INTERNATIONAL OMBUDSMAN ASSOCIATION

MEMORANDUM

To: All IOA Members & the Ombuds Community
From: IOA Government and Policy Committee
Date: 22 October 2020
Subject: **Recission of the U.S. Department of Education's 2016 Clery Act Handbook for Campus Safety and Security Reporting**

On October 9, 2020, the U.S. Department of Education rescinded the 2016 Clery Act Handbook for Campus Safety and Security Reporting, which was relied on by some colleges and universities to compel their ombuds to be designated as a "campus security authority (CSA)." Read the full announcement and the new guidance from the Department of Education here. The Handbook, while stating that the determination of who is a CSA should be based on a functional analysis (based on who has "significant responsibility for student and campus activities"), then went on to state (without any functional analysis) that examples of who meets the criteria for being a CSA would include, among others listed, "an ombudsperson (including student ombudspersons)." As you may recall, IOA raised this issue with a letter to the Department of Education and provided it with a legal memorandum prepared by the Wilmer Hale law firm. Unfortunately, the Department did not change its position. Read the Department's response.

In the memorandum accompanying its new guidance document, the Department acknowledged that there had been no change to either the statute or the regulations prior to 2016 and that the Handbook "expanded the definition of a CSA to include individuals on campus who should likely not be designated so under a strict interpretation of the regulatory framework." The Department further stated:

> The 2016 edition took an expansive view of the phrase "significant responsibility for student and campus activities" found at 34 CFR 668.46(a). As a result, it captured groups of individuals who did not have "significant responsibility." Even if the 2016 edition's guidance was drawn from Department experience, it was not applicable to every situation and may have resulted in creating more confusion than clarity. As a result, the Department's new guidance makes clear that it is up to an institution to identify which individuals are CSAs and it is beyond the Department's authority to disagree with that reasonable determination.

The memorandum from the Department, and the Appendix accompanying it, make it clear that this guidance, just like the guidance in the Handbook, is just that—guidance--not a regulation and has no force of law. Yet, the memorandum and Appendix reflect a determination by the Department to strictly adhere to the statute and regulations and make it clear that the Department will not challenge reasonable determinations made by an institution as to who has

significant responsibility for student and campus activities. The complete section in the Appendix dealing with "campus security authorities" provides as follows:

> Campus Security Authorities: 34 CFR 668.46(a) –
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> While not defined in statute, regulations provide that CSAs include: campus police or security department personnel; individuals or organizations identified in institutional security policies; and individuals with security-related responsibilities. The definition at § 668.46(a)(iv) states that a CSA also includes an official "who has significant responsibility for student and campus activities."
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> The Department will defer to an institution's designation of CSAs as authoritative and provide any technical assistance necessary to work with institutions to help ensure proper identification and notification of CSAs consistent with the regulations. The regulations do not require that an employee with minimal responsibilities for student and/or campus activities *necessarily* be considered CSAs. On a case by case basis, institutions may apply the regulations to not designate CSA responsibilities for Clery Act reporting purposes to an individual. Individuals determined not to have significant responsibility for student and campus activities, which may, in some cases, include those individuals who, for example, have irregularly scheduled duties or duties that are not part of an employee's primary job description. If paragraphs (i)-(iii) of the definition of CSAs are not applicable, institutions should focus on the "significant responsibilities" of an employee when determining whether that employee is a CSA for Clery purposes. Note that a CSA for Clery purposes may or may not include employees who meet the definition of "any official...who has the authority to institute corrective measures" for Title IX purposes under 34 CFR 106.30(a).

As noted in the last sentence of this guidance, the designation of a CSA under the Clery Act may or not include employees who, under the new Title IX regulations that took effect in August, meet the definition of "any official…who has the authority to institute corrective measures" for purposes of Title IX.

The IOA Government and Policy Committee hopes this new guidance from the Department will assist college and university programs who either have already been designated as a CSA or a Title IX mandatory reporter or who are under threat of being so designated in articulating why they should not be so designated. As we all know, an organizational ombuds program that adheres to the IOA Code of Ethics and Standards of Practice should neither have significant responsibility for student and/or campus activities nor have authority to institute corrective measures on behalf of their institution.

Ombuds programs who would like assistance in addressing these issues may contact the IOA Executive Director, Chuck Howard, or the Co-Chairs of the GPC, Jessica Kuchta-Miller and Sarah Klaper.