

Memorandum

To: Scott Coltrane, Interim President, University of Oregon
From: Bruce MacAllister, University Ombudsperson
Cy: Greg Rikoff, Dave Hubin
Date: August 20, 2014

Subject: *“Formal Notice” and Serving as an “Office of Report” for Compliance purposes; Ombuds Program*

I. Executive Summary

A fundamental element of the Standards of Practice and Code of Ethics of the International Ombudsman Association [IOA] is the requirement that, as a truly independent office, the organizational ombuds office does not function as a point of notice to the organization. The IOA standards requiring independence and neutrality also require that the ombudsperson, as a non-manager serving in the independent role, expressly has no authority to impose solutions or management actions. Thus, by definition, the organization’s ombudsperson cannot possibly meet the definition of a “responsible authority” as defined by Title IX administrative rules. The conditions under which the ombudsperson must disclose information to the university are governed by the IOA standards and include provisions that require the ombudsperson to disclose information to avoid “imminent risk of serious harm.” The question of whether the ombuds office is an “office of notice” and therefore required to report information from program contacts must be answered definitively as a policy matter to resolve conflicting positions between those expressed in ombuds program materials (reflecting compliance with the IOA Standards) and the current position of Associate General, Samantha “Sam” Hill.

Given the current intense focus and robust national dialogue in the area of sexual assault and Title IX-related reporting, the status of the ombuds program as a “mandatory report” or as a “confidential resource” is a fundamental and timely issue. How the ombuds office is defined fundamentally affects the way the office can serve the University and, indeed, whether the ombuds office should even be established. In the national conversation, it is now virtually universally acknowledged that more must be done to increase the incidence of reporting by providing additional confidential resources for victims/survivors, and the standard definition of ombuds confidentiality furthers that objective.

Nationally recognized experts all agree that it is important to respect the right of the alleged victim of an incident to assess their options confidentially without fear of recrimination, or of losing control of their options. All agree, too, that discussing an incident in confidence with a confidential resource (including the ombudsperson) does not necessarily mean the case will remain forever cloaked with confidentiality. There is an extremely wide range of behavior included under the term “sexual assault.” The community of professionals focusing on victim support recognizes that victims need to feel safe to assess their options. With appropriate support and counseling, most serious cases move from confidential first contact to work with more formal resources. A safe, informal, confidential point of entry into the system enables the victim/survivor to feel that they can make informed choices and maintain control of the situation during the initial period of decision-making. Likewise, it is

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critical that all victim-focused resources are effectively trained so that critical evidence is preserved while the alleged victim assesses their options.

Congressional momentum, current legal and administrative standards, and widely accepted national practices all support a policy of confidentiality protection for the ombuds office. The full memorandum provides a detailed review and analysis of the current state of requirements in this area. By way of summary, the review and analysis of this full memorandum shows that:

- There are **more than 300 colleges and universities that currently have ombuds programs** on their campus. The vast majority of these campuses (including virtually all AAU benchmarks) expressly state that the campus ombuds office is neither a point of notice to the campus, nor an office of “mandatory report”.
- The **American Bar Association (ABA) has formally endorsed** the confidentiality protections for organizational ombuds offices as articulated by the IOA.
- The **IOA Standards of Practice** regarding confidentiality are consistent with the U. S. Department of Education’s “Dear Colleague Letter” of April 4, 2011 acknowledging an alleged victim’s right to confidentiality and confidential resources.
- The First Report of the **White House Task Force to Protect Students from Sexual Assault**, published in April 2014, highlights the need for increased confidential options for victims/survivors and emphasizes the problems associated with requiring all campus employees to be officers of notice with a duty to report.
- The Office of Civil Rights of the Department of Education [“OCR”] prepared **“Questions and Answers on Title IX and Sexual Violence,”** (which the Department views as a “significant guidance document”) and these specifically recommend and encourage schools to designate confidential points of access beyond the standard professional and pastoral counseling services, as does newly introduced proposed legislation.
- *Absent confidentiality provisions consistent with the IOA Standards of Practice, the ombuds office will be unable to fully provide the services it was instituted to provide.* The confidentiality required by the IOA standards is a defining characteristic of an ombuds program and distinguishes it from being merely a duplicative HR service.
- To offer an “ombuds program” that does not comport with the IOA Standards of Practice would not be advisable in that it would be similar to offering a counseling practice without complying with recognized standards of confidentiality.

