

# Appellate Panelist Training

Presented by OGE and ODR

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**HARVARD UNIVERSITY**  
Office for Dispute Resolution

# Agenda

**01**

## **Federal and State Requirements**

Title IX, VAWA, MA Law, and Harvard's Structure

**02**

## **Harvard's Policies and Procedures**

Review of Harvard's Policies and Procedures

**03**

## **The Appeal**

The Bases and the Process

**04**

## **Questions**

# What is Title IX?

“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.”

# Regulatory Requirements



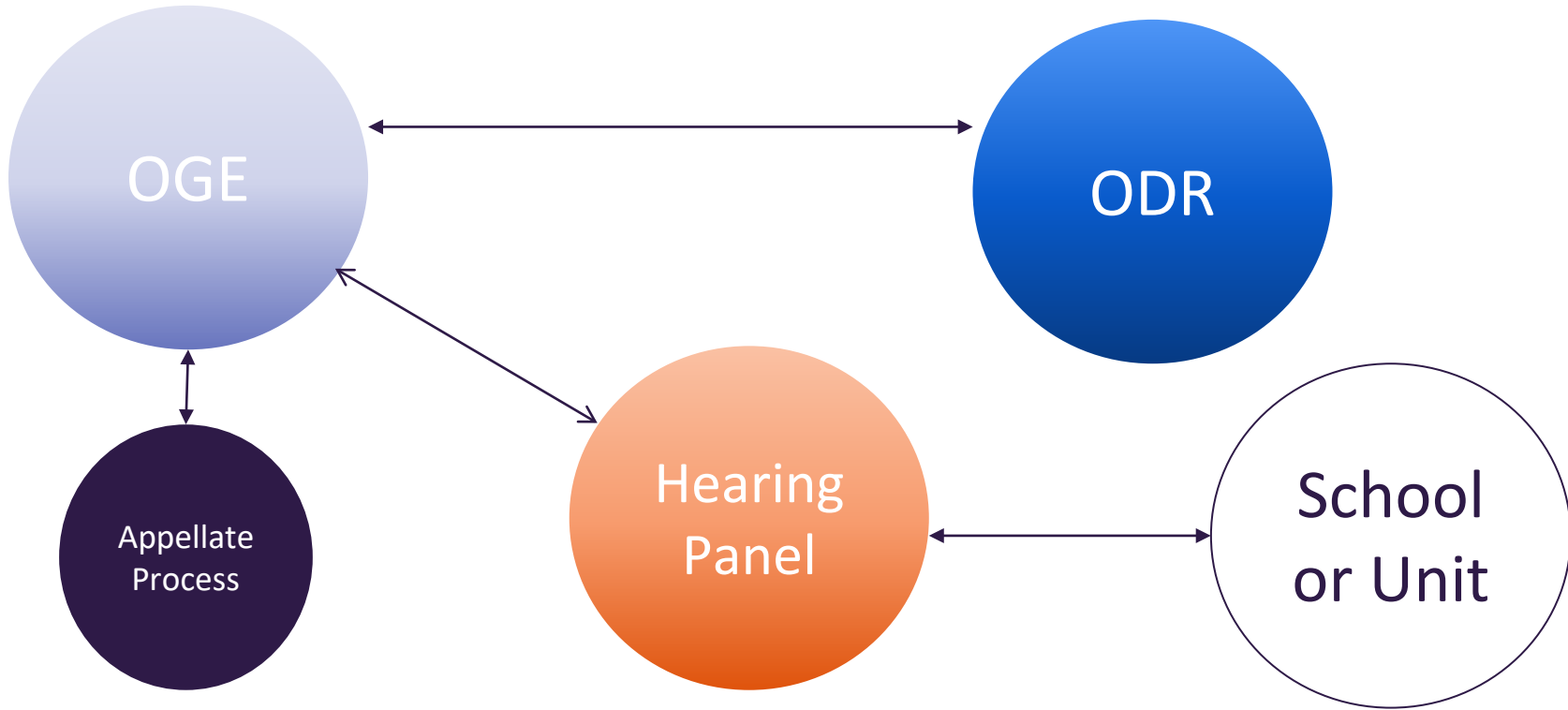
# Title IX Training Requirements

- Definition of Sexual Harassment
- Scope of Harvard's Programs or Activities
- How to Conduct an Investigation and Grievance Process including Hearing, Appeals, and Informal Resolution Processes, as Applicable
- How to Serve Impartially
- Technology Used During the Hearing
- Issues of Relevance

# Harvard's Structure

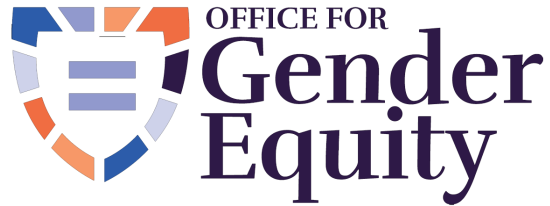
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# Harvard's Structure



