



**To: IOA Membership**  
**From: IOA Board of Directors**  
**Ad Hoc Title IX Task Force**  
**Date: April 1, 2016**  
**Re: Academic Ombuds Confidentiality and Campus Sexual Violence in the U.S.**

The protection of students from sexual violence on college and university campuses has been the focus of heightened attention in recent years. The United States Office for Civil Rights of the Department of Education (OCR), the federal agency responsible for enforcement of Title IX of the Educational Amendments Act of 1972 (Title IX), has escalated its efforts to shine a light on these concerns and encourage institutions of higher education to implement measures to protect students, and to respond promptly, effectively, and thoroughly to reported concerns. This attention stems from the OCR's obligation to ensure non-discrimination in higher education, and the proposition that sexual misconduct is a form of gender discrimination.

The obligation of colleges and universities to ensure student safety has also received increased scrutiny since the passage in 1990 of the *Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act* ("Clery Act"). This federal statute came about as a result of 1986 rape and murder of Lehigh University student. That incident produced heightened awareness of the absence of crime related data, and a lack of transparency regarding campus safety. Among other provisions, this statute requires colleges and university to designate "campus security authorities" (CSAs) to report all incidents of crime brought to their attention. The designation of the campus ombuds as a CSA jeopardizes confidentiality and the ability of the ombuds to practice in accordance with the *Standards of Practice* and *Code of Ethics* of the International Ombudsman Association (IOA).

In April 2014, the Office of the President released *Not Alone – The First Report of the White House Task Force to Protect Students From Sexual Assault*. In that document, the White House Task Force emphasized the importance of providing victims of sexual violence with confidential resources for consultation, advice and support. The report noted that victims of a sexual assault "want time and privacy to sort through their next steps," and that having a "confidential place to go can mean the difference between getting help and staying silent." The report goes

on to state that “on campus counselors and advocates can talk to survivors in confidence,” citing guidance from the U.S. Department of Education.

The report does not explicitly identify the campus ombuds as one of those possible confidential resources. That omission triggered vigorous conversation among academic ombuds as to how to draw attention to the vital role the confidential ombuds can play on college campuses. Out of those discussions, an *ad hoc* Title IX Task Force was formed by the IOA Board of Directors in May 2014.

From its inception, the Task Force has been extremely mindful that many colleges and universities have been hesitant to accommodate the confidential role of the ombuds, in large measure due to fears of exposure to legal risk stemming from the heightened enforcement practices of the OCR regarding Title IX. The Task Force determined that a legal memorandum from a highly respected law firm, making the case for the ombuds confidentiality in the contexts of both Title IX and Clery, could be extremely valuable to the advancement of understanding and acceptance the ombuds as a non-reporting, confidential resource.

To that end, the Task Force sought approval from the IOA Board to identify a highly regarded, nationally renowned law firm with attorneys known for their deep and broad practice in higher education. After interviewing a number of candidates, the Task Force selected the law firm of Wilmer Hale, <https://www.wilmerhale.com/>. Bruce Berman, [https://www.wilmerhale.com/Bruce\\_Berman/](https://www.wilmerhale.com/Bruce_Berman/), the author of the final memorandum, is the firm’s General Counsel, leads its Education Practice, and is a partner in the Litigation/Controversy Department. Mr. Berman counsels colleges and universities on Title IX and Clery Act issues, and has extensive experience representing higher education institutions in the area of campus sexual misconduct. The Task Force has been impressed with Mr. Berman’s breadth and depth of knowledge, his careful listening, and his ability to fully grasp the issues of concern we presented to him, as evidenced by the final product.

The attached memorandum from Mr. Berman makes clear that an ombudsman following the *Standards of Practice* and *Code of Ethics* may be designated as a confidential resource and not a “responsible employee,” and would normally not be considered a “campus security authority” under the Clery Act.

