



**Comments of the International Ombuds Association re:
Nondiscrimination on the Basis of Sex in Education Programs
or Activities Receiving Federal Financial Assistance
Docket ID ED-2021-OCR-0166**

Executive Summary

- **Organizational Ombuds are vital, confidential, and informal components of a campus safety system who help victims/survivors of sexual misconduct access formal reporting channels that they would not otherwise use.**
- **To better serve the goals of Title IX, the International Ombuds Association requests changes to Section 106.2 definition of “confidential employee” that will highlight and ensure the confidential Organizational Ombuds role in campus safety and the Title IX process.**
- **Section 106.2 “but if” language should be moved to 106.44(d) to avoid conflating the status of “confidential employee” with the actions required of the institution.**
- **Clarifying Section 106.44(c) & (d) will better illuminate the definition of “confidential employee.”**

Introduction

The International Ombuds Association (“IOA”) is the premiere professional association committed to supporting Organizational Ombuds (“Ombuds”) worldwide. An Organizational Ombuds is one who assists individuals and groups in managing conflict and raising concerns in service of a highly effective and healthy organization. As such, Organizational Ombuds play a *critical* role in the campus safety landscape of higher educational institutions.

Organizational Ombuds are:

- Confidential
- Impartial
- Informal
- Independent
- Resources for conflict resolution within their organizations

Organizational Ombuds:

- Listen and understand issues while remaining neutral with respect to the facts.

- Assist in developing and evaluating available options for resolving the situation.
- Guide or coach individuals to deal directly with other parties, including the use of formal resolution resources of the organization, including the Title IX process. Ombuds often seek to empower individuals to voice their own concerns directly.
- Refer individuals to appropriate resolution resources. Ombuds may refer individuals to one or more support or formal organizational resources that can assist with the issue.
- Assist in surfacing issues to formal resolution channels and decision makers when an individual is unable or unwilling to surface a concern directly.
- Facilitate informal resolution processes. Ombuds may help to resolve issues between parties through various types of informal mediation or facilitation.
- Identify issues and opportunities for systemic change for the organization. The unique positioning of the Ombuds serves to provide unfiltered information that can produce insight to issues and resolutions. The Ombuds is a source of detection and early warning of new issues and a source of suggestions of systemic change to improve existing processes.

Because of the informal, impartial, confidential, and independent positioning of an Ombuds in an organization, they do NOT:

- Manage students, staff, or faculty in *any* capacity.
- Participate in any evaluative, disciplinary, legal, or administrative proceedings related to concerns brought to the Ombuds' attention or conduct formal investigations.
- Create or mandate binding business and policy decisions on behalf of the organization.
- Create or maintain records for the organization.
- Are not an office of notice for purposes of receiving notice of claims against the organization and are not authorized to be a formal reporting channel for the organization on matters brought to the Organizational Ombuds' attention except when specifically, and expressly mandated by law.

IOA Proposed Revisions and Specific Comments

IOA commends the Department of Education for acknowledging the critical interests of both complainant autonomy and the ability to seek out confidential resources for survivors and respondents alike. A new policy framework strengthening the means for protecting these interests is essential. By clearly defining “confidential employee,” Title IX would further encourage survivor/complainant autonomy while also encouraging the effective utilization of formal resources.

Given the critical role Organizational Ombuds have in the campus security landscape, we appreciate the opportunity to provide these comments.

1. Proposed Revisions re: Section 106.2, Definitions. *Confidential employee*.

“*Confidential employee* means:(2) An employee of a recipient whom the recipient has designated as a confidential resource for the purpose of while providing services to persons in connection with sex discrimination;” ~~—but if the employee also has a role or duty not associated with providing these~~

~~services, the employee's status as confidential is limited to information received about sex discrimination in connection with providing these services;”~~

Rationale:

Including “but if” language, as the Department has currently proposed, conflates status with actions and potentially limits the capabilities of confidential resources to support institutional priorities outside of the Title IX arena. This language more properly resides in section 106.44(d) as described below, which talks about what a university/school must *do*—i.e., require confidential employees to explain the limits of confidentiality. Doing so will avoid the pitfalls that come from a definition which is malleable based on conduct and instead puts the burden upon recipient institutions to ensure designated confidential employees are acting consistently with their designations.

Instead, “confidential employee” should be defined by intended output i.e., a safe place for an employee or student to raise issues and concerns without fear of creating a record and precipitating a formal response. This results-oriented definition creates avenues for raising concerns without fear. It also empowers potential complainants and respondents to feel supported, and to act effectively and with autonomy in the Title IX processes.