# What is OGE's Role?

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## Sexual Harassment/Assault Resources & Education (SHARE) (confidential & privileged)

### Spaces for safety and healing, coalition building, and restorative practices

- ✓ Support for those who have experienced harm:
  - ✓ Trauma-informed counseling
  - ✓ Groups
  - ✓ Advocacy and accompaniment with Title IX, legal processes, police, hospital, etc.
  - ✓ Community resources and referrals
- ✓ Restorative practices
- ✓ Proactive partnership
- ✓ Accountability-focused counseling
- ✓ Group support and consultation
- ✓ Culture change initiatives

### Call for related support anytime

- ✓ Main office line: (617)-496-5636
- ✓ 24/7 Confidential hotline: (617)-495-9100



## Prevention Education, Engagement & Outreach

### Promote a climate of gender equity and inclusivity in your School or unit

- ✓ Consultation and assessment
- ✓ Culture change initiatives
- ✓ eLearning courses
- ✓ Advisory committees
- ✓ Workshops and presentations
  - ✓ Gender Diversity and Inclusion
  - ✓ Cultivating a Climate of Gender Equity
  - ✓ Bystander Intervention
  - ✓ Consent Education
  - ✓ Know Your Role, Responsibilities, and Resources



## Title IX Resources (private resources, not confidential)

### Connect with University and local Title IX resources

- ✓ Seek supportive measures through network of TIX Resource Coordinators
- ✓ Disclose/notify the University of a concern of sexual harassment or other sexual misconduct
- ✓ Connect with University and community resources
- ✓ Learn about the University policies and procedures
- ✓ File a formal complaint

### Anonymously disclose a concern

- ✓ Share your concerns anonymously with a member of the Title IX team via the [Resource for Online Anonymous Disclosure \(ROAD\)](#)

# What is ODR's Role ?

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HARVARD UNIVERSITY  
Office for Dispute Resolution

# ODR's Services



## Request Information

If you have questions about the services we offer, you may contact ODR to schedule an informational meeting.

[MAKE A REQUEST](#)



## Investigative Process

Learn more about the investigative process including how to file a formal complaint with the University Title IX Coordinator.

[INVESTIGATIVE PROCESS](#)



## Seek Informal Resolution

Some incidents of sexual harassment and other sexual misconduct may be resolved through an informal resolution process without a full investigation.

[ABOUT INFORMAL RESOLUTION](#)

## **ODR's Internal Investigators:**

- Eric Jordan, J.D.
- Korey Moscatelli, J.D.
- Susanna Murphy, J.D.
- Jennifer Worley, J.D.

## **ODR's Current External Investigators:**

- Meaghan Borys, J.D.
- Brigid Harrington, J.D.
- Elizabeth Sanghavi, J.D., M. Ed.
- Alexandra (Sasha) D. Thaler, J.D.

# **ODR's Investigators**


# Harvard's Policies

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# Harvard's Policies

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## THE POLICIES



**Interim Title IX Sexual Harassment Policy**

This Policy is designed to address conduct that falls within Title IX of the Education Amendments of 1972 and other federal and state laws and regulations. This Policy addresses misconduct occurring on or after August 14, 2020.

[READ THIS POLICY \(PDF\)](#)



**Interim Other Sexual Misconduct Policy**

This Policy is designed to address sexual misconduct that falls outside the jurisdiction of the Interim Sexual Harassment Policy. This Policy addresses misconduct occurring on or after August 14, 2020.

[READ THIS POLICY \(PDF\)](#)



**Sexual and Gender-Based Harassment Policy**

This Policy addresses sexual harassment and other sexual misconduct occurring before August 14, 2020.

[READ THIS POLICY \(PDF\)](#)

[EN ESPAÑOL \(PDF\)](#)

# Harvard's Policies: Interim Title IX Sexual Harassment Policy (ITIXSHP)

## Sexual Harassment?

- Unwelcome Conduct
- On Basis of Sex, including Sexual Orientation and Gender Identity
- Quid Pro Quo, or
- So Severe, Pervasive, and Objectively Offensive, it Effectively Denies Equal Access, or
- Sexual Assault, Dating Violence, Domestic Violence, and Stalking

## Jurisdiction

- Against a Person in the United States
- Harvard Property, or
- Off Harvard Property
  - University Program or Activity
  - Substantial Control Over Person Accused and Context
  - Building Owned or Controlled by Recognized Student Organization

Complainant at time of filing must be participating or attempting to participate in University Program or Activity