**While the Title IX Task Force hopes that the attached memorandum will be helpful to ombuds, neither Task Force nor the IOA Board offers it as legal advice. Campus ombuds should always refer to their appropriate campus resources for legal counsel.**

## MEMORANDUM

Date March 14, 2016

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To Board of Directors  
International Ombudsman Association

From Bruce M. Berman

Re **Campus Ombuds as Confidential Resource for Purposes of Title IX and Clery Act Reporting**

At the request of the Title IX Task Force of the International Ombudsman Association (IOA), we have prepared this memorandum to address whether higher education institutions that have an academic organizational ombudsman (“ombuds”)<sup>1</sup> may treat the ombuds as a confidential resource in light of federal laws that require certain campus personnel to report information about sexual violence<sup>2</sup> incidents to institution officials. An ombuds is a designated neutral whose major function is to provide informal assistance to constituents of the institution’s community, including students, staff, and faculty, on a confidential basis. Depending on the institution, the particular constituents served by the ombuds may include one or more of these groups.

IOA has promulgated *Standards of Practice* (SOPs)<sup>3</sup> and a *Code of Ethics* (COE)<sup>4</sup> intended to promote excellence in the practice of ombuds work. Four principles provide the foundation for ombuds practicing in accordance with the SOPs and COE<sup>5</sup>:

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<sup>1</sup> Practitioners may use alternative forms of this word, such as “ombuds,” “ombudsman,” and “ombudsperson.”

<sup>2</sup> The U.S. Department of Education’s Office for Civil Rights uses the phrase “sexual violence” in its guidance regarding the implementation of the Title IX of the Education Amendments of 1972. See, e.g., U.S. Department of Education, Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence, A-1 (2014) (hereinafter, the “2014 Q&A”) (explaining that sexual violence includes “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent,” and includes rape, sexual assault, sexual battery, sexual abuse, and sexual coercion). In practice, the guidance often uses the phrase “sexual violence” as shorthand for sexual misconduct, stalking, and sexual harassment, among other things. To maintain consistency with the guidance documents, this memorandum uses the phrase “sexual violence.”

<sup>3</sup> [http://www.ombudsassociation.org/IOA\\_Main/media/SiteFiles/IOA\\_Standards\\_of\\_Practice\\_Oct09.pdf](http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/IOA_Standards_of_Practice_Oct09.pdf)

<sup>4</sup> [http://www.ombudsassociation.org/IOA\\_Main/media/SiteFiles/Code\\_Ethics\\_1-07.pdf](http://www.ombudsassociation.org/IOA_Main/media/SiteFiles/Code_Ethics_1-07.pdf)

<sup>5</sup> The analysis and conclusions set forth in this memorandum are limited to ombuds practicing in accordance with the SOPs and COE.

- *Independence.* The ombuds operates independently from other organizational entities and holds no other position within the organization that might give rise to an actual or perceived conflict of interest. The ombuds exercises sole discretion over its office operations, staff, and budget.
- *Neutrality and Impartiality.* The ombuds advocates for fair and equitable processes but remains unaligned with any individual.
- *Confidentiality.* The ombuds does not disclose any information brought to its office without the permission of the individual who has confided in the office. The only exception to this commitment to confidentiality is in the event that the ombuds learns of an imminent risk of serious harm to any person and there is no other reasonable option but to disclose the confidence.
- *Informality.* The ombuds serves as an off-the-record resource, and has no authority to make binding decisions, mandate policies, conduct formal investigations, or adjudicate issues for the organization.

The ombuds acts as a source of information and referral, aids in answering questions, and assists in the management of conflicts and the resolution of disputes. In considering any given matter, the ombuds takes into account the points of view and interests of all stakeholders. The ombuds office supplements, but does not replace, the institution's resources for formal conflict resolution.

The ombuds focuses on providing informal support in resolving issues of equity and fairness. Such issues may come to the ombuds' attention directly or indirectly. In addition, the ombuds may provide early alerts to offices and officials with formal responsibilities. The ombuds also provides information about available resources, thereby safeguarding and increasing constructive reporting.

The ombuds may also periodically report to the broader community on the basis of anonymized and/or aggregate data. Such reporting may help the institution assess the climate of the campus and may provide a basis for policy and procedural enhancements.

The U.S. Department of Education ("DOE") Office for Civil Rights ("OCR") contemplates that various personnel enjoying a legal privilege (e.g., clergy and physicians acting in their professional capacity) will serve as confidential resources for the campus community. However, OCR guidance makes clear that colleges and universities may also designate other personnel as confidential resources. As discussed below, institutions with an ombuds may designate the ombuds as a confidential resource and not a "responsible employee"; moreover, an ombuds would normally not be considered a "campus security authority" under the Clery Act.