This memorandum includes specific process steps and recommendations to resolve this issue and to enable the ombuds office to finalize implementation in time for a full launch by fall term. Specifically it recommends that you expressly approve implementation of the new ombuds program in full compliance with the IOA standards and approve a charter for the office that is consistent with the benchmarks adopted by other higher education institutions within Oregon and nationally. The package includes a draft of a possible memorandum that can be used to announce the policy change (with formal actions that would follow).

II. Memorandum Purpose & Overview of Issue

This briefing provides information and background necessary for a decision to resolve an issue of critical importance to the UO's new ombuds program. The issue regards the Ombudsperson's role and responsibilities relating to serving as an office of "notice" to the university and whether the ombudsperson is obligated to "report" certain matters. The *Standards of Practice of the International Ombudsman Association* [IOA] and requirements for membership eligibility as a full, voting member in the IOA mandate that the organization's ombuds is not authorized to accept "notice" on behalf of the organization, nor is the ombuds required (except within the parameters of the exceptions included in the IOA standards) to report issues such as alleged violations of Title IX. However, Sam Hill, of the University General Counsel's Office has advised that current UO policy mandates that University Ombudsperson is subject to the general reporting requirements of most other University employees and is also an Officer of the university for purposes of placing the university on official "notice" of potential legal claims. Even though there are articulable bases for distinguishing the ombuds role from the scope of the general policy at issue, the better approach appears to be to address the policy issue directly.

To continue implementation of the ombuds program, we need a clear decision on this issue at an institutional level. This memo seeks to provide relevant background and benchmarks to aid in this decision. It also offers an approach by which you can hear directly from all key principals involved so that you are comfortable moving forward.

III. Procedural Background

All of the foundational documents¹ necessary to implement the new University Ombuds Program were completed and shared with the President and the President's Chief of Staff by mid-May 2014. The materials are based on the Ombudsperson's understanding that the UO intends to implement a program that complies with the *Standards of Practice and Code of Ethics of the IOA*, which, as the University Senate resolution states, is the "industry leader in

¹ The President's briefing package contained the following:

- Status Report on Implementation;
 - Draft program announcement to university constituents;
 - Draft Charter document; draft "frequently asked questions" (FAQs);
 - Copies of current website pages; and additional reference materials, which included copies of:
 - The University Senate resolution titled "*Support for the Addition of an Ombuds Office at the UO,*"
 - A copy of the UO Ombudsperson position advertisement;
 - The IOA *Code of Ethics and Standards of Practice*;
 - The IOA Best Practices document;
 - IOA Guidance for *Best Practices and Commentary on the American Bar Association Standards for the Establishment and Operation of Ombuds Offices*;
 - The American Bar Association *Standards for the Establishment and Operation of Ombuds Offices*
 - Copy of the current temporary Ombuds Program brochure
- These documents are provided as reference in "**Attachment One.**"

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this field.” My understanding is that this is the expected approach for structuring the ombuds program based on the hiring and interview focus, the priority given to knowledge of the IOA standards in the university ombudsperson job posting, discussions with the University President at the time I accepted the position, and the February 2013 University Senate Resolution number US 12/13-22, titled *Senate Support for the Addition of an Ombuds Office at the UO*².

The policy approach designed into the materials developed is based strictly on the requirements of the IOA Standards of Practice, which, as stated, require that its members operate ombuds programs that are neutral, independent, and confidential (with significant exceptions), and specifically provide that the ombuds office is *not an office that is authorized to receive formal notice of claimed legal violations* (such as Title VII and Title IX) and is *not a position with a duty to report such issues to other authorities*, such as the Title IX Officer.

I provided the President and his Chief of Staff with draft review copies of the materials and that same week, on May 16, I provided the same set of program and background reference materials to Samantha “Sam” Hill, of University General Counsel’s Office. Subsequently, Ms. Hill and I had a meeting and exchanged email communications to bring the issue into focus. After communications in which I directed the focus to this issue, and having reviewed the proposed ombuds program materials, Ms. Hill has shared her professional opinion that current university policy expressly requires all employees including, in her view, the ombudsperson, to serve as agents of notice and that all employees are required to report issues subject to “mandatory reporting” (with very narrow exceptions).³

It is important to note, that there is no disagreement among the principals with respect to the current policy and its potential implications. Ms. Hill points to an express policy requirement that seems clear on its face. Discussions with Ms. Hill were cordial and professional. Once the policy basis of Ms. Hill’s position was identified, it seemed appropriate to direct the focus to research and benchmarking regarding whether the current UO policy remained in the best interest of the university, or – given the severe implications to continued implementation of the ombuds program – whether policy adjustments were appropriate. Ultimately, it appears that the issue is one that simply requires a senior level policy decision that considers all of the implications and ultimately makes an executive policy decision.

