



January 30, 2019

Secretary Betsy DeVos  
c/o Brittany Bull  
U.S. Department of Education  
400 Maryland Ave., SW Room 6E310  
Washington, D.C. 20202

**RE: Comment on FR Doc# 2018-25314**

Dear Secretary DeVos:

The International Ombudsman Association (“IOA”), the leading professional association committed to supporting organizational ombuds worldwide working in educational institutions, appreciates the opportunity to provide comments in response to the Department’s November 29, 2018 Notice of Proposed Rulemaking (“NPRM”) amending regulations to Title IX of the Education Amendments of 1972 (“Title IX”), Docket ID ED-2018-OCR-0064.

**Introduction**

Many educational institutions, including more than 70 percent of AAU member universities,<sup>1</sup> across the United States have long employed at least one organizational ombuds,<sup>2</sup> an important role that has been overlooked in previous Title IX guidance as a valuable resource to students, faculty, staff and administration. The Department of Education’s proposed changes offer an overdue opportunity to explicitly acknowledge and incorporate the role of the organizational ombuds into the language of the Title IX regulations. The primary purpose of the organizational ombuds at our educational institutions is to assist students and employees in addressing problems, conflicts, and concerns.

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<sup>1</sup> IOA membership roster. Internal document, last accessed Dec. 11, 2018. Roster includes ombuds from the Association of American Universities member institutions.

<sup>2</sup> There are a number of different titles or names for this position, including “ombudsman,” “ombudsperson,” “ombuds,” or “ombud.” Use of the shortened form, ombuds, here is not intended to discourage the use of other terms.



The IOA submits the following comments and recommendations, and specifically requests that the final regulations include a statement expressly permitting colleges and universities to designate their organizational ombuds as “confidential resources” under Title IX. We begin by explaining why the proposed regulations make the confidential ombuds role more necessary and valuable to colleges and universities than ever before.

## **Background**

Organizational ombuds play an important and unique role on many college and university campuses. They provide conflict management and prevention services, as well as problem solving, strategy development, and coaching services. They also play an important role as an early warning resource on campuses to advise when systems are not working as designed. The organizational ombuds assists individuals by serving as a confidential source of information; providing reporting options; advising regarding available supportive services; and explaining administrative processes. By definition, then, organizational ombuds who follow the Standards of Practice of the IOA are neither responsible employees as currently defined by Title IX guidance, nor “officials with authority to institute corrective measures on behalf of the recipient” as proposed under section 106.44(a). Pursuant to the Standards of Practice of the IOA,<sup>3</sup> organizational ombuds are:

- **Confidential** -- All communications between an organizational ombuds and visitors<sup>4</sup> are confidential, unless an imminent risk of serious harm to an individual exists.<sup>5</sup>

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<sup>3</sup> [https://www.ombudsassociation.org/assets/docs/IOA\\_Standards\\_of\\_Practice\\_Oct09.pdf](https://www.ombudsassociation.org/assets/docs/IOA_Standards_of_Practice_Oct09.pdf)

<sup>4</sup> “Visitors” is a term of art describing designated campus constituents which may include, for example, students, staff, faculty, postdoctoral fellows, and administrators, who voluntarily seek the assistance of an organizational ombuds.

<sup>5</sup> *Id.* §§ 3.1, 3.2



- **Neutral** -- The ombuds cannot participate in formal investigations or advocate for any party; therefore, the organizational ombuds can work with all sides in a situation with credibility and without being perceived as being biased.<sup>6</sup>
- **Informal and Independent** -- Organizational ombuds are NOT offices of notice for their campuses, as they are not authorized to receive formal complaints on behalf of the institution, and are not a part of the formal administrative structure of the institution.<sup>7</sup>

### **Why Add the Organizational Ombuds to the Title IX Regulations?**

#### **The negative effects of sexual harassment on individuals are well documented.** A 2018

Consensus Report on sexual harassment conducted by the National Academies of Sciences, Engineering, and Medicine concluded that individuals' experiences of sexual harassment are associated with reductions in their professional, psychological, and physical health.<sup>8</sup> Among the damaging effects of sexual harassment are negative emotions such as anger, fear, depression, and humiliation; stress-related psychosomatic symptoms such as headaches, nausea, palpitations, and sleeping disruptions; eating disorders and drug and alcohol abuse; symptoms of post-traumatic stress disorder; and for students in particular, a diminished sense of safety on campus. Employees report reduced job satisfaction and commitment to work, disengagement, task avoidance, and increased absenteeism.<sup>9</sup> The effects of sexual harassment have also been found to have