## I. DOE and the White House Have Clarified the Importance of Confidential Resources

DOE has long recognized a student’s right to request confidentiality when making a report of sexual violence to an institution under both Title IX of the Education Amendments of 1972 (“Title IX”), 20 U.S.C. § 1681 *et seq.*, and the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act (the “Clery Act”), 20 U.S.C. § 1092(f).<sup>6</sup> Notwithstanding that, colleges and universities have increasingly designated a broader range of campus personnel as mandatory reporters, particularly in the wake of OCR’s April 2011 Dear Colleague Letter.<sup>7</sup> However, OCR and the White House have reiterated the importance of confidential resources for students who do not wish, or have not yet decided, to make a complaint or cooperate with an investigation.

In developing its 2014 “Not Alone Report,” the White House Task Force to Protect Students From Sexual Assault conducted 27 “listening sessions” where thousands of people joined discussions regarding sexual violence on college campuses.<sup>8</sup> One problem discussed during these sessions was the lack of confidential resources on campus.<sup>9</sup> The Task Force learned that “[i]f victims don’t have a confidential place to go, or think an institution will launch a full-scale investigation against their wishes, many will stay silent.”<sup>10</sup> Institutions that have designated nearly all campus employees as mandatory reporters have left “survivors with fewer places to turn.”<sup>11</sup> Instead, the Task Force recognized, some students are more likely to report sexual violence if they can first consult with a confidential resource to discuss the options available to them.<sup>12</sup>

Campus ombuds are well-suited to serve as a confidential resource to campus community members who may be involved in or know about an alleged sexual violence incident. Campus climate surveys show that, despite the best efforts of colleges and universities to make students

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<sup>6</sup> See, e.g., Department of Education, Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12037 (Mar. 13, 1997) (issuing guidance regarding Title IX); 64 Fed. Reg. 59060, 59069 (Nov. 1, 1999) (adopting regulations to implement the Clery Act).

<sup>7</sup> U.S. Department of Education, Office for Civil Rights, Dear Colleague Letter (April 4, 2011) (hereinafter, the “April 2011 Dear Colleague Letter”). The April 2011 Dear Colleague Letter advised, for example, that employees “likely to witness or receive reports of sexual harassment or violence” must be “trained so that they know to report harassment [or sexual violence] to appropriate school officials.” At 4.

<sup>8</sup> The White House, *Not Alone: The First Report of the White House Task Force to Protect Students From Sexual Assault*, 7, 11 (April 2014) (hereinafter, the “Not Alone Report”).

<sup>9</sup> “For some, having a confidential place to go can mean the difference between getting help and staying silent.” *Id.* at 2.

<sup>10</sup> *Id.* at 11.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

aware of the resources available to them, many do not know where to turn when they experience, witness, or are accused of sexual violence. Victims of sexual violence may want to give voice to their experience even when they do not wish to file a complaint, or before they have decided whether to do so. Students accused of sexual violence often do not know where to turn for support or for information about how their school's investigation and adjudication process works. And friends and bystanders may need guidance as they consider whether to report an incident. As a neutral resource, ombuds can provide invaluable assistance to all community members affected by sexual violence.

## **II. The Ombuds May Be a Confidential Resource, and Not a Responsible Employee, Under Title IX**

Title IX prohibits discrimination on the basis of sex, including sexual harassment and sexual violence, in federally funded education programs and activities at institutions of higher education. Title IX and its implementing regulations, at 34 C.F.R. Part 106, prohibit discrimination on the basis of sex in admissions and recruiting, education programs and activities, and employment in educational programs. However, the regulations do not expressly delineate an institution's responsibilities with respect to sexual violence. Instead, OCR has issued various "significant guidance documents"<sup>13</sup> that advise institutions on how the foundational anti-discrimination principles apply to sexual harassment and sexual violence, and what institutional responsibilities arise therefrom. OCR guidance leaves no doubt that if an institution knows or reasonably should know of possible sexual harassment or violence, the institution must take "immediate and appropriate steps to investigate or otherwise determine what occurred."<sup>14</sup>

### **A. Only Employees Meeting Certain Criteria are "Responsible Employees"**

An institution is deemed to have knowledge, or be on notice, if a "responsible employee" knew or, in the exercise of reasonable care, should have known about alleged sexual harassment or violence. Accordingly, institutions must require "responsible employees" to report incidents of sexual harassment or violence to the Title IX Coordinator or other designated officials.<sup>15</sup>

