



IOA Title IX Regulations Recommendations

INTRODUCTION

On 6 May 2020 the U.S. Department of Education (“Department”) issued the long-awaited final regulations under Title IX of the Education Amendments Act of 1972. These regulations will go into effect on 14 August 2020. With over 2000 pages of discussion and supplementary information to review, it has taken time to analyze these new regulations. What follows is a summary of the changes as they relate to organizational ombuds.

The new regulations narrow the scope of misconductⁱ covered under Title IX and significantly change how schools must respond to allegations of sexual harassment. The new regulations introduce greater formality to the process, prohibit the single-investigator model and require post-secondary institutions to hold live disciplinary hearings that allow for the cross-examination of witnesses by advisors (who may be attorneys). Students accused of misconduct are presumed “not responsible” until proven responsible. Further, prior guidance required schools to use “the preponderance of the evidence” standard of proof rather than the more demanding, “clear and convincing evidence” standard. Schools now can choose which standard to use but must apply the same standard to all sexual harassment cases.

Survivors’ advocates argue that the new grievance proceedings could have a “chilling effect” on victims and discourage them from coming forward. Consequently, survivors’ advocates as well as several states have filed lawsuits to block the new regulations. It’s uncertain these suits will delay implementation. Respondents’ advocates, on the other hand, see the new regulations as a victory in protecting free speech and preserving due process. For organizational ombuds, the regulations offer an invitation to postsecondary institutions to examine and clarify the role.

During the Notice of Proposed Rule Making in 2019, IOA submitted a comment asking that the new regulations identify organizational ombuds who practice to industry standards and recognized codes of ethics as confidential resources exempt from reporting. The Department responded to IOA’s request to exempt organizational ombuds from the categories of persons to whom notice charges a recipient with actual knowledge. While the Department declined to categorically exempt organizational ombuds, it said a fact-specific inquiry is required and encouraged postsecondary institutions to examine resources such as ombuds to “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.” (p. 346) The Department, however, indicated that all K-12 employees, including ombuds, are obligated to report.

TOPIC	WHAT TO KNOW	IOA RECOMMENDATIONS	SUPPORTING IOA SOP
Actual Knowledge	Prior Department guidance recommended that schools take action on constructive or imputed knowledge of sexual harassment allegations. Actual knowledge is now required and defined as notice of sexual harassment or allegations of sexual harassment to a recipient's ⁱⁱ Title IX coordinator or any "official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary or secondary school." (§106.30)	Charters and any other written materials should be explicit in describing the areas in which the ombuds has no authority. ⁱⁱⁱ	3.8 Communications made to the ombudsman are not notice to the organization.
Mandatory Reporting	"Official with authority to institute corrective measures" on behalf of the institution replaced the term "responsible employee." For post-secondary institutions, this is now a fact-specific inquiry to determine who should be designated as an "official." (§106.30(a)) With respect to elementary and secondary schools, all employees, including ombuds are mandatory reporters.	Where not circumscribed by state law, ombuds in postsecondary institutions who practice pursuant to the IOA Standards of Practice and Code of Ethics can be identified as confidential resources.	4.3 The Ombudsman does not make binding decisions, mandate policies, or formally adjudicate issues for the organization.
Recordkeeping	Schools must maintain records of investigations, hearings (including recordings), appeals, an "informal resolution process," "supportive measures" as well as training materials for seven (7) years. (§106.45(b)(10))	Ombuds are exempt from the recordkeeping requirements <i>unless</i> they create records the Department requires, such as those connected to an "informal resolution process" and "supportive measures." (See more about these topics in the columns below.)	3.5 The Ombudsman keeps no records containing identifying information on behalf of the organization.