IV. Summary of Issue

Essentially, the issue requiring resolution is whether the UO chooses to implement an ombuds program that operates in compliance with the IOA Standards of Practice. The IOA standards unequivocally require that its “full members” operate ombuds programs that comply with the IOA standards of neutrality, independence, and confidentiality (with the IOA’s recognized exceptions), and they expressly mandate that the ombuds office is *not an office that is authorized to receive formal notice of claimed legal violations* (such as Title VII and Title IX) and is *not a position with a duty to report such issues to other authorities*, such

² Included in “**Attachment One**.”

³ Ms. Hill’s email explanations and communications on this topic are attached as “**Attachment Two**”.

as the Title IX Officer. Meanwhile, current UO policy appears to require relatively universal notice and reporting responsibility. See, e.g., OAR 571-003-0025(2)(a) which provides that university employees with “credible evidence that any form of prohibited discrimination is occurring have a responsibility to inform their supervisor ...” Thus, current UO policy appears in conflict with the university’s own apparent desire to establish an ombuds program in compliance with IOA standards and thus enabling the University Ombudsperson to participate in the IOA as a full (voting) member, as ostensibly mandated by the UO Ombudsperson position description.

V. Discussion

A. Legal and Administrative Standards⁴

1. International Ombudsman Association

On July 21, 2014 the International Ombudsman Association submitted a formal response to U. S. Department of Education’s proposed Rulemaking related to the Violence Against Women Reauthorization Act of 2013. The IOA’s comments request that the Department of Education Rules expressly recognize the long-standing position of the IOA and of many colleges and universities that have ombuds programs and use their programs as a part of the support matrix for individuals with sexual violence concerns. The IOA comment directly supports what I assert in this document. It is included as the first attachment in the reference section, “Attachment Three”.

2. American Bar Association

The IOA standards and its position on notice and reporting limitations have been in place for decades and are widely accepted by the legal community. The American Bar Association formally endorsed the limits on reporting in its 2004 “*Standards for the Establishment and Operation of Ombuds Offices.*” In this document, the ABA states expressly:

⁴ It is neither my intention nor my role to provide legal advice to the University. The “Legal and Administrative Standards” referenced here refer to readily available references and sources available to practicing ombudsmen as resources. Copies of key reference materials referenced in the legal and administrative section of this whitepaper are included in Attachment Three. These include:

- IOA Official Comment to the U. S. Department of Education regarding the Reauthorization of the Violence Against Women Act of 2013
- *Not Alone; The First Report of the White House Task Force to Protect Students from Sexual Assault*
- U. S. Department of Education *Questions and Answers on Title IX and Sexual Violence*
- IOA Best Practices document, *Best Practices: Ombuds Office Charters*
- *The Ombuds Confidentiality Privilege; Theory and Mechanics*, Charles Howard, Esq. and Maria Gulluni, Esq.
- American Bar Association, *Standards for the Establishment and Operation of Ombuds Offices.*
- April 4, 2011 Revised U. S. Department of Education “*Dear Colleague Letter*” regarding Title IX Enforcement.
- U. S. Department of Education *Comparison Table for Title IX and Clery Act Enforcement*
- *Top Ten Things We Need to know About Title IX (That the DCL Didn’t Tell Us)*, The NCHERM Group, LLC.
- *Report to the President and Fellows of Yale University of the Advisory Committee on Campus Climate*, September 2011.

“(3) If an ombuds functions in accordance with Paragraph C, “Independence, Impartiality and Confidentiality,” of these standards (ABA Standards), 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 ... (in which case the ombuds places the entity on notice).”*

3. Other Legal & Administrative References

The U. S. Department of Education’s *“Dear Colleague Letter”* of April 4, 2011 acknowledges the alleged victim’s right to confidentiality in a manner that is virtually identical to the IOA Standards of Practice. The *Dear Colleague Letter* states:

“Schools also should inform and obtain consent from the complainant (or the complainant’s parents if the complainant is under 18 and does not attend a postsecondary institution) before beginning an investigation. If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation. If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited [footnote omitted]. The school also should tell the complainant that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs.