OCR reiterated its longstanding definition of "responsible employee" in its 2014 Questions and Answers on Title IX and Sexual Violence ("2014 Q&A").<sup>16</sup> According to OCR, a "responsible employee" is "any employee who has the authority to take action to redress sexual

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<sup>13</sup> OCR issues "significant guidance documents" under authority granted by the Office of Management and Budget's Bulletin for Agency Good Guidance Practices, *see* 72 Fed. Reg. 3432 (Jan. 25, 2007), to "provide [federal funding] recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations [enforced by OCR]," *see* April 2011 Dear Colleague Letter at n.1.

<sup>14</sup> 2014 Q&A at A-5.

<sup>15</sup> *Id.* at D-1.

<sup>16</sup> *See supra* note 7.

violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.”<sup>17</sup> Which personnel satisfy one or more of those criteria differs from school to school. Institutions can identify the employees to whom the “responsible employee” designation applies by (i) determining who has authority to redress harassment or violence, (ii) determining what other personnel have a duty to report, and (iii) taking into account student expectations of who would have such a duty or authority, and if necessary clearly explaining who would *not*. An institution “must make clear to all of its employees and students which staff members are responsible employees so that students can make informed decisions about whether to disclose information to those employees.”<sup>18</sup>

### **B. Ombuds Need Not Be “Responsible Employees”**

Ombuds who do not meet the criteria set forth above need not be designated as responsible employees. Ombuds who are not responsible employees are not required to report information about sexual violence incidents to the Title IX Coordinator or any other designated official.

In particular, ombuds who are independent from their institution in organizational structure and function and who offer only informal services do not have authority to redress harassment or violence. Ombuds who abstain from participation in any formal investigative, adjudicative, or remedial processes lack the “authority” to “take action” to redress sexual violence, even if they offer voluntary services such as conflict coaching, mediation, facilitation, and shuttle diplomacy. Colleges and universities need not make ombuds responsible for reporting sexual violence or other misconduct incidents to the Title IX Coordinator or other school officials, and they may take such steps as are necessary to let community members know ombuds have no such responsibility. In determining whether to designate ombuds as responsible employees, institutions may wish to consider whether doing so would undermine the independence, impartiality, confidentiality, and informality principles that define the ombuds’ role and may promote its effectiveness.

### **C. Confidential Resources Need Not Be Legally Privileged Persons or Certain Professionals**

It is not the case that only individuals with confidential legal status or whose communications are protected by a privilege under state or federal law, such as clergy,

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<sup>17</sup> 2014 Q&A at D-2; *see also* U.S. Department of Education, Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 13 (2001) (hereinafter, the “2001 Guidance”). DOE has acknowledged that the definition of “responsible employee” for purposes of its Title IX guidance is broader than the standard announced by the U.S. Supreme Court for derivative liability purposes (*see* 2001 Guidance at n.74), wherein a school would only be liable to private parties for monetary damages if a school official with authority to address the alleged discrimination and take corrective action had actual notice. *See, e.g., Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 292-93 (1998).

<sup>18</sup> 2014 Q&A at D-2.

physicians, psychiatrists, and lawyers, may be designated confidential resources. On the contrary, in its 2014 Q&A, OCR encouraged institutions to designate “people who provide assistance to students who experience sexual violence [but] are not professional<sup>19</sup> or pastoral<sup>20</sup> counselors” as confidential resources.<sup>21</sup> These include, but are not limited to, employees and volunteers in on-campus sexual assault centers, victim advocacy offices, women’s centers, and health centers.<sup>22</sup>

The sample sexual misconduct policy accompanying the Not Alone Report lists professional, pastoral, and nonprofessional counselors as confidential resources. The preface to the sample policy states that the “sample language is neither exhaustive nor exclusive, and the sections of every institution’s policy must reflect its own character and circumstances.”<sup>23</sup> Thus, there is no restriction on designating ombuds as confidential resources.

