

Some Initial Observations of the Impact on Organizational Ombudsman Resulting from the New Department of Education Title IX Regulations

Overview

Groups are polarized over the impact of the U.S. Department of Education's (Department) newly promulgated Regulations interpreting Title IX of the Educational Amendments Act of 1972 ("Title IX") to educational institutions receiving Federal funding, governing sexual harassment and sexual assault. Many victims and survivors groups find the regulations to be a setback in terms of preserving or broadening protections for victims and survivors, groups supporting due process rights and balance rights for respondents accused of misconduct appear, in large, to hail the new Regulations as bringing more fairness and balance to the overall system. For organizational ombudsmen practicing in the educational setting in the United States, the regulations seem to add clarity – or at least the opportunity for clarity for the role of the ombuds on American school campuses.

Preliminary Observations

While the regulations themselves are comparatively brief, the commentary explaining the Department's rationale is extensive and exceed 2,000 pages. Thus, it is way too soon to provide any definitive analysis. However, a fairly extensive initial review focusing on the narrow interest of organizational ombuds seems to reveal the following:

1. The Department has discarded the term "responsible employee" in favor of "an official who has actual authority to institute corrective measures (upon receipt of "actual knowledge") (See p. 342. esp. fn 534 and 535).
2. The definition of sexual harassment has been narrowed. Beyond *quid pro quo* as its "first prong, basically the Department embraced the narrower standard of *Davis v. Monroe County Board of Education*, 526 U.S. 629, that the behavior must be "so severe, pervasive and objectively offensive" that it denies equal access to education."
3. Additionally, the Department incorporates sexual assault as a part of sexual harassment by simply incorporates the VAWA/Clery Act language that includes as "sexual harassment," "a single instance of sexual assault, dating violence, domestic violence, or stalking."
4. As discussed, the Department does acknowledge that, in a post-secondary setting, the ombuds can be deemed a "confidential resource." (See, e.g., p 28, p 37,)
5. The Department draws a bright line between elementary and secondary ombuds versus post-secondary. All employees, ombuds included, in the elementary/secondary setting are mandatory reporters. If elementary/secondary settings want confidential resources, the Department suggests that they must be non-employee resources. Kathie Greenwood made a good point about even university ombuds working with minors. The Department discusses in great length, the role for parents and guardians now under the envisioned process. (This may have implications for ombuds, should a minor visit the university ombuds office for information, as well.)

6. Based on the Department’s language, while a university is free to continue to require blanket mandatory reporting, it is also free to develop its own list of confidential resources as “[t]he mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.”
7. Assuming that ombuds practice to the IOA Standards of Practice and do not participate in activities for which the regulations require documentation, there is very good news with regard to ombuds and record keeping. Provided the ombuds is not engaged in activities (such as officially recognized “supportive measures,” under the coordination of the Title IX Coordinator, Ombuds records are exempted from the regulations record-keeping requirements. The Department states that it “wishes to clarify that, unless ombudspersons have created records that the Department requires the recipient to maintain or publish, ombudspersons do not fall under § 106.45(b)(10). The provision identifies the type of record that must be kept, not the category of persons whose records do or do not fall under this provision.”
8. Having read much more about “informal resources,” as conceptualized by the Department, I am less worried about the ombuds’ “informal” role. On a relativistic scale, what the Department conceives as “informal resolution” is much more structured and formal than the ombuds’ role. Here’s why:
 - a. The department revised § 106.45(b)(9) to expressly state that a recipient may not offer informal resolution unless a formal complaint is filed. (p.1371)
 - b. To ensure that the parties do not feel forced into an informal resolution by a recipient (the university), and to ensure that the parties have the ability to make an informed decision, § 106.45(b)(9) requires recipients to:
 - i. inform the parties in writing of the allegations,
 - ii. explain the requirements of the informal resolution process,
 - iii. describe any consequences resulting from participating in the informal process, and
 - iv. obtain both parties’ voluntary and written consent to the informal resolution process.
9. Repeatedly throughout the document, the Regulations refer to “Title IX personnel” and impose very specific training and record-keeping requirements on that category of personnel. The implication for ombuds appears to be to avoid any activities that could be viewed as the responsibility of “Title IX personnel,” so as to avoid the concomitant training and record-keeping requirements. Because they use this term so extensively, I am still mining the regs for more comments that define the term.
10. As I read the regulations, I have become convinced that it is a good idea for ombuds to keep arms-length distance from all Title IX activities that occur as a part of the Department’s vision of “Informal Resolution.” Thus, I think it would be a bad idea for the ombuds on campus to seek to provide training in neutral, non-biased administration of Title IX informal resolution activities. Because these activities are extremely specialized and invariably lead to non-neutral outcomes for the parties to a Title IX complaint, it seems ill-advised for an ombuds to appear to have an association with the functions of the Title IX Coordinator as the Title IX Coordinator is expected to extensively document the training that Title IX personnel receive and, if the sufficiency of this