“As discussed in the 2001 Guidance, if the complainant continues to ask that his or her name or other identifiable information not be revealed, the school should evaluate that request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students. Thus, the school may weigh the request for confidentiality against the following factors: the seriousness of the alleged harassment; the complainant’s age; whether there have been other harassment complaints about the same individual; and the alleged harasser’s rights to receive information about the allegations if the information is maintained by the school as an “education record” under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g; 34 C.F.R. Part 99.15 The school should inform the complainant if it cannot ensure confidentiality. Even if the school cannot take disciplinary action against the alleged harasser because the complainant insists on confidentiality, it should pursue other steps to limit the effects of the alleged harassment and prevent its recurrence. Examples of such steps are discussed later in this letter.”

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An IOA-compliant ombuds office offers confidentiality to the visitor to provide a safe place for the person to explore their options, consistent with position expressed in the *Dear Colleague Letter*. Typically, visitors who approach the ombuds office want something done; they just need a safe entry point. Likewise, even if a visitor insists on confidentiality, if the situation they present leads the ombudsperson to conclude that there is an imminent risk of serious harm, they must advise the visitor that they must share the information in some way to minimize the risk to others. The factors listed above, and others that are actually more comprehensive, such as the ombudsperson's sense of whether the visitor poses a risk to their *own* safety are considered.

The First Report of the White House Task Force to Protect Students from Sexual Assault, titled "*Not Alone*," published in April 2014, reported its findings from an extensive listening process that included 27 listening sessions with survivors, parents, activists, and university faculty, staff, and administrators. A major topic included in the report is captioned "*Giving Survivors More Control: Reporting and Confidentially Disclosing What Happened*." This section states that:

"Sexual assault survivors respond in different ways. Some are ready to make a formal complaint right away and want their school to move swiftly to hold the perpetrator accountable.

"Others, however, aren't so sure. Sexual assault can leave victims feeling powerless – and they need support from the beginning to regain a sense of control. Some, at least at first, don't want their assailant ... to know they've reported what happened. But they do want someone on campus to talk to – and many want to talk in confidence, so they can sort through their options at their own pace. If victims don't have a confidential place to go, or think a school will launch a full –scale investigation against their wishes, many will stay silent.

"In recent years, some schools have directed nearly all their employees (including those who typically offer confidential services, like rape crisis centers) to report all the details of an incident to school officials – which can mean that a survivor quickly loses control over what happens next. That practice, however well-intentioned, leaves survivors with fewer places to turn [emphasis added]."

The Report continues with specific recommendations that include confidential options, but with the caveat that students should be advised about the limits of confidentiality. (This is completely consistent with the IOA standards.)

The Department of Education Office of Civil Rights' "***Questions and Answers on Title IX and Sexual Violence***," (which the Department views as a "significant guidance document") includes three salient questions regarding mandatory reporting. The first question, "D-1"

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on page 14 of the document asks, ***“Which school employees are obligated to report incidents of possible sexual violence to school officials?”***

The Department’s answer is as follows:

“Answer: Under Title IX, whether an individual is obligated to report incidents of alleged sexual violence generally depends on whether the individual is a responsible employee of the school. A responsible employee must report incidents of sexual violence to the Title IX coordinator or other appropriate school designee, subject to the exemption for school counseling employees discussed in question E-3. This is because, as discussed in question A-4, a school is obligated to address sexual violence about which a responsible employee knew or should have known. As explained in question C-3, the Title IX coordinator must be informed of all reports and complaints raising Title IX issues, even if the report or complaint was initially filed with another individual or office, subject to the exemption for school counseling employees discussed in question E-3. (Discussed below.)

Question “D-2” discusses ***“Who is a responsible employee?”***

“Answer: According to OCR’s 2001 Guidance, a responsible employee includes any employee: who has the authority to take action to redress sexual 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.

“A school 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. A school must also inform all employees of their own reporting responsibilities and the importance of informing complainants of: the reporting obligations of responsible employees; complainants’ option to request confidentiality and available confidential advocacy, counseling, or other support services; and complainants’ right to file a Title IX complaint with the school and to report a crime to campus or local law enforcement.