#### **D. Ombuds at the University of California Are Confidential Resources**

The University of California System (“UC System”) provides a comprehensive approach to and rationale for the designation of the ombuds as a confidential resource across its affiliated institutions. The Declaration of Best Practices for the University of California Ombuds Offices<sup>24</sup> states that ombuds at all UC System institutions are obligated to maintain confidentiality and do not have the authority or responsibility to take action against or redress allegations of misconduct, or to report allegations to applicable institutional officials. In particular, the Declaration states that the ombuds:

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<sup>19</sup> “Professional counselor” is defined in the Clery Act regulations as “a person whose official responsibilities include providing mental health counseling to members of the institution’s community and who is functioning within the scope of the counselor’s license or certification.” 34 C.F.R. § 668.46(a). OCR’s Title IX guidance recognizes this definition and explains that it includes professional counselors who are not employees of the institution but may be under contract to provide counseling to the institution community, as well as individuals who are not yet licensed or certified counselors but are supervised by a licensed or certified individual. 2014 Q&A at n.26.

<sup>20</sup> “Pastoral counselor” is defined in the Clery Act regulations as “a person who is associated with a religious order or denomination, is recognized by that religious order or denomination as someone who provides confidential counseling, and is functioning within the scope of that recognition as a pastoral counselor.” 34 C.F.R. § 668.46(a). OCR’s Title IX guidance recognizes this definition, as well. *See* 2014 Q&A at n.26.

<sup>21</sup> 2014 Q&A at E-3 (emphasis added).

<sup>22</sup> *Id.* OCR refers to individuals offering such services as “nonprofessional counselors or advocates,” and notes that they are “valuable sources of support for students.” *Id.*

<sup>23</sup> Not Alone Report, Sample Language for Reporting Confidentially Disclosing Sexual Violence Attachment, at 1. Further support for this principle is found in the 2014 Q&A, which notes that residential advisors may serve as confidential resources if the institution “has determined and clearly informed students that RAs are generally available for confidential discussions and do not have the authority or responsibility to take action to redress any misconduct or to report any misconduct . . . .”<sup>23</sup> 2014 Q&A at D-5.

<sup>24</sup> Declaration of Best Practices for University of California Ombuds Offices (Nov. 6, 2006), available at [http://students.berkeley.edu/files/Student\\_Affairs/Ombuds/UC%20OmbudsBestPractices.pdf](http://students.berkeley.edu/files/Student_Affairs/Ombuds/UC%20OmbudsBestPractices.pdf).



- “shall not disclose or be required to disclose any information provided in confidence, except to address an imminent risk of serious harm”;
- “shall not conduct formal investigations of any kind”;
- “shall not participate in formal dispute processes or outside agency complaints or lawsuits”; and
- “shall not have the authority to adjudicate, impose remedies or sanctions, or to enforce or changes policies or rules.”<sup>25</sup>

The Declaration further states that “[b]ecause the Ombuds does not function as a part of the administration of the University, even if the Ombuds becomes aware of [allegations that may be perceived to be violations of law, regulations or policies, such as sexual harassment issues covered by the Whistleblower policy, or incidents subject to reporting under the Clery Act], the Ombuds is not required to report them to the University.”<sup>26</sup>

Through its Declaration, the UC System has addressed the essential criteria of “responsible employee” status—that the employee has the authority to take action to redress sexual violence, that the employee has been given the duty of reporting incidents to the Title IX Coordinator or other appropriate school designee, or that the employee is someone whom a student could reasonably believe has such authority or duty—and made clear its ombuds do not meet any of the criteria. Other higher education institutions could follow the UC System example consistent with federal law, and, in fact, an increasing number do not consider their ombuds to be responsible employees under Title IX or a campus security authority under the Clery Act.

**E. Responsible Employees Must Themselves Inform Students of the Availability of Confidential Resources, Including Ombuds Serving as Such**

OCR has explained that a responsible employee must inform a student of the student’s “option to request confidentiality” and of “available confidential advocacy, counseling, or other support services” before the student shares information that he or she may wish to keep confidential.<sup>27</sup> It follows that responsible employees at institutions that have designated ombuds as a confidential resource should advise students of the availability of ombuds and other confidential resources, and such institutions should train responsible employees on their duty to do so.

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<sup>25</sup> *Id.* at 7.

<sup>26</sup> *Id.* at 6.

<sup>27</sup> 2014 Q&A at D-2.