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<sup>6</sup> *Id.* §2.4

<sup>7</sup> *Id.* §§1, 4

<sup>8</sup> National Academies of Sciences, Engineering and Medicine, *Sexual harassment of women: Climate, culture, and consequences in academic sciences, engineering, and medicine*. (The National Academies Press 2018), available at <https://www.nap.edu/catalog/24994/sexual-harassment-of-women-climate-culture-and-consequences-in-academic>.

<sup>9</sup> U.S. Equal Emp. Opportunity Commission: Report of the co-chairs of the select task force on the study of harassment in the workplace (2016).



lasting impact on life satisfaction.<sup>10</sup> Unwelcome sexual conduct, especially when it is severe and offensive, may have these negative effects whether it is reported to university authorities or not.

**Sexual harassment is underreported.** Studies have consistently found that no more than 25 percent of employees and fewer than 15 percent of students who experience sexual harassment report it to their organization or university.<sup>11</sup> Individuals are reluctant to make formal reports because they fear being blamed, humiliated, accused of fabrication, ostracized, and subjected to retaliation; that there will not be sufficient evidence to prove their allegations; that reporting will damage their career and reputation; and that no action will be taken.<sup>12</sup> When sexual harassment is prevalent, and not reported because of such fears, it may create a campus culture that effectively denies equal access to education without the institution's actual knowledge.

**Organizational ombuds are prepared and well situated to surface unreported sexual harassment so options for addressing it can be discussed.** Because the organizational ombuds role is impartial, informal, confidential, and unaligned with university authorities who are responsible for investigating and remedying sexual harassment, the ombuds is uniquely positioned to help close the reporting gap; assist individuals with managing situations that could escalate into sexual harassment; and provide a safe place for both complainants (i.e., target/victim) and respondents (i.e., the accused) to seek information and navigate the reporting/grievance process.

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<sup>10</sup> *Id.*; See also A. Pino & T.A. Gannon, *An overview of the literature on antecedents, perceptions, and behavioral consequences of sexual harassment*, 18 J. OF SEXUAL AGGRESSION 209 (2012); and M.N. Rosenthal, A.M. Smidt, & J.J. Freyd, *Still second class: Sexual harassment of graduate students*, 40 PSYCHOL. OF WOMEN Q. 364 (2016).

<sup>11</sup> *Id.* at *supra* note 8. See also L.M. Cortina & J.L. Berdahl, *Sexual harassment in organizations: A decade of research in review*. In J. Barling and C. L. Cooper (eds.), *THE SAGE HANDBOOK OF ORGANIZATIONAL BEHAVIOR: VOLUME I MICRO APPROACHES* 469–497 (2008).

<sup>12</sup> *Id.* at *supra* note 9, Cortina & Berdahl.



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. Because the ombuds does not keep records, investigate complaints, or have authority to determine responsibility for wrongdoing, the ombuds sometimes hears of sexual harassment that otherwise would not be disclosed to anyone at the institution. 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.

The assistance of an ombuds is tailored to the concerns and circumstances of the individual seeking assistance. It might involve, for example, providing information about policies and resources so that a victim gains confidence to visit the Title IX Coordinator and consider making a formal report; empowering a student to identify creative approaches to preventing a peer's unwelcome sexual conduct from becoming more severe; listening to concerns of respondents and helping with comprehension of the process, whether or not they accept responsibility or believe the complainant's allegations are false; coaching individuals to alter their sexual language or nonverbal communication that others consider unwelcomed; or consulting with bystanders on methods for intervention (such as interrupting inappropriate interactions, taking an individual aside to express disapproval or share information about the institution's sexual harassment policy, or assisting a peer with reporting an incident).<sup>13</sup>

**Organizational ombuds function to keep the system true to its commitments and work with leadership to help ensure they work as intended.** The organizational ombuds is independent from other campus systems while being a part of the university. They share a commitment to the mission and values of

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<sup>13</sup> L. Bowes-Sperry & A.M. O'Leary. *To act or not to act: The dilemma faced by sexual harassment observers* 30(2) THE ACAD. OF MANAGEMENT REVIEW 288-306.