“Whether an employee is a responsible employee will vary depending on factors such as the age and education level of the student, the type of position held by the employee, and consideration of both formal and informal school practices and procedures. For example, while it may be reasonable for an elementary school student to believe that a custodial staff member or cafeteria worker has the authority or responsibility to address student misconduct, it is less reasonable for a college student to believe that a custodial staff member or dining hall employee has this same authority.

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“As noted in response to question A-4, when a responsible employee knows or reasonably should know of possible sexual violence, OCR deems a school to have notice of the sexual violence. The school must take immediate and appropriate steps to investigate or otherwise determine what occurred (subject to the confidentiality provisions discussed in Section E), and, if the school determines that sexual violence created a hostile environment, the school must then take appropriate steps to address the situation. The school has this obligation regardless of whether the student, student’s parent, or a third party files a formal complaint. For additional information on a school’s responsibilities to address student-on-student sexual violence, see question A-5. For additional information on training for school employees, see questions J-1 to J-3.”

The universally accepted view of ombuds programs is that they are deemed to function independently from the administration and are not viewed as a part of management. The IOA Standards expressly provide that *“[t]he ombudsman is independent in structure, function, and appearance to the highest degree possible within the organization.”* The IOA Best Practices Document provides that *“[e]xcept in the administrative capacity as manager of the Ombudsman Office, the ombudsman should not participate in formal management functions or serve in any other role ... [and should not] be charged in any way to make, change, enforce or set aside a law, rule or management decision.”*⁵

The draft UO Ombuds Program documents strongly emphasize that the ombudsperson has no management authority, and state directly that the UO does *not* consider the Ombuds (or staff within the office) to be a “responsible employee.” Not having management authority or authority to enforce rules and policies, an ombudsperson should not be deemed a “responsible employee,” using the Department of Education’s own guidance document and its standards and definitions, which specify that a responsible employee is *“one who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence ...”* Further, the language in the draft program documentation is clear and unambiguous on this topic and it is extremely unlikely that anyone could successfully argue that they “reasonably believed” that the ombuds was a “responsible authority”.

Question “E-3” of the OCR document asks, **“What are the reporting responsibilities of school employees who provide or support the provision of counseling, advocacy, health, mental health, or sexual assault-related services to students who have experienced sexual violence?”** In its answer, the OCR states that mental health and pastoral professionals and related staff are not considered “responsible authorities.” (Presumably, this stems from the fact that these professions all have their own testimonial privilege recognized by the federal rules of evidence.) However the answer also acknowledges that:

⁵ IOA Best Practices Document, p. 4

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“OCR recognizes that some people who provide assistance to students who experience sexual violence are not professional or pastoral counselors”. The OCR characterizes these individuals as “non-professional counselors or advocates.” The OCR continues, “OCR wants students to feel free to seek their assistance and therefore interprets Title IX to give schools the latitude not to require these individuals to report incidents of sexual violence in a way that identifies the student without the student’s consent. These non-professional counselors or advocates are valuable sources of support for students, and OCR strongly encourages schools to designate these individuals as confidential sources.”

An organization called the “National Center for Higher Education Risk Management” [NCHERM] prepared a Whitepaper on Title IX compliance. It must be noted that this entity is, in reality, a for-profit consulting legal firm and its positions do not have force of law or indeed the influence of organizations such as the American Bar Association. However, this group’s “whitepaper” states that “Counselors, clergy, and other confidential employees fulfill their reporting mandate by making John/Jane Doe reports for statistical purposes and pattern tracking, but do not divulge personally identifiable information without client consent.” The document later cautions that the organization cannot issue blanket confidentiality assurances (which is not at issue). It must be also noted that the same group of lawyers state that, “[o]mbuds are not exempt from reporting.” Yet, this group provides absolutely *no* legal authority or analysis in support of this statement and, as you will note from the substantial package of supporting information I provide in this memorandum, this does not seem accurate or supported by law or best practices.

On June 26, 2014, the United States Senate Committee on Health, Education, Labor, & Pensions held hearings on campus sexual assault. I reviewed the entire transcript along with other senate round table and hearing transcripts on the topic of sexual assault, which also occurred in June of this year. There were many insights shared by Senators and in the testimony of the experts the Senate called. Listed below are salient quotations from the hearing.⁶

Senator Tom Harkin, D- Iowa (In dialogue with Catherine Lhamon, Assistant Secretary of Education, Civil Rights):

“If the [‘nuclear option’]⁷ is the only thing you have in your arsenal, then it makes it very hard to respond to incidents that may not rise to the level of a felony, but still are egregious actions on the part of students ... Secondly ... a lot of times students who are victims of this, they just need to know what to do. They need to have somebody they can trust ***like an ombudsman on a campus that has been trained. That has the qualifications to at least initially be on the side of the person who has been victimized to give***

⁶ The full Senate hearing testimony is available on CSPAN. The excerpts of the testimony are found at 1:13:15 and thereafter in the testimony.

