



TO: Hon. Suzanne B. Goldberg, Acting Assistant Secretary for Civil Rights

FROM: International Ombudsman Association
Melanie Jagneaux, President
Charles L. Howard, Executive Director
2150 N. 107th St. Ste. 205
Seattle, WA 98133
info@ombudsassociation.org

DATE: June 10, 2021

RE: Written Comment: Title IX Public Hearing (2020 amendments to the Title IX regulations in the postsecondary educational environment)

The provisions of the 2020 Amendments to the Title IX Regulations and accompanying commentary relating to organizational ombuds reporting and recordkeeping obligations should be retained.

Introduction

We are writing on behalf of the International Ombudsman Association (“IOA”), the leading professional association committed to supporting organizational ombuds, including those working in educational institutions worldwide. Organizational ombuds programs have been created in many colleges and universities over the past fifty years, and now more than 70 percent of Association of American Universities (AAU) member universities in the United States have at least one organizational ombuds.

Organizational ombuds play an important and unique role on many campuses by providing confidential assistance to students, faculty, and staff in addressing problems, conflicts, and concerns. They provide conflict management and prevention services, as well as problem solving, strategy development, and coaching. An organizational ombuds assists individuals by serving as a confidential source of information; helping people develop options to address or report their concerns; advising regarding available supportive services; and explaining administrative processes, all while maintaining confidentiality. Ombuds also play an important role as an early warning and systemic issue feedback resource for the administration of a college or university to advise when systems are not working as designed.

These services are particularly needed and relevant in the context of sexual harassment and discrimination within the scope of the Title IX Regulations. Just in the last three years, studies by the [National Academy of Sciences, Engineering, and Medicine](#) (NASEM), the [Urban Institute](#), the [U.S. Commission on Civil Rights](#), and the [University of Massachusetts Amherst](#) analyzed the problem of sexual harassment and discrimination and recommended the greater use of ombuds to provide confidential assistance to people who are otherwise afraid of retaliation or reluctant to report such issues. Similar conclusions were presented in the lead article and accompanying articles in the May-June edition of the [Harvard Business Review](#). These studies build on

decades of work among experienced ombuds who offer victims/survivors and complainants a resource that is confidential, informal, neutral, and independent, in keeping with the IOA Standards of Practice.¹

Experience has proven that many people wish to consult an organizational ombuds to obtain guidance on what their options are *before* they decide whether or how to take action. While typically there are multiple means for reporting misconduct, including Title IX Coordinators, there is often a paucity of resources for confidential assistance. An ombuds' ability to have confidential communications to protect victims'/survivors' privacy and not serve as a reporting channel is what makes organizational ombuds distinctive and valuable in this context.

Organizational ombuds also can serve as a valuable confidential resource for people who are accused of sexual harassment. The fact that they are a valuable resource for victims and survivors in no way precludes them from being a valuable confidential resource for alleged harassers. In fact, ombuds can consult with and provide impartial confidential assistance to **any** party involved in a sexual harassment situation, whether they are a victim, survivor, bystander, alleged harasser, supervisor, or someone else responsible for the well-being of others.

2020 Amendments to Title IX Regulations

The 2020 Amendments have been highly controversial in many respects, but IOA is limiting its comments to the issues of (1) whether communications with organizational ombuds who comply with the IOA Standards of Practice should be imputed to a post-secondary institution to place it on notice of Title IX claims, and (2) record keeping obligations as they relate to properly structured organizational ombuds.

Actual Notice Standard

The definition of "Actual knowledge" in §106.30, makes it clear that institutional liability for Title IX claims rests on notice of reports to Title IX Coordinator or to "any official of the recipient who has authority to institute corrective measures on behalf of the recipient...." The Department based this new standard on prior Supreme Court authority² that required "actual knowledge" and rejected the concept of a "Responsible Employee" that previously had been used as guidance for imputed knowledge and institutional liability.

IOA urges the Department not to change the standard for recipient liability based on notice to the Title IX Coordinator or the actual knowledge of "any official of the recipient who has authority to institute corrective measures on behalf of the recipient...." The previous guidance of "Responsible Employee" was often interpreted overbroadly by institutions out of fear of compliance actions by the Department and was itself broader than the standard for institutional liability articulated by the Supreme Court. The current standard, embodied in §106.30, is solidly based on Supreme Court precedent and provides a clear standard for higher educational institutions.