the university, yet the ombuds' loyalty is guided by principles of fairness and impartiality.<sup>14</sup> Ombuds work with leadership to address systems and individual performance issues that create trends or even single isolated-but-major breakdowns. This is especially true in situations of sexual harassment. A recent Practice and Compensation survey conducted by the IOA shows that most ombuds report helping with discrimination and harassment situations on their campuses, with more than half indicating that their most serious cases in the year prior involved harassment based on sex/gender.<sup>15</sup>

The proposed regulation changes would vest a large number of responsibilities in the Title IX Coordinator. This single position becomes the lynchpin in the system. The Title IX Coordinator has near exclusive responsibilities for coordinating responses for recipients;<sup>16</sup> interpreting and coordinating supportive measures<sup>17</sup> and ensuring the effectiveness of such measures.<sup>18</sup> The proposed rules obligate the Title IX Coordinator to act when multiple allegations against the same respondent are made,<sup>19</sup> and expect the Title IX Coordinator to create and maintain records of all actions taken.<sup>20</sup> Thus, the system is extremely dependent on the effectiveness of a single individual, the Title IX Coordinator. Such a system creates a strong potential for a single point of failure with significant impact—to victims, those accused, and the university. In such a system, the ombuds acts as a supplement to the formal reporting channels. They serve

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<sup>14</sup> M. Rowe & H. Gadlin, *The organizational ombudsman*. In W.K. Roche, P. Teague, & A.J.S. (eds.), *THE OXFORD HANDBOOK OF CONFLICT MANAGEMENT IN ORGANIZATIONS* (2014).

<sup>15</sup> IOA Practice and Compensation Survey (2017). Available to members at [www.ombudsassociation.org](http://www.ombudsassociation.org)

<sup>16</sup> §34 CFR 106.30

<sup>17</sup> *Id.*

<sup>18</sup> §34 CFR 106.44(b)(3)

<sup>19</sup> §34 CFR 106.44(b)(2)

<sup>20</sup> § 34 CFR 106.45(b)(7)



as a trusted navigator through a complex system. Through this process, ombuds surface sensitive and often otherwise undetected issues to help their institutions remain true to existing policy commitments, develop new policy responses when gaps appear, and implement system improvements when the need is identified. Based on their confidential work, ombuds provide anonymous, aggregate data to campus leadership. They identify problematic trends and make recommendations, which helps institutions improve a campus culture in which unreported sexual harassment can be pervasive and tolerated, or when systems do not work as designed.

### **Summary of Comments to Proposed Rule**

Organizational ombuds serve the goals of Congress, and the U.S. Department of Education as described in the Proposed Rule, and should therefore be specifically included as a confidential resource.

#### **§34 CFR 106.44(a)**

Suggested Language:

**“Meeting with confidential resources on campus, such as organizational ombuds—complying with industry standards of practice and code of ethics—does not constitute actual knowledge on behalf of the institution.”**

Pursuant to the *Gebser* decision, organizational ombuds working under the IOA Standards of Practice are not “offices of notice” for their college and university campuses, and are not “responsible employees” under the current Title IX guidance.<sup>21</sup> They are specifically not authorized to receive notice on behalf of their institutions, or to “institute corrective measures on behalf of the recipient.”<sup>22</sup> In addition, they offer

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<sup>21</sup> *Id.* at *supra* note 3 §§1 & 4; *See also Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 292-3 (1998). (“Responsible employees” are any employee who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence . . . to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.)

<sup>22</sup> *Id.* at *supra* note 3 §§3.8, 2.2



only informal services, and they have no authority to redress harassment or violence. They also do not have the authority to take action or to participate in any formal, investigative, adjudicative, or remedial process.<sup>23</sup>

Instead, when either a complainant or a respondent brings a Title IX concern to an organizational ombuds, the ombuds listens, provides pertinent information about the Title IX process, and identifies additional supportive resources to help an individual through the process. Because ombuds do not “receive reports,” they best serve the purpose of Title IX, all of the parties, and the institution by being noted as a confidential resource exempt from “actual notice.”