training were to be questioned, an ombuds could readily be pulled into testifying about the training. Moreover, the sort of training appropriate for Title IX personnel is quite different than the expertise typical to an organizational ombudsperson. Title IX personnel will be expected to conduct comprehensive, credible, independent investigations that are typically supported by a written report, deep understanding of evidentiary considerations, discerning actual facts from assumptions, drawing conclusions from the evidence, and developing specific, non-neutral recommendations to resolve the complaint at hand. None of this typically falls into the wheelhouse of an organizational ombudsman. We truly want to be far more “informal” than these sorts of activities.

11. The Department discusses “supportive measures” and the interplay between them and “informal resolution.” The Department indicates that “supportive measures are designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party and without constituting punitive or disciplinary actions including by protecting the safety of all parties and the recipient’s educational environment or deterring sexual harassment. Unlike informal resolutions, which may result in disciplinary measures designed to punish the respondent, supportive measures must be non-disciplinary and non-punitive.”
 - a. The Department lists examples of supportive measures. Examples include:
 - i. counseling,
 - ii. extensions of deadlines or other course-related adjustments,
 - iii. modifications of work or class schedules,
 - iv. campus escort services,
 - v. mutual restrictions on contact between the parties,
 - vi. changes in work or housing locations,
 - vii. leaves of absence,
 - viii. increased security and monitoring of certain areas of the campus, and
 - ix. other similar measures
 - b. Supportive measures are provided under the coordination of the Title IX Coordinator and the activities taken under that coordination are documented as a part of the “informal resolution of the case and are typically take *after a case has been initiated as a part of full resolution.*
 - c. In light of the Departments elucidation, the supportive measures called out are all relatively “formal” when compared to the sorts of activities that the ombuds provides on campus. Virtually all examples identified involve the *documented action* of a campus employee *with authority to implement the specific measures* such schedule adjustments, housing adjustments, leaves of absence, etc.
 - d. In the alternative they involve providing a professional service, such as counseling, which, while itself confidential, is provided under the documented coordination of the Title IX Coordinator (i.e. the identity of the person receiving counseling is documented.)
 - e. The Department acknowledged the comment that pushed for ombuds to be included as an identified “supportive measure.” Perhaps based on IOA’s comments to the Department opposing this recommendation, the Department did not determine that