⁷ The “nuclear option” refers to the authority of the Department of Education to withdraw all federal funding from the institution.

them information about where they should go. How many campuses have these [Emphasis added]?"

Ms. Lhamon's response reflected her misunderstanding of the independent role of an ombudsman, as follows:

"Well, the Title IX Coordinator can function as an ombudsman and every campus is supposed to have a Title IX person."

To which Senator Harkin replied:

"But the Title IX person is part of the hierarchy of the school and that's the problem [emphasis added]."

Later in the testimony (1:56:18) campus sexual assault prevention expert Jane Stapleton⁸ stated:

"I think it is really essential to allow survivors to have outside support people."

To which Senator Harkin responded:

"I raised the issue of ombudsmen. Having someone that the student can go to who is not in the hierarchy of the school structure."

To which Ms. Stapleton responded:

"Yes that is very important and particularly if that person can have confidential communication ..."

Ms. Stapleton continued, and emphasized the need for non-reporting services and specifically mentioned counseling, health centers, and victims' advocacy functions.

Elsewhere in the hearing, Emily Renda, Chair of the University of Virginia Student and Sexual Assault Leadership Council, noted:

"I think the clear point of distinction is maintaining a range of options ... and being able to offer survivors a range of options and outcomes. ... The risk of mandatory reporting is preventing a person from coming forward in the first place, which prevents [the entire disciplinary process] in the first place."⁹

It is also important to note that the confidential avenue for reporting is strongly encouraged by federal law in areas outside of sexual harassment and assault. For example, the Sarbanes-Oxley Act of 2002 [SOX], and many environmental protection laws mandate confidential

⁸ Ms. Stapleton is Co-Director of the University of New Hampshire's Prevention Innovations Program.

⁹ Emily Renda testimony before the Senate Committee on Health, Education, Labor & Pensions, at 1:31:34.

channels for reporting. While SOX and some other federal laws do not necessarily apply to the university, there are a significant number of separate federal statutes that include whistle-blower protection provisions. Most of these statutes encourage confidential reporting avenues.

As to court recognition of general provisions of ombuds confidentiality, the California Court of Appeals recognized the right of an ombudsperson to claim confidentiality for their mediation sessions under the California Constitution¹⁰. This confidentiality was recognized even absent express statutory provisions, such as the Oregon statutory provision section 36.266 which protects the confidentiality of communications in which a public body are involved. (However other California cases do reference the protections of the California mediator shield law.)

Elsewhere Oregon public records law; ORS § 192.501 (16) conditionally exempts mediation records from disclosure.

B. University Benchmarks

The concept of a university ombudsman program was first implemented in the U.S. in 1966, and today there are more than 300 college and university ombuds programs. Naturally, with over 300 possible benchmarks, a definitive review was not realistic. However, a quick review of ombuds charters and websites revealed only *one* reference that does not specifically assert compliance with the IOA standards (Danforth Campus, Washington University in St. Louis, MO.).¹¹

Notable benchmarks include two Oregon higher education institutions – Lewis and Clark College and Oregon State University. Both of these universities include statements in their charters and/or websites that provide that they are not offices of report for purposes of accepting notice, and are not obligated to report concerns outside of the office (except in compliance with IOA standards).

Specifically, the Ombuds Program charter for Oregon State University provides in Section III (B):

“ B. Confidentiality

“The ombuds shall endeavor to maintain the confidentiality of communications to the extent feasible and lawful. In order to protect the safety of members of the University community, the Ombuds may not be able to maintain the confidentiality of certain disclosures, including but not limited to, disclosures regarding imminent threats to public safety, child abuse, and/or harm to self or others. There may also be times with the Ombuds must disclose information as required by subpoena.

¹⁰ *The California Mediation Act has also been expressly interpreted to apply to ombudsmen.*

¹¹ *As of the last IOA conference in Denver, I was informed that the University of Texas was no longer going to offer IOA-compliant confidentiality, however, my search of its website indicates that the UT still asserts confidentiality consistent with IOA Standards of Practice.*

“The Ombuds shall not participate in any formal process inside or outside the university, unless compelled to do so by court order or applicable law.

