact/determination will be shared with both parties.
Interviewing the Parties

• Remind parties of the right to a personal advisor.
• Remind Respondent that advised in Policy to seek legal counsel before making any written or oral statements when allegations, if true, might constitute criminal conduct.
• Remind parties of the right to consult an attorney at any time during the investigation.
Interviewing Respondent

• Elicit Respondent’s version of events, suggestions for witnesses, other evidence, in same level of detail as Complainant’s version. (Parity/neutrality/impartiality)

• Explain process, which Policy standards may have been violated, and what to anticipate.

• Don’t use, e.g., term “harassment” to describe complaint – to do so is conclusory; say, e.g.: “a serious matter has been raised that [she/he/they] [has/have] been to connected to and alleges unwelcome behavior on [his/her/their] part.”

• Explain that confidentiality/retaliation provisions also protect the Respondent.
Interviewing Witnesses

• Share as little information as possible with witnesses to gather the evidence that is needed
• Explain that confidentiality and retaliation provisions apply
• Explain that witness interview summaries of information directly related to the allegations under investigation will be shared with the parties
• At conclusion, ask if anything else to share?
During the Interview

• Listen with purpose. Always keep in mind the specific information you need to verify or refute the potential Policy violation you are investigating, even while allowing for various narrative approaches and while being neutral and trauma-informed.
Attending: to pay attention to

Attending is when the interviewer indicates, through both words and body language, including posture, that she or he is paying close attention to the interviewee and wants to hear what the interviewee has to say. If you are feeling fatigued, it is okay to ask for a break."
Beginning the Interview

• Explain the interview process
  o may have to redirect the discussion if it gets into areas not relevant to the investigation

• In ODR’s experience, interviews can vary greatly in length, from less than an hour to, in rare situations, more than 12 hours over three or four sessions.
General Interviewing Strategies

• Ask questions that are relevant and within the scope of the investigation
• Ask open-ended, general questions calling for narrative answers before focusing on narrower, specific questions
• Avoid leading questions; ask questions in a manner that discloses the minimum amount of information
• Avoid compound questions
• Elicit facts rather than conclusions
• Do not ask questions that assume information that hasn’t been established yet
General Interviewing Strategies, cont.

Must be willing to ask difficult or sensitive questions in order to understand the intimate details of the incident; reassure the interviewee that this is ODR’s role, and we do so without any, e.g., value judgement

- Ask in a neutral, receptive tone
- Maintain eye contact
General Interviewing Strategies, cont.

- Clarify conflicting statements, information behind opinions, contemporaneous documentation
- Do not include your own interpretations, conclusions, or assumptions about the facts (neutral/impartial)
- Ask and order questions in ways to encourage parties and witness to provide information that will help the investigator to, sooner or later, relate events chronologically
General Interviewing Strategies, cont.

• Ask only for firsthand knowledge, unless, e.g., the witness is explaining what Complainant, Respondent told him or her

• Ask witnesses to identify all individuals who may have relevant information and the nature of that information

• Ask witnesses to identify any relevant documents
Putting the Interviewee at Ease

- Informal
- Relaxed (Pacing)
- Friendly
- Supportive
- Encouraging

**NEUTRAL/IMPARTIAL**

- Professional
- Polite
- Open
- Fair
Probing

Q. What is probing?

A. Asking follow-up questions about a given interview response to identify and obtain more specific information that the initial response may have behind it.
Probing, cont.

- Be silent -- sometimes an effective probe.
- If you have provoked a negative emotion, e.g., anger, hostility, indignation, or fear, one way of letting the emotion defuse is not to push but to circle back to the subject again later once the interviewee has regained composure, or offer to take a break.
Interviewing Challenges

Dealing with Negative Feelings
Witness is responding negatively to something interviewer is doing

• Listen closely and watch non-verbal cues to gauge total message
• Try to identify the source of the problem
• Reflect your understanding of the problem in simple terms
• Concentrate on the response
• Acknowledge the problem again, alter any behavior on your part that is contributing to a negative response, and continue the interview
Assessing Witness Credibility and Relevance

• Was the witness able to see, hear, or know the things about which they reported?

• How well could the witness remember and describe the things about which they reported?

• Did the witness have any interest in the outcome of the complaint or any other motive that might go to the weight of the information provided? Any indication the witness was coached?
Assessing Witness Credibility and Relevance, cont.

- Uncertain, confused, self-contradictory, or evasive during the interview? Possible legitimate reasons for this?

- Make sense in light of the totality of the other evidence, including the evolving timeline of the case, the site visit, other witness information, and physical evidence?

- Make sense in light of the known relationships in the case?
Drafting Investigative Reports
Recommended Findings of Fact

The Investigative Team will make recommended findings of fact in the investigative report, applying a preponderance of the evidence standard. The hearing panel independently makes the determination regarding responsibility.
Recommended Findings of Fact, cont.

Recommended factual findings on each issue investigated

- The Report should summarize the key facts supporting each recommended finding, including information obtained through party and witness interviews and documents.

- Material conflicting information should typically be identified. If the Investigative Team was able to resolve the conflict, the report should indicate, in the recommended finding, how (for example, by corroborating documents or witnesses).
In gathering and weighing evidence, the Investigative Team will note that whether conduct is unwelcome is subjective, that is, based on whether the person subject to the conduct viewed it as unwelcome. However, in making recommended findings of fact as to whether consent was communicated by the person subject to the conduct, and as to the elements of severity, pervasiveness, objective offensiveness, and denial of equal access, consideration should be given not only to the subjective perspective of the person subject to the conduct, but also to the objective view of a reasonable person, based on the totality of the circumstances.
The following types of information may be helpful in making recommended findings of fact, while avoiding prejudgment of the facts at issue:

- an objective evaluation of all relevant evidence – including both inculpatory (tending to support that the alleged conduct occurred) and exculpatory (not tending to support that the alleged conduct occurred) evidence;
- statements by any witnesses to the alleged incident;
- information about the relative credibility of the parties and witnesses, so long as credibility determinations are not based on a person’s status as a complainant, respondent, or witness;
- the detail, consistency, and plausibility of each person’s account;
- the absence of corroborating information where it should logically exist;
- information that the Respondent has been found to have committed sexual misconduct or harassment;
- information that the Complainant has been found to have made false allegations against others;
- information about the parties’ reaction or behavior after the alleged incident; and
- information about any actions the parties took immediately following the incident, including reporting the matter to others.
Informal Resolution
Informal Resolution

• Informal Resolution under the Interim Title IX Sexual Harassment Policy may only be offered after a formal complaint is filed.

• Parties must be provided written notice disclosing:
  • the allegations,
  • the requirements of the informal resolution process including,
    • the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and
    • any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.
Informal Resolution, cont.

- Both parties must give *voluntary informed consent* to attempt informal resolution.
- At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint.
- Informal resolution *may not* be offered as a process to resolve allegations that an employee sexually harassed a student.
- A school *may not* require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment.
Informal Resolution, cont.

• Length of process –
  • Ordinarily the parties will have up to two weeks from receipt of the request to reach an informal resolution.
  • Extensions may be granted by *written agreement* of the Complainant and the Respondent with the approval of the Director of ODR in consultation with the University Title IX Coordinator and the relevant School or unit.