2. Section 106.44 Action by a recipient to operate its education program or activity free from sex discrimination. (b) Monitoring.

IOA supports the role of the Title IX Coordinator as a monitor of *formal* channels to address Title IX issues so that a meaningful analysis of its systems is possible. However, the Title IX Coordinator should not manage or direct the informal resources. Such “monitoring” could lead to reporting requirements that would defeat the purpose and effectiveness of the confidential resources and deter survivors/complainants from seeking the services of those offices. The degree to which individuals feel comfortable reaching out to an informal resource, such as an Organizational Ombuds, for assistance is directly tied to the individual knowing that they can explore options without compromising their identity and autonomy over their situation.

3. Section 106.44(c) Notification requirements.

In furthering the Department’s goal of providing clarity in definitions, Title IX should not restrict the number of employees that can be deemed as confidential, but rather ensure confidential resources and mandated reporters alike are clearly and effectively identified as “survivor/complainant-supporting” and “respondent-supporting.” For this new policy framework to work, to achieve autonomy for the complainant, and to protect the rights of the respondent, a recipient must clearly classify those who provide confidential resources as confidential employees without fear that the Department will penalize the recipient for reasonable designations.

4. IOA Proposed Revisions re: Section 106.44(c)(2)(ii) & (iii) Notification requirements.

“(ii) Any employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or [academic or career](#) advising in the recipient's education program or activity to notify the Title IX Coordinator when the employee has information about a student being subjected to conduct that may constitute sex discrimination under Title IX;

(iii) Any employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or [academic or career](#) advising in the recipient's education program or activity and has information about an employee being subjected to conduct that may constitute sex discrimination under Title IX to . . . “

Rationale:

In furtherance of the Department's stated goal of providing clarity, it is imperative that the Department clearly delineate academic or career advising as opposed to employees who provide confidential advising.

5. IOA Proposed Revisions to Section 106.44(d)(2) Confidential employee requirements.

“(2) A recipient must require a confidential employee to explain their confidential status to any person who informs the confidential employee of conduct that may constitute sex discrimination under Title IX and must provide that person with contact information for the recipient's Title IX Coordinator and explain how to report information about conduct that may constitute sex discrimination under Title IX. [If the employee also has a role or duty not associated with providing confidential services, the employee's status as confidential is limited to information received about sex discrimination in connection with providing these services. Even when serving in a confidential capacity, the employee must nonetheless explain how to report information.](#)”

Rationale:

As noted above, the “but if” language from 106.2 is most appropriate here in 106.44(d)(2). This section is active in discussing recipients' active obligations to explain confidentiality. Including the “but if” language here clarifies instead of conflating status with actions and creating confusion for recipients and survivors/complainants.

6. Comments re: Mandatory Reporting, Complainants, and Respondents

The need for checks and balances to ensure that campuses are acting responsibly in responding to Title IX concerns is self-evident. In addition, Title IX Coordinators legitimately use mandatory reporting as a route to outreach, education, and resources for victims/survivors.

However, research has demonstrated that overall, universal mandatory reporting causes real concerns for victims/survivors of sexual misconduct: ¹

- It is invasive
- It removes agency and sense of control from the victim/survivor

¹ See e.g. Holland, Cipriano, Huit, “A Victim/Survivor Needs Agency”: *Sexual Assault Survivors' Perceptions of University Mandatory Reporting Policies*, Analysis of Social Issues & Public Policy, Nov. 2020 at 488; Bedera, *Beyond Trigger Warnings: A Survivor-Centered Approach to Teaching On Sexual Violence and Preventing Institutional Betrayal*, Teach. Sociol 49 (2021); National Academies of Sciences, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (National Academies Press, Washington, DC, 2018).

- Forcing a report when the victim/survivor is not ready to report can cause further damage to the victim/survivor
- It discourages the victim/survivor from coming forward to report the behavior to anyone
- It discourages the victim/survivor from seeking assistance in any fashion

At the same time, members of Congress and other critics have also raised concerns about the due process and educational rights of respondents within Title IX processes.²

7. Ombuds Are an Antidote to Those Concerns

Preserving the confidentiality of Organizational Ombuds and other victim/survivor support resources is an antidote to both victim/survivor concerns about mandatory reporting, and concerns for the due process and educational rights of Title IX respondents. As such, Ombuds are essential components of the campus safety landscape.