“Speaking with an Ombuds does not constitute legal notice to the University of any problem, concern, or complaint. Visitors must pursue alternatives complaint avenues if they wish the University to respond in any way. The Ombuds has no duty or responsibility to report incidents to any person or authority other than described above.”

The OSU Ombuds Charter includes provisions similar to the drafts provided and also specifically addresses the issue of receiving notice in more detail in a paragraph under section “B. Limitations on the Authority of the Ombuds,” which states:

“B. Limitations on the Authority of the Ombuds

1. *Receiving Notice for the University:* Communication to the Ombuds shall not constitute notice to the University. This includes allegations that may be perceived to be violations of laws, regulations or policies, including but not limited to sexual harassment, discrimination, issues covered by whistleblower policies or laws, or incidents subject to reporting under the Clery Act. Although the Ombuds may receive such allegations, he/she is not a “campus security authority” as defined in the Clery Act, nor is he/she required to report these allegations to the University. In addition, if the visitor discloses such allegations and expresses a desire to make a formal report, the Ombuds shall refer the visitor to the appropriate University office(s) for investigation, response, remediation, support or administrative or formal grievance processes.”

The charter for the Lewis and Clark Ombuds Program includes substantially similar language, as follows:

“B. Limitations on the Authority of the Ombuds Office

“1. Receiving Notice for the College

“Communication to the Ombuds Office shall not constitute notice to the College. The Ombuds Office shall publicize its non-notice role to the College. This includes allegations that may be perceived to be violations of laws, regulations or policies, such as sexual harassment, issues covered by the College’s Financial Whistleblower policy, or incidents subject to reporting under the Clery Act. Because the Ombuds does not function as part of the administration of the College, even if the Ombuds become aware of such allegations, the Ombuds is not required to report it to the College.”

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Certainly, the legal staff within our General Counsel's Office will be able to advise you directly. However, when I asked for an explanation of why it appeared legally viable and permissible for sister institutions within the same legal jurisdiction to offer the sort of provisions offered in the UO Ombuds Charter draft, the explanation was that our own OAR, specifically the OAR cited above (OAR 571-003-0025(2)(a)) was the issue. I would note that this OAR was developed long before the existence of a UO Ombuds Program, and the University Senate, as the University's legislative body, has already formally stated its position with respect to ombuds confidentiality, via its own resolution (also noted above). Thus, if this is the barrier, this seems easy to surmount.

In addition to the Oregon benchmarks, I have attached samples of many other college and university ombuds charters, all of which provide for ombuds office confidentiality in accordance with IOA Standards of Practice.¹² The samples are random and represent small (and large), private institutions as well as large state institutions. I did not specifically limit or focus the benchmarking process on AAU institutions, however, a number of the benchmarks involve AAU universities. Among the notable benchmarks included, are:

- Report to the President and Fellows of Yale University of the Advisory Committee on Campus Climate;¹³
- The Declaration of Best Practices for University of California Ombuds Offices, which applies to all UC ombuds programs;
- Sample Charters (in alphabetical order) from¹⁴:
 - Boise State University
 - [Boston University](#)
 - Cal Poly Pomona
 - University of Central Florida
 - Claremont Graduate University
 - Coastal Carolina University
 - [Columbia University](#)
 - Dixie State University
 - [Washington University in St. Louis](#)
 - University of Northern Arizona
 - [University of North Carolina, Chapel Hill](#)
 - University of Northern Illinois
 - [UC Irvine](#)
 - UC Merced
 - UC Riverside
 - [UC Santa Barbara](#)
 - [UC San Diego](#)
 - [University of Texas, Austin](#)
 - University of Texas, MD Anderson Cancer Center

¹² Attachment Four

¹³ This report includes language expressly endorsing the use of a university ombuds program as one of the confidential resources available to students, see Para. d, pp. 18 - 19 of the Report.

¹⁴ AAU Universities indicated in blue.