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Informal Resolution	<p>Schools have discretion to offer but not require the parties to participate in an “informal resolution process.” An “informal resolution process” may only be offered <u>after</u> a formal complaint has been filed. (§106.45(b)(9)) Voluntary, written consent is required of both parties. This record must be preserved by the Title IX coordinator for seven (7) years.</p>	<p>Because an “informal resolution process” is permitted only after a formal complaint has been filed, ombuds are not authorized to engage in an “informal resolution process” as described in these regulations. Ombuds, however, remain a resource to visitors prior to the filing of a Title IX complaint as well as after the conclusion of any formal investigative or adjudicatory process. Ombuds also can address systemic issues and procedural irregularities.^{iv} Moreover, the regulations define “Title IX personnel” to include those who facilitate “an informal resolution process.” This is further reason why ombuds should decline involvement after a complaint is filed.</p>	<p>3.1 The Ombudsman does not reveal, and must not be required to reveal, the identity of any individual contacting the Ombudsman office. 3.5 The Ombudsman keeps no records containing identifying information on behalf of the organization. 4.5 The Ombudsman does not participate in any formal investigative or adjudicative procedures.</p>
Supportive Measures	<p>“Supportive measures” are designed to restore or preserve equal access to educational programs or activities and provided without fee or charge. (§106.30) Examples include but are not limited to counseling, deadline extensions, course-related adjustments, modifications of work or class schedules, mutual restrictions of contact between the parties, etc. The Title IX coordinator must offer “supportive measures” to every complainant whether or not a formal complaint is filed. (§106.44(a)) If a complainant is not provided “supportive measures,” it must be documented (§106.45(b)(10)(ii))</p>	<p>The Title IX coordinator is responsible for coordinating—and documenting—the effective implementation of supportive measures.</p> <p>While ombuds are an effective and helpful resource for students and employees, they are <i>not</i> a “supportive measure” as defined by these regulations, subject to the coordination of the Title IX coordinator and recordkeeping requirements. Therefore, ombuds should <i>not</i> be designated as a “supportive measure” under the Title IX regulations.</p>	<p>1.1 The Ombudsman Office and the Ombudsman are independent from other organizational entities. 1.3 The Ombudsman exercises sole discretion over whether or how to act regarding an individual’s concern. 2.1 The Ombudsman is neutral, impartial, and unaligned. 2.3 The Ombudsman should not report to nor be structurally affiliated with any compliance function of the organization.</p>

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Training	<p>Schools must provide training to Title IX coordinators, investigators, decision-makers and any person who facilitates an “informal resolution processes” (i.e., “Title IX personnel”) on a number of topics, including not only policies and procedures, but also how to serve impartially without bias and avoid conflicts of interest and sex stereotypes. (§106.45(b)(1)(iii))</p> <p>All training materials used to train “Title IX personnel” must be posted on the recipient’s website or available for public inspection (§106.45(b)(10)(D) and are subject to the recordkeeping requirements provided in §106.45(b)(10).</p>	<p>The regulations do not mandate sexual harassment training for ombuds. Per the Department, “The intent of §106.45(b)(1)(iii) is to ensure that Title IX personnel directly involved in carrying out the recipient’s Title IX response duties are trained in a manner that promotes a recipient’s compliance with these final regulations.” (p. 843)</p> <p>Ombuds who practice pursuant to the IOA Standards of Practice and Code of Ethics neither serve in a compliance function for their school nor serve as “Title IX personnel.” Further, except for training required of all employees in an organization, ombuds should not receive Title IX training from the Title IX coordinator for purposes of participating in a grievance process for formal complaints of sexual harassment. To do so may render them “Title IX personnel” under the regulations, which will create recordkeeping requirements that are inconsistent with the ombuds role.</p> <p>While ombuds possess the subject matter expertise to train others on the topics of impartiality and facilitation, doing so for the purposes of Title IX training could subject the ombuds to the oversight of the Title IX coordinator and open the ombuds to future discovery demands should the adequacy of a school’s response to sexual harassment or the efficacy of the training provided to “Title IX personnel” be called into question.</p>	<p>1.1 The Ombudsman Office and the Ombudsman are independent from other organizational entities.</p> <p>2.1 The Ombudsman is neutral, impartial, and unaligned.</p> <p>2.3 The Ombudsman should not report to nor be structurally affiliated with any compliance function of the organization.</p> <p>2.4 The Ombudsman serves in no additional role within the organization which would compromise the Ombudsman’s neutrality.</p>

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Clery	Postsecondary institutions have discretion to determine which employees, other than the Title IX coordinator, have authority to institute corrective measures on behalf of the recipient, and that is independent of whether such employees are campus security authorities (“CSAs”) under the Clery Act. (§106.30) (p. 1827)	<p>The new Title IX regulations raise potential points of advocacy related to Clery which will be addressed in a separate document.</p> <p>Ombuds who practice pursuant to the IOA Standards of Practice and Code of Ethics do not satisfy the definition of a CSA and should not be categorized as such.</p>	4.3 The Ombudsman does not make binding decisions, mandate policies, or formally adjudicate issues for the organization.