# Harvard's Policies: Interim Other Sexual Misconduct Policy (IOSMP)

## Other Sexual Misconduct?

- Unwelcome Conduct
- On Basis of Sex, including Sexual Orientation and Gender Identity
- Quid Pro Quo, or
- So Severe, Persistent, or Pervasive, it Effectively Denies Equal Access (Hostile Environment)

## Jurisdiction

- Harvard Property; or
- Off Harvard Property, if:
  - University Program or Activity
  - Hostile Environment for Member of Harvard Community



# Harvard's Policies: IOSMP continued

- Retaliation
  - Retaliation against an individual for making a report or complaint of sexual harassment, or for participating or refusing to participate in any proceeding regarding such a complaint, or for opposing discriminatory practices is prohibited.
- Not in Good Faith, False or Misleading
  - Submitting a complaint that is not in good faith or providing materially false or misleading information in any such proceeding is also prohibited, provided that a determination regarding responsibility or lack of responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

# Harvard's Policies: Consent

“Consent is agreement, assent, approval, or permission given voluntarily and may be communicated verbally or by actions. That a person welcomes some sexual contact does not necessarily mean that person welcomes other sexual contact. Similarly, that a person willingly participates in conduct on one occasion does not necessarily mean that the same conduct is welcome on a subsequent occasion.”

# Harvard's Policies: Incapacitation

When a person is incapacitated, meaning so impaired as to be incapable of giving consent, conduct of a sexual nature is deemed unwelcome,

- provided that the Respondent knew or reasonably should have known of the person's incapacity.
- The person may be incapacitated as a result of drugs or alcohol or for some other reason, such as sleep or unconsciousness.
- A Respondent's impairment at the time of the incident as a result of drugs or alcohol does not, however, diminish the Respondent's responsibility for sexual harassment under this Policy.

# The Investigation

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# The Investigative Process – Initiating A Formal Complaint

To file a formal complaint, individuals may submit a complaint in writing to the University Title IX Coordinator at [oge@harvard.edu](mailto:oge@harvard.edu) or via the on-line complaint form. Formal complaints:

- must be a document or electronic submission
- must contain a physical or digital signature, or otherwise indicates that the individual is the person filing the formal complaint
- must allege sexual harassment or other sexual misconduct against an individual and request that the University investigate the allegation(s)

# The Investigative Process – Initiating A Formal Complaint Cont.

- should state the name (if known) of the individual who you are alleging engaged in sexual harassment or other sexual misconduct and describe with reasonable specificity the incident(s) of alleged sexual harassment or other sexual misconduct, including the date and place of such incident(s)
- must be in your own words, and may not be authored by others, including family members, advisors, or attorneys
- should have an attached list of any sources of information (for example, witnesses, correspondence, records, and the like) that you believe may be relevant to the investigation

# After a Formal Complaint Is Received



University  
Title IX  
Coordinator

ODR

# The Investigative Process – Impartiality: Avoiding Prejudgment, Conflicts of Interest, and Bias

- The Procedures:
  - “Any individual designated as a University Title IX Coordinator or a School or unit Title IX Resource Coordinator, investigator, School designee, hearing panelist, appellate panelist, or any person designated to facilitate an informal resolution process will not have a conflict of interest or bias for or against complainants or respondents generally or an individual Complainant or Respondent in a case to which they are assigned.”
- Accurate resolution of each allegation requires objective evaluation of all relevant evidence without bias and without prejudgment of the facts.
- Parties and witnesses are not automatically or prematurely believed or disbelieved.
- Whether bias exists is a fact-specific inquiry. Bias is not determined by generalizations, for example, about prior professional work.



# The Investigative Process – Confidentiality

- The Procedures
- The need for caution and vigilance in ODR investigations
- Reasonable steps to protect privacy

# The Investigative Process – Confidentiality Cont.

- Share information with others only on a “need to know” basis.
- Information about the complaint, including the names of the people involved, is shared with witnesses only to the extent necessary to gather information.
- Inform parties and witnesses, as appropriate, the kind of information likely to be disclosed for investigative purposes, to whom, and why.
- Explain to participants party access to case materials.
- Conduct interviews in a space that ensures privacy.

# The Investigative Process – The Initial Review

- Local Title IX Resource Coordinator notified of formal complaint for purposes of supportive measures
- Case assigned to ODR Investigator
- Complainant invited to participate in initial review interview

# The Investigative Process – Personal Advisors

- Personal Advisors – Complainants and Respondents may bring a personal advisor of their choice to any meeting or proceeding that is part of the investigation, including initial review, or in cases under the Interim Title IX Sexual Harassment Policy, the hearing

# The Investigative Process – The Initial Review

- Written notice of determination of whether formal complaint shall proceed to investigation or if a dismissal is warranted

# Dismissal Following Initial Review

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ODR

OGE

Appeal

# The Appeal

- Must be received by OGE within one week of the date of the notice of dismissal or the determination.
- Must be in writing and no more than 2,500 words.
- The appeal will be shared with the non-appealing party.
- The non-appealing party may submit a response to the appeal within one week of receiving the appeal, and the response must be no more than 2,500 words.
- The response will be shared with the appealing party.
- The appealing party may submit a reply of no more than 1,000 words within 2 business days.
- The non-appealing party will have access to the other party's reply, but no further responses will be permitted.
- All appeals will be based solely on the written record.