Other benchmarks and reference materials provided in this Attachment include:

- 2011 ORS § 192.501
- ORS § 36.226
- ORS § 36.232

C. Campus Preferences

In the process of meeting with virtually all faculty, staff, and student support services offices and functions, the input, while not universal, seems to range from neutral on the topic of mandatory reporting for the ombuds, to strongly supportive of the confidentiality stipulation. It is important to note that in addition to the strongly worded formal support of the University Senate, virtually all programs that have a role in victim support or advocacy voice support for an additional confidential channel. The current ASUO President expressed the position that there is a clear and unequivocal need for additional confidential channels for student reporting. There is also strong agreement among the principals of the offices that provide sexual assault support services that additional confidential resources are needed. Moreover, the position of some on campus that these confidential needs can be filled by hiring licensed counseling professionals is entirely unrealistic, in that the typical assault counseling position has an authorized annual salary of approximately \$40K while licensed counselors commonly command annual salaries of at least twice that amount. Thus, finding competent licensed counselors to fill this position is essentially unrealistic.

Conclusion

Clearly, the topic of mandatory reporting and Title IX compliance is a high priority area for any University in the US. Because of the complexities of the issue, it is clear that any ombudsperson who works in the American college or university setting must be well-versed on the compliance issues and closely integrated with the other student services that provide support to victims of sexual harassment or violence. More will be demanded of those working in direct support of Title IX compliance at the UO.¹⁵ It is undeniable that it will be imperative for the ombuds program to provide its staff with extensive training in this area to ensure that referrals and services are responsible and that they comply with federal expectations. This will be a growing area of training demand within the ombuds community, and looms on the horizon for all sexual assault campus resources, should pending congressional legislation pass as currently drafted.

The UO has the opportunity to join other leading higher education institutions in the area of Title IX compliance and in the area of providing a seamless matrix of support for survivors of sexual assault, sexual violence, and sexual harassment. Research clearly establishes that, in the context of the national university scene and the operation of ombuds programs in

¹⁵ I note that the UO hired an individual as its ombudsperson who, in addition to eighteen year's experience as an ombuds, has significant experience as an attorney (who focused on civil rights and employment law and litigation), former manager of a large employee relations function, senior legal trainer, and former senior higher education executive directly responsible for Title IX and Clery Act compliance.

higher education, that the following recommendations simply comport with nationwide standards and shared approaches.

It is important to note that there are significant implications to the decision sought. Should the university fail to recognize and support implementation of its new ombuds program in full compliance with the IOA standards, the administration should be prepared to work with the University Senate to explain its rationale in light of the Senate's very expressly-worded resolution supporting the implementation of a program that operates in full compliance with IOA standards.

Secondly, without the recommended confidentiality protection, the university should expect continuing challenges in demonstrating that survivors and victims have safe avenues to report and therefore the statistics are reasonably reliable.

Should the decision be to not authorize the ombuds program to implement a charter that is in full compliance with IOA standards, I would strongly recommend that the University cancel implementation of the program and simply devote the resources to other HR-related staffing. Without the confidentiality protection, the ombuds office will be unable to serve its users in a manner consistent with professional standards. The confidentiality called for by the IOA standards is a ***defining characteristic*** of an ombuds program. To offer a program without that provision is to offer services that are completely redundant of other current services in HR. It would essentially amount to false advertising to hold out that we offer an ombuds program, while not being prepared to function in compliance with clear standards.

Recommendations

Based on extensive research, backed by overwhelming benchmarks, I recommend the following:

1. The President should review the materials and discuss the concerns and rationale with the principals involved. Specifically, I recommend that the President meet jointly with University Counsel and with the Ombudsperson
2. Thereafter, the President should decide whether to expressly authorize implementation of its new ombuds program in full compliance with the IOA standards and implement a charter that is consistent with the same benchmarks adopted by other higher education institutions within Oregon and around the country, or whether to elect to pursue a different course.
3. Once the fundamental policy issue has been resolved, I am prepared to finalize ombuds program documentation. Assuming the decision is made, there will be additional opportunities available to review specific language around confidentiality exceptions. It is indeed important that the language is clear and does not promise confidentiality beyond that allowed under the law.
4. I have drafted, and attached a draft memorandum that expressly clarifies the ombuds role as a non-reporting office. This approach could be used to communicate clarity around this issue or simply signing and approving the final draft charter

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together with a Campus Community announcement about the program to be distributed with the fall “hard launch,” will also be a reasonable approach.

I have not widely distributed this document, but I am entirely comfortable with this document being shared, as the President and/or his Chief of Staff deem appropriate. I stand ready to participate in any discussions and to answer any questions.

BJM

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