### III. An Ombuds Is Presumptively Not a Campus Security Authority Under the Clery Act

The Clery Act, as amended by the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, requires federally funded institutions of higher education to collect and disseminate information about crimes that occur on or near campus, including sexual violence. Among other reporting obligations, institutions must publish an “annual campus security report” that contains statistics about various categories of crime reported on or near campus during the three most recent calendar years. So that an institution can collect the information it needs to comply with these obligations, “campus security authorities” (“CSAs”) are required to communicate to the institution reports of covered crimes that they receive.<sup>28</sup>

CSAs include: (1) a campus police or security department; (2) any other individual responsible for campus security, such as an individual who is responsible for monitoring entrance into institutional property; (3) any individual or organization specified in an institution’s statement of campus security policy as an individual or organization to which students and employees should report criminal offenses; and (4) an official of an institution who has significant responsibility for student and campus activities, such as student housing, student discipline, and campus judicial proceedings.<sup>29</sup>

Under normal conditions, ombuds do not play any of the roles enumerated above. *First*, ombuds are not part of any police or campus security department and are not otherwise responsible for campus security. *Second*, colleges and universities generally do not designate them as individuals to whom criminal offenses should be reported—and certainly have no obligation to do so. *Third*, an ombuds is not “an official of an institution who has significant responsibility for student and campus activities.” Indeed, for Clery Act purposes an ombuds is not even “an official of an institution,” which DOE defines as “any person who has the authority and the duty to take action or respond to particular issues *on behalf of the institution*.”<sup>30</sup> Rather, ombuds are independent and offer assistance to campus community members upon request only, do not act as campus administrators (*e.g.*, Dean of Students, Director of Athletics, Residential Life Coordinator, etc.), do not offer or replace any formal channels of grievance or dispute resolution, and cannot adjudicate any dispute or disciplinary matter.

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<sup>28</sup> See 20 U.S.C. § 1092(f)(1)(F); 34 C.F.R. § 668.46(c). The institution must also have policies and procedures that encourage students and campus community members to report criminal activities and other emergencies that occur on campus. 34 C.F.R. § 668.46(b).

<sup>29</sup> 34 C.F.R. § 668.46(a).

<sup>30</sup> U.S. Department of Education, *The Handbook for Campus Safety and Security Reporting*, 74 (Feb. 2011) (emphasis added).

#### IV. Case Law Supports the View that Communications with Campus Ombuds Do Not Constitute Notice to the Institution

Judicial opinions from various jurisdictions support the proposition that the ombuds office is not an office of notice for a college or university. If the ombuds office is independent, neutral and impartial, confidential, and informal, and the campus community is advised that communications with the office do not constitute notice to the institution, such communications do not constitute notice to the institution.<sup>31</sup>

Many decisions, typically in employment discrimination cases, reinforce the view that communications with an ombuds do not constitute notice to the institution or organization when such communications are intended to remain confidential,<sup>32</sup> or when other persons or offices have been identified as the designated contact for formal complaints.<sup>33</sup>

Two recent opinions dealing with campus ombuds under Title IX are not contrary to the proposition that notice to an ombuds practicing under the SOPs is not notice to the ombuds' institution. In *S.S. v. Alexander*, a 2008 Title IX case, the State of Washington Court of Appeals determined that a campus ombuds (along with several other university officials) received notice on behalf of the university when a student informed her of an alleged sexual assault.<sup>34</sup> But the decision reveals that the ombuds did not adhere to the SOPs. In particular, the ombuds was part of the campus's formal dispute resolution processes and was not neutral or independent; on the contrary, the ombuds was "charged with the authority" to resolve complaints from students, had

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<sup>31</sup> This conclusion is also consistent with the ABA model standards for ombuds, which recommend that "[i]f an ombuds functions in accordance with [the ABA established principles of] "Independence, Impartiality, and Confidentiality," . . . then—(a) no one, including the entity in which the ombuds operates, should deem the ombuds to be an agent of any person or entity, other than the office of the ombuds, for purposes of receiving notice of alleged violations, and (b) communications made to the ombuds should not be imputed to anyone else, including the entity in which the ombuds acts, unless the ombuds communicates with representatives of the entity . . . ." American Bar Ass'n, Standards for the Establishment and Operation of Ombuds Offices (revised Fed. 2004), available at <http://apps.americanbar.org/webupload/commupload/AL322500/newsletterpubs/115.pdf>.