SUMMARY OF RECOMMENDATIONS

1. Charters and all other written materials should be explicit in describing the areas in which the ombuds has no authority, for example:
 - Ombuds have no authority to receive notice of any claims against the University, including any claims under Title IX [Clery Act: and have no authority to receive reports for the University of criminal offenses].
 - Ombuds have no authority to institute corrective measures on behalf of the University under Title IX and its regulations [Clery Act: Ombuds have no authority to be responsible for student or campus activities or serve as a campus security authority under the Clery Act and its regulations].
 - Ombuds are not authorized to participate in an “informal resolution process” after the filing of a formal Title IX complaint because this would trigger recordkeeping requirements that are inconsistent with their role and may result in ombuds being classified as “Title IX personnel” under the Final Regulations. Ombuds are, however, a resource available to people prior to the filing of a formal complaint or with respect to systemic issues involving sexual harassment or any other issue.
2. Except for training required of all employees in an organization, ombuds should not receive Title IX training from the Title IX Coordinators for purposes of participating in a grievance process for formal complaints of sexual harassment under §106.45 because to do so may render them “Title IX personnel” under the regulations, which will create recordkeeping requirements under the Final Regulations that are inconsistent with their role.
3. Ombuds should not be designated as a “supportive measure” under the Title IX regulations. “Supportive measures” are coordinated by the Title IX coordinator and also create recordkeeping requirement under the Final Regulations that are inconsistent with their role.

ⁱ The regulations change the definition of sexual harassment, making it less expansive than prior Department guidance. The new regulations define “sexual harassment” as “conduct on the basis of sex that satisfies one more of the following” categories:

- Quid pro quo sexual harassment, meaning that “an employee of the recipient conditions the provision of an aid, benefit, or service of the recipient [school] on an individual’s participation in unwelcome sexual conduct”;
- Hostile educational environment, meaning “unwelcome conduct determined by a reasonable person to be so severe, pervasive, *and* [emphasis added] objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity”;
- Clery Act violations, including sexual assault as defined in 20 U.S.C. 1092(f)(6)(A)(v), dating violence 34 U.S.C. 12291 (a)(10), domestic violence 34 U.S.C. 12291(a)(8), and stalking as defined in 34 U.S.C. 12291(a)(30).

By adopting the standard set forth by the U.S. Supreme Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), hostile environment claims now require heightened proof. An isolated unwelcome remark of a sexual nature would not fall under the new definition. Survivors’ advocates fear that the narrowed definition will not only discourage complainants from bringing forward complaints but also limit an institution’s obligation to act.

ⁱⁱ Elementary or postsecondary school or institution of higher education that receives federal funding under Title IX

ⁱⁱⁱ For example,

Ombuds have no authority to receive notice of any claims against the [University], including any claims under Title IX [Clery Act: and have no authority to receive reports for the University of criminal offenses].

Ombuds have no authority to institute corrective measures on behalf of the [University] under Title IX and its regulations [Clery Act: Ombuds have no authority to be responsible for student or campus activities or serve as a campus security authority under the Clery Act and its regulations].

Ombuds are not authorized to participate in an “informal resolution process” after the filing of a formal Title IX complaint because this would trigger recordkeeping requirements that are inconsistent with their role and may result in ombuds being classified as “Title IX personnel” under the Final Regulations. Ombuds are, however, a resource available to people prior to the filing of a formal complaint or with respect to systemic issues involving sexual harassment or any other issue.

^{iv} See graphic on following page: “The Interface Between the Organizational Ombuds and Campus Title IX Coordination.”

The Interface Between the Organizational Ombuds and Campus Title IX Coordination

In the Context of the the 2020 U.S. Department of Education Regulations Governing “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance”