# Bases for Appeal - ITIXSHP

1. A procedural irregularity that affected the outcome of the decision;
2. The appellant has new evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, and that could affect the outcome of the decision;
3. The University Title IX Coordinator, School or unit Title IX Resource Coordinator, Investigative Team, or Hearing Panel had a conflict of interest or bias for or against complainants or respondents generally or the individual Complainant or Respondent that affected the outcome of the matter; or
4. On the record as a whole, no reasonable Hearing Panel could have reached the same determination regarding responsibility.



# Bases for Appeal - IOSMP

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or
4. On the record as a whole, no reasonable Investigative Team could have reached the same determination regarding responsibility.

# Bases for Appeal

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Disagreement with the Investigative Team's [or Hearing Panel's] reason(s) for a dismissal or the findings or determination regarding responsibility, is not, by itself, a ground for appeal.

# The Investigation

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# The Investigative Process – The Investigation

- Respondent provided opportunity to submit a written response to allegations
- Individual interviews with each of the parties
- Individual interviews with witnesses
- Collection of relevant information from other sources, including site visits
- Parties provided equal opportunity to review and respond to relevant information collected during the course of the investigation
- Parties in ITIXSHP cases provided equal opportunity to review, inspect, and respond to any directly related evidence obtained in the investigation

# The Investigative Process – ODR’s Interviews

- Ask questions that are relevant and within the scope of the investigation
- Ordinarily:
  - 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
- Consider cultural sensitivity and best practices in LGBTQ terminology
- Use trauma-informed practices as part of an impartial, unbiased investigative process that does not rely on sex stereotypes, while taking care not to permit general information about the neurobiology of trauma to lead to applying generalizations to allegations in specific cases

# The Investigative Process – Relevance

- When identifying potential witnesses, the parties should understand that the purpose of interviews is to gather and assess relevant information about the incident(s) at issue in the formal complaint.
  - Prior misconduct by either party, or a witness, that is otherwise relevant, but that was not supported by a finding resulting from a formal, impartial investigative process, will be given minimal (i.e., the least possible) weight by the Investigative Team (in its recommended findings of fact) and the Hearing Panel
  - Information regarding the character of either party, or a witness, that is otherwise relevant, will be given minimal weight by the Investigative Team (in its recommended findings of fact) and the Hearing Panel
  - Information from lie detector tests or similar taken by either party, or any witness, that is otherwise relevant, will be given minimal weight by the Investigative Team (in its recommended findings of fact) and the Hearing Panel

# The Investigative Process – Relevance Cont.

- Evidence that is ***not relevant***:
  - Questions and evidence about the Complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the Complainant’s prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or if the questions and evidence concern specific incidents of the Complainant’s prior sexual behavior with respect to the Respondent and are offered to prove consent.

# The Investigative Process – Relevance

- Evidence that is ***not relevant***:
  - Information protected under a legally recognized privilege, unless the individual holding such privilege has waived the privilege.



# The Final Report of Investigation – IOSMP

- Introduction
- The Policies
- The Proceedings
- Findings of Fact
- Addenda
- Exhibits

# The Process Following the Issuance of the Investigative Report – IOSMP



# The Investigative Report: Provided to the Hearing Panel – ITIXSHP

- Introduction
- The Policies
- The Proceedings
- Summary of Evidence and Recommended Findings of Fact
- Addenda
- Exhibits

# The Process Following the Issuance of the Investigative Report - ITIXSHP



# The Hearing

# The Written Determination – ITIXSHP

- Introduction/Allegations
- The Policies and Evidentiary Standard
- Procedural Steps
- Findings of Fact Supporting the Determination Regarding Responsibility
- Conclusions Regarding the Application of the Policies to the Facts and Statement of and Rationale for the Result as to Each Allegation
- Determination Regarding Responsibility
- Procedures and Permissible Bases for the Complainant and Respondent to Appeal

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# Bases for Appeal

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# Additional Resources to Review as Appellate Panelist

- [Harvard's Policies and Procedures Prohibiting Sexual Harassment and Other Sexual Misconduct](#)
- [Appellate Panel Title IX and Other Sexual Misconduct Basics and Refresher](#)

# Questions