

TRANSCRIPT: The Final Title IX Regulations on Sexual Harassment
Hosted By: American Association of Colleges of Osteopathic Medicine
Webinar Presented By: Debbie Osgood - Partner at Hogan Marren Babbo & Rose, Ltd.

(The Final Title IX Regulations on Sexual Harassment - AACOM Slide 1)

Robert Cain, DO: Good afternoon, or good morning, depending upon your location today. I'm Dr. Robert Cain. The President and CEO of the American Association of Colleges of Osteopathic Medicine. It's my pleasure to welcome you to today's webinar, which is being recorded. As a reminder, all participants have been placed into listen only mode and your lines have been muted.

Robert Cain, DO: Please note the participants have the option of asking questions throughout the presentation using the Q & A feature on your screen. Questions will be answered, following the presentation during a moderated Q & A session.

Robert Cain, DO: AACOM is pleased to partner with Hogan Marren Babbo & Rose, Ltd. for today's webinar exclusive to the Osteopathic Medical education community on