It is commendable that the Department has already recognized that some employees must be exempt from reporting and concerns:

“Ensuring that some employees can receive confidential reports of sex discrimination, including sex-based harassment, is a longstanding priority for the Department and would be consistent with the practices of many schools both before and since the 2020 amendments. The Department also notes that making confidential employees available may also result in more individuals feeling comfortable to seek the support they need to address the immediate effects of sex-based harassment or other sex discrimination and ultimately find the confidence to make the recipient aware of incidents that may otherwise have gone unreported.”³

² See e.g. Quilantan, Perez, Stanford, *DeVos Unveils Rules that Boosts Rights for Students Accused of Sexual Misconduct*, Inside Higher Ed, May 6, 2020; Binkley, Collin, *New Sexual Assault Rule Bolster Rights of Accused*, AP NEWS (May 7, 2020) <https://apnews.com/article/virus-outbreak-us-news-ap-top-news-sexual-assault-sexual-misconduct-f489490cb06c0ac02e6c586be9abc5f1>.

³ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, ED-2021-OCR-0166-0001 (proposed July 12, 2022) at 191. See also: National Academies of Sciences, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (National Academies Press, Washington, DC, 2018) at 140: “Academic ombuds offices are one of the few places on campus that students can go to confidentially report an incident of sexual assault. Ombuds offices are meant to manage conflict constructively and informally, providing neutral and impartial information to the campus community, including students, staff, faculty, and/or administrators. The ombudsperson does not advocate for any individual or for the organization, but advocates for fair processes. These offices are unique in that they are independent of normal organizational structure and are completely confidential. Because of this, academic ombuds offices can serve as a valuable informal reporting mechanism for people who are seeking to report sexual harassment confidentially.”

Because confidentiality is essential for Ombuds' offices to be successful, most campuses that have Organizational Ombuds programs define and clarify the Ombuds' confidentiality in multiple ways:

- Developing a charter or policy to clarify the Ombuds' role and obligations and to ensure that Ombuds are clearly understood to be
 - Confidential
 - Independent
 - Impartial
 - Informal

- Publicly declaring that the Ombuds is confidential and not an official authorized to receive notice against the institution in
 - Title IX Policies
 - Other institutional policies
 - On the website
 - Ombuds brochures and promotional materials
 - Ombuds' introductions at the beginning of every meeting

In supporting the purposes and goals of Title IX, Organizational Ombuds play a key role in supporting victims/survivors of sexual harassment and abuse by providing a safe, confidential, and informal environment to discuss issues and concerns, understand policies and resources, and explore pathways forward. Organizational Ombuds help victim/survivors:

- feel heard
- fully understand their formal options
- take the fear of the unknown out of the process

In that way, victim/survivors are more educated about the process and their options. They are therefore empowered to make educated choices about their situation and are more open to actually using the formal resources available to them through Title IX. Organizational Ombuds help create a victim/survivor-driven process⁴ and help individuals utilize formal processes who actively state that they would not otherwise do so.⁵ The ombuds role *exists* to bring issues to resolution through autonomy-protecting means.

Organizational Ombuds are also a key resource for respondents in Title IX processes. Respondents have Title IX advisors, but they typically do not have **confidential** resources available to them to help them understand where they sit in the process, the process itself, the resources available to them,

⁴ See Schmidt, Caitlin, *Oregon's Unique Title IX Reporting Policy Gives Autonomy to Students*, Arizona Daily Star (March 8, 2019 updated Jan 13, 2020), https://tucson.com/news/local/oregons-unique-title-ix-reporting-policy-gives-autonomy-to-students/article_e47e582a-4058-11e9-9489-23f17e7dd88b.html.

⁵ See e.g. Holland, Cipriano, Huit, "A Victim/Survivor Needs Agency": *Sexual Assault Survivors' Perceptions of University Mandatory Reporting Policies*, Analysis of Social Issues & Public Policy, Nov. 2020 at 488; Bedera, *Beyond Trigger Warnings: A Survivor-Centered Approach to Teaching On Sexual Violence and Preventing Institutional Betrayal*, Teach. Sociol 49 (2021); National Academies of Sciences, Engineering, and Medicine, *Sexual Harassment of Women: Climate, Culture, and Consequences in Academic Sciences, Engineering, and Medicine* (National Academies Press, Washington, DC, 2018).

etc. The Organizational Ombuds educates Title IX respondents about the process, enabling potential complainants and respondents to act with autonomy in participating in Title IX processes effectively, and helping them to feel supported.

Conclusion

When recipient institutions offer and support confidential and informal options for those impacted by Title IX issues, victims/survivors are heard, the Title IX office is bolstered, and greater utilization of formal channels are facilitated. Organizational Ombuds also help and empower those who use their services and can mitigate risk for the institution.

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