### **§34 CFR 106.45**

Organizational ombuds are resources during grievance and appeal processes. Ombuds are objective, neutral and confidential resources who provide information regarding the grievance process and procedure. Similarly, in the grievance process proposed here, ombuds would inform both complainant and respondent visitors about the available grievance processes and the options available to them. The ombuds also “advocates for equitably administered processes.”<sup>24</sup>

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<sup>23</sup> See, e.g. *Cotrone v. Marquette Univ.*, 2007 WL 1687576, \*3 (E.D. Wis. June 8, 2007) (recognizing confidentiality of university ombuds); *Karibian v. Columbia Univ.*, 812 F. Supp. 413 (S.D.N.Y 1993), *rev'd on other grounds*, 14 F.3d 773 (2d Cir. 1994) (finding information found through confidential channels did not equal actual notice and “knowledge” on behalf of the university requiring a remedial response); *Norden v. Samper*, 503 F. Supp. 2d 130 (D.D.C 2007) (finding that confidential communication with the ombuds did not put the organization on notice as to required disability accommodations).

In contrast, when ombuds do not adhere to the IOA Standards of Practice, courts have found that they can be considered offices of notice for the university. See, e.g. *S.S. v. Alexander*, 177 P.3d 724, 730 (Wash. App. Div. 1, 2008) (finding an ombuds, and other campus officials, were offices of notice for the university when the ombuds was “charged with the authority” to resolve student complaints, participated in formal dispute resolution processes, and was neither neutral nor independent); *Ault v. Oberlin College*, 2014 WL 4245991, 14-15 (N.D. Ohio Aug. 26, 2014) *rev'd on other grounds*, 620 Fed. Appx. 395 (U.S. App. 2015) (the college did not provide evidence regarding the functions and limitations of the office).

<sup>24</sup> *Id.*





### **§34 CFR 106.45 (B)(7)**

Suggested language:

**“Confidential resources such as organizational ombuds who comply with professional standards of practice and codes of ethics are exempt from institutional recordkeeping requirements pursuant to Title IX.”**

While proper recordkeeping is a necessary component to demonstrate a reasonable response in the Title IX processes, it is essential that confidential resources such as organizational ombuds who adhere to the IOA Standards of Practice be exempt from Title IX reporting and recordkeeping. Visitors to ombuds offices, both complainants and respondents, regularly state that they were searching for assistance that is completely confidential. They specifically report wanting a resource that is removed from the organizational structure of the rest of the institution, and that will not disclose their presence to anyone.<sup>25</sup> If campus ombuds were to report to the Title IX Coordinator, or another campus official, it would destroy those necessary components of the ombuds office.

### **Conclusion**

Organizational ombuds are informal resources for both complainants and respondents as well as for their colleges and universities as a whole. Organizational ombuds are well recognized on their campuses, and nationally, as being critical to ensuring fair and equitably administered processes. They provide complete guidance regarding processes; provide information regarding all of the options and resources available to those in need; and identify trends and systemic issues to leadership. The organizational ombuds

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<sup>25</sup> See Brian A. Pappas, *Out from the shadows: Title IX, university ombuds, and the reporting of campus sexual misconduct*, 94 DENV. L. REV. 71, 112 (2016). (Pappas’ research suggests that strict-compliance based regimes that cannot guarantee confidentiality will not be seen by campus targets as legitimate. Organizational ombuds, as completely confidential resources, independent of ordinary institutional structure, offer an ideal mechanism for encouraging reporting of sexual misconduct.) See also *supra* note 7 at 162. (A recent Consensus Studies report by the National Academies of Science, Engineering and Medicine contends that increasing informal, confidential options [such as organizational ombuds offices] within the complaint-response



is uniquely suited to help complainants overcome barriers to reporting sexual harassment and to help respondents navigate the university's policies and practices in a fair and equitable manner.

The International Ombudsman Association respectfully requests specific reference in the final Title IX regulations to organizational ombuds being confidential resources on college and university campuses, and not as "responsible employees" or as "officials with the authority to institute corrective measures." Such a reference would strengthen each institution's ability to provide access, support, and fair processes for all involved in a Title IX matter. Organizational ombuds are carefully positioned to help individuals make educated decisions that will greatly impact their lives while they work through emotionally challenging situations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Marcia Martinez-Helfman", with a large, stylized flourish at the end.

Marcia Martinez-Helfman, President  
International Ombudsman Association

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system is important for academic institutions to create more supportive environments for those who have experienced sexual harassment.)