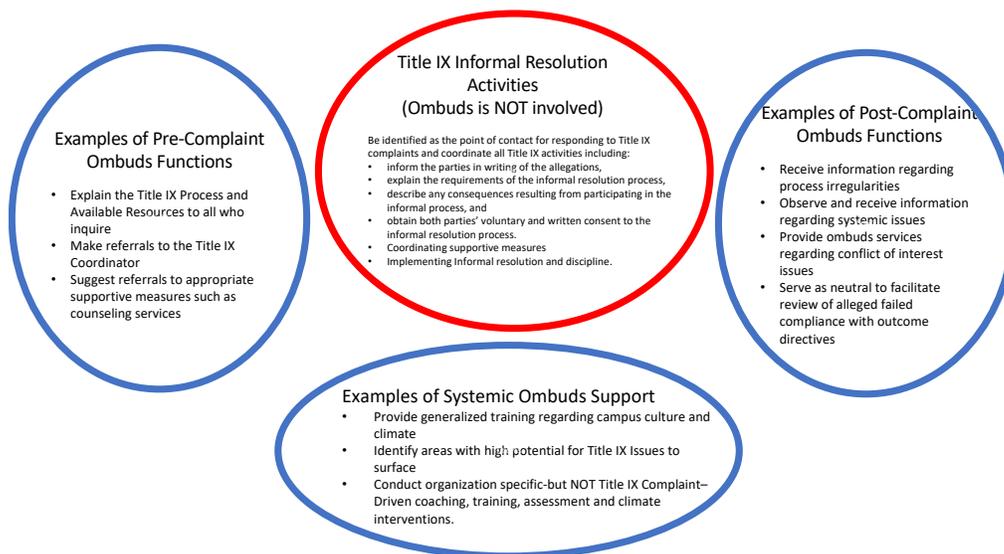
adding ombuds to the list of supportive measures was appropriate, and it is clear that the Department envisions the typical supportive measure to be something quite different from ombuds services.

- f. The final regulations clearly illustrate, that the Department expects supportive measures and informal resolution activities to be documented in Title IX Coordinator records, which are to be maintained, consistent with the Clery Act, for seven years (as opposed to the three-year term in the proposed regulations).
- g. Thus, consistent with its comments about ombuds record keeping, to have added ombuds to the list of “supportive measures” would have imposed record-keeping requirements on ombuds. (The provision identifies the *type of record that must be kept, not the category of persons whose records do or do not fall under this provision.*” [emphasis added])

12. As to the interface of the ombuds function with the Title IX Coordinator function, based on my reading it seems that the ombuds, as a neutral with no actual authority to impose corrective

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



measures, still has continuing roles quite in keeping with our very informal assistance (i.e. outside of the university’s structured “formal” processes -- such as formal responses to complaints of sexual harassment. Basically, our ombuds activities can fall into three major areas: **Pre-Title IX Complaint, Post-Complaint, and Systemic support**. I did a little infographic to illustrate. Essentially, the ombuds should not intrude into the red circle!

13. In light of the Department’s express acknowledgement of the IOA’s comments, it seems to me that IOA is best situated to share best practice tips to the ombuds community as the entity that is implicitly recognized in the regs as the entity responsible for promulgating “industry standards.” This said, it seems that some of the obvious best practices, in light of these regulations, would include:
- a. Have a clearly written policy, charter, or other applicable terms of reference-type document that clearly identifies the campus ombuds program as a confidential resource that is not subject to reporting requirements.
 - b. Ensure that all of your documentation and your position description, make it absolutely clear that the ombuds, even if the ombuds has actual knowledge of an alleged Title IX situation, the ombuds does not have the authority to “institute corrective measures on behalf of” your institution.
 - c. Review the services that your program provides to ensure that nothing in the program description could possibly be viewed as the responsibility of “Title IX personnel.”
 - d. Scrupulously avoid any activities that could be viewed as Title IX informal resolution measures.
14. Many professional groups, including the International Ombudsman Association and the committees within the American Bar Association are working to provide more detailed information and suggestions and time is of the essence because the new regulations become effective August 14, 2020.

Disclaimer

It is important for each institution to work in alignment with their own internal and contract Title IX experts. While I am an attorney (retired), this review should not be construed as offering legal advice. All readers will want to independently review and analyze the information consistent with your own attorney’s advice and recommendations, or in alignment with your own institution’s interpretations and management direction.

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