Hearing & Appellate Panelist Training

Presented by OGE and ODR

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 Hearing & Appeal**

What to Expect, Your role as a Panelist, and Relevance

04 **Technology**

Technology Used During the Hearing

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."

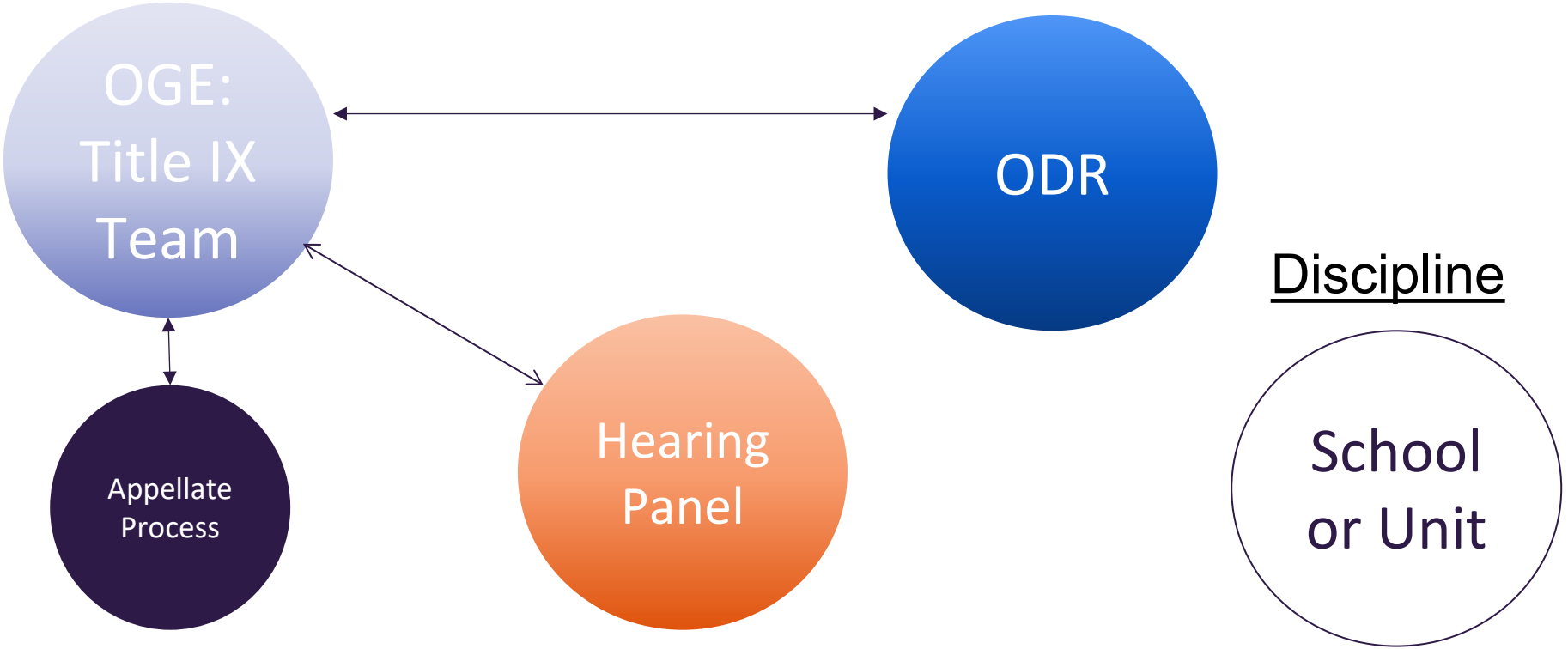
Regulatory Requirements

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

Harvard's Structure



What is OGE's Role?

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 ?

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 Investigators

ODR uses both internal and external investigators

https://odr.harvard.edu/our-investigators

Harvard's Policies

Harvard's Policies

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

Sexual Harassment?

- Unwelcome Conduct
- On Basis of Sex
- 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.

Initiating a Formal Complaint

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 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)

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

The Investigative Process

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

The "Confidentiality" language in the procedures for each policy is substantially similar. Example from the student procedures for the ITIXSHP:

"The ODR, the Hearing Panel, the Appellate Panel, personal advisors, and others at the University involved in or aware of the formal complaint will take reasonable steps to protect the privacy of all involved. Once a complaint is filed, the Complainant, the Respondent, and any witnesses will be notified of the potential for compromising the integrity of the investigation by disclosing information about the case and the expectation that they therefore keep such information – including any documents they may receive or review –confidential. They also will be notified that sharing such information might compromise the investigation or may be construed as retaliatory. Retaliation of any kind is a separate violation of University policy and may lead to an additional complaint and consequences.

The parties remain free to share their own experiences, other than information that they have learned solely through the investigatory process. The parties are not restricted in their ability to discuss the allegations under investigation, except in a manner that constitutes retaliation, though to avoid the possibility of compromising the investigation, it is generally advisable to limit the number of people in whom they confide."

The Investigative Process – Confidentiality

- 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 – 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 hearing

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
- ITIXSHP: Parties notified in writing of the allegations and provided a copy of the procedures
- Complainant invited to participate in initial review

The Investigative Process – The Initial Review

- Parties notified in writing of determination of whether formal complaint shall proceed to investigation or if a dismissal is warranted

Dismissal Following Initial Review

The Investigative Process – The Investigation

- Respondent has one week to submit written response to allegations
- Individual interviews with each party
- 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 and inspect any directly related evidence obtained as part of 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 inclusive 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. In TIXSHP cases:
  - 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

- 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 Investigative Process – The Investigation (ITIXSHP)

- Parties given 10 business days to respond (in writing) to all directly related evidence prior to the conclusion of the investigation
- Parties (and their advisors) provided Investigative Report with recommended findings of fact
  - Parties provided 5 business days to submit a written response
- Investigative Report provided to School/unit Title IX Resource Coordinator and University Title IX Coordinator for informational purposes

The Investigative Process – The Investigative Report (ITIXSHP)

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

The Investigative Process – 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 Hearing

(ITIXSHP Only)

The Hearing – The Pre-Hearing Meeting

- Generally, takes place one week prior to the Hearing
- Includes Hearing Chair, Hearing Panelists, and University Title IX Coordinator
- Opportunity to ask questions about process, technology, and/or any case-related materials
- Review of technology used during the Hearing (i.e., Zoom)

The Hearing – What to Expect

- Secure Zoom Link
- Attendees
- Voluntariness of Process
- Expectations/Rules Governing the Hearing
- Evidence and Relevance
- Questioning
- Closing

Evidence & Relevance

Cross Examination

The Hearing – The Written Determination

- After the Hearing and deliberations, the Hearing Chair will draft a written determination
- The parties are then afforded the opportunity to appeal to a panel of drawn from a pool of trained faculty and administrators
- After the appeal period, in matters where the Hearing Panel finds a policy violation, the matter will be passed on to the relevant entity at the University to determine discipline
- The Hearing Chair will integrate discipline into the letter before sending to OGE to share with the parties

The Hearing – The Written Determination

- 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

The Process Following the Issuance of the Investigative Report - ITIXSHP

The 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

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, or Investigative Team, 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 Investigative Team/ Hearing Panel could have reached the same determination regarding responsibility.

Bases for Appeal

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.

Additional Resources

- Harvard's Policies and Procedures Prohibiting Sexual Harassment and Other Sexual Misconduct
- ODR Training 2024-2025
- Rules Governing the Hearing
- Zoom Instructions (Panelists)

Questions