While the Department, in response to comments previously submitted by IOA on the then proposed regulations, declined to specifically exempt organizational ombuds from being "responsible employees" (and thus mandatory reporters), commentary to the amended regulations recognized that each institution should perform a

1. ¹ https://www.ombudsassociation.org/assets/docs/IOA_Standards_of_Practice_Oct09.pdf

² *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) and *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)

functional analysis of its ombuds office to determine if the ombuds is an “official of the recipient with authority to take corrective measures”:

The Department encourages postsecondary institution recipients to examine campus resources such as organizational ombudspersons and determine whether, given how such ombudspersons work within a particular recipient’s system, such ombudspersons are or are not officials with authority to take corrective measures so that students and employees know with greater certainty the persons to whom parties can discuss matters confidentially without such discussion triggering a recipient’s obligation to respond to sexual harassment. We note that with respect to elementary and secondary schools, notice to any employee, including an ombudsperson, triggers the recipient’s response obligations.¹³

IOA believes that this is an appropriate standard because it focuses on the role of an organizational ombuds program in a particular institution rather than merely the title of "ombuds." Organizational ombuds who adhere to the IOA Standards of Practice, however, are not *officials* with *authority* to take corrective measures *on behalf of their institutions*.

As independent, informal, and neutral resources, IOA organizational ombuds are not part of management or the administration of a higher educational institution. They have no authority to make management decisions, set policy, investigate, or take any action on behalf of or against anyone on campus. This includes taking corrective measures on behalf of the institution. Instead, it is essential that parties have someone on campus with whom they can discuss matters confidentially without triggering an obligation to report. Parties need to know that there is a confidential, reliable resource who can provide guidance on the situation, the process, and options for reporting and/or resolution so they can make informed choices and take appropriate action. The organizational ombuds is essential in fulfilling that role.

The organizational ombuds role is designed to eliminate all barriers that might prevent an individual from feeling safe enough to ask questions and talk openly about confidential matters. Thus, when victims/survivors, accused individuals, or bystanders choose to discuss sexual harassment with an organizational ombuds, the ombuds can offer informal assistance that otherwise may not be provided by anyone else. This valuable service is vitiated when ombuds are compelled to be mandatory reporters. The standard embodied in the current regulations both fairly applies the law and, by focusing on the question of whether an official has authority to institute corrective measures, prevents properly structured programs from being considered mandatory reporters.

Record Keeping

The Department declined to impose new record keeping obligations on organizational ombuds in the 2020 Amendments to the Regulations. Instead, record keeping obligations are imposed on the types of records that are created, not who creates them:

The Department wishes to clarify that, unless ombudspersons have created records that the Department requires the recipient to maintain or publish, ombudspersons do not fall under §106.45(b)(10). The

³ Department of Education, Docket ID ED 2018-OCR-0064, 34 CFR Part 106, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Financial Assistance, Final Rule issued May 6, 2020 at 346.

provision identifies the type of record that must be kept, not the category of persons whose records do or do not fall under this provision.⁴

IOA also supports this standard and analytical framework. Organizational ombuds who comply with IOA Standards of Practice do not create or maintain the types of records encompassed by §106.45(b)(10).

Conclusion

IOA urges the Department to retain the provisions in the 2020 Amendments to the Title IX Regulations, and accompanying commentary, that articulate an actual knowledge standard for institutional liability (notice to the Title IX Coordinator and to an "official of the recipient with authority to institute corrective measures on behalf of the recipient") and the recordkeeping obligations. IOA is confident that neither of these provisions, because they are based on a functional analysis, will preclude organizational ombuds programs that are compliant with IOA Standards of Practice from continuing to serve as a valuable confidential resource for people with sexual harassment or discrimination concerns. IOA also urges the Department not to reinstate previous guidance based the "responsible employee" concept, which was not anchored on Supreme Court precedent, was overbroad, and was subject to misapplication out of fear of compliance actions by the Department.

⁴ *Id.* at 1411.