<sup>32</sup> See, e.g., *Cotrone v. Marquette University*, 2007 WL 1687576, \*3 (E.D. Wis. June 8, 2007) (recognizing the confidentiality of complaints made by campus staff to university ombuds); *Karibian v. Columbia University*, 812 F. Supp. 413 (S.D.N.Y. 1993), *rev'd on other grounds*, 14 F.3d 773 (2d Cir. 1994) (finding that information obtained by university employees through confidential channels was not "knowledge" on the part of the university triggering the university's duty to inquire and take remedial action). See also *Grother v. Union Pac. R.R. Co.*, 2006 WL 1662936, \*13-14 (S.D. Texas, Houston Div., June 9, 2006) (stating that communications to Union Pacific's ombuds were "protected activities," and that "if an employer is unaware of an employee's protected conduct at the time of the adverse employment action, the employer plainly could not have retaliated against the employee based on that conduct"); *Brya-Grzegorzczuk v. Bristol-Myers Squibb Co.*, 572 F. Supp. 2d 233, 249 (D. Conn. 2008) (finding that employee's reports to an ombuds office constituted protected activity); *Webb v. Merc & Co., Inc.*, 450 F. Supp. 2d 582, 601 (E.D. Pa. 2006) (same).

<sup>33</sup> See, e.g., *Norden v. Samper*, 503 F. Supp. 2d 130, 147 (D.D.C. 2007) (finding that communications with ombuds about plaintiff's need for accommodation did not constitute notice to the organization's designated Equal Employment Opportunity counselor).

<sup>34</sup> 177 P.3d 724, 730 (Wash. App. Div. 1, 2008).

the authority to investigate matters, and participated in management decisions regarding disciplinary actions against the alleged perpetrator in the matter at issue.<sup>35</sup>

Similarly, in a 2014 discrimination suit, *Ault v. Oberlin College*, the U.S. District Court for the Eastern District of Ohio found that the college had not produced evidence establishing the functions and limitations of the ombuds.<sup>36</sup>

In order to minimize the risk that an ombuds will be considered an office of notice:

- The ombuds office should include a prominent disclaimer on all documents, electronic communications, and webpages emanating from it to the effect that communications with the office do not constitute notice to the institution. For example, the University of Chicago Office of the Student Ombudsperson webpage states: “What we don’t do . . . Act as an agent of ‘notice’ for the university”;<sup>37</sup> the Massachusetts Institute of Technology Ombuds Office webpage states: “We do not accept formal complaints or notice for MIT;”<sup>38</sup> and the University of North Carolina-Chapel Hill Ombuds Office webpage states: “Any communication with us is ‘off the record’ and does not put the University on formal notice of a problem.”<sup>39</sup>
- The ombuds office webpage, office brochures, and other materials describing the roles and responsibilities of the ombuds should include a list of appropriate notice offices for the institution .
- The institution should not employ the ombuds or the ombuds’ office staff for additional roles within the institution, particularly if communications with personnel in such roles would constitute notice to the institution or trigger reporting obligations.
- The institution should ensure that the ombuds office has no responsibility to report to the institution’s Title IX coordinator, campus security or law enforcement office, or other institutional administrative offices.

The ombuds and the institution should create and update documentation that establishes the functions and limitations of the ombuds office, and clearly states that communications to the ombuds office are confidential and do not constitute notice to the institution.

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<sup>35</sup> *Id.* at 730-31, 730 n.4.

<sup>36</sup> 2014 WL 4245991, 14-15 (N.D. Ohio Aug. 26, 2014). This decision is currently under appeal to the U.S. Court of Appeals for the Sixth Circuit.

<sup>37</sup> See <http://ombudsperson.uchicago.edu/page/about-office-student-ombudsperson> (last accessed June 19, 2015).

<sup>38</sup> See <http://ombud.mit.edu/role> (last accessed June 19, 2015).

<sup>39</sup> See <http://ombuds.unc.edu/principles.html> (last accessed June 19, 2015).

### **Conclusion**

Nothing in Title IX or the Clery Act requires that an institution consider its ombuds to be a “responsible employee” or “campus security authority.” “Responsible employee” and “campus security authority” status is inconsistent with the ombuds’ foundational tenets of independence, neutrality and impartiality, confidentiality, and informality, and undermine the ombuds’ effectiveness. The weight of authority supports the proposition that ombuds are not offices of notice, particularly where the ombuds and the ombuds’ institution make clear that communications with the ombuds do not constitute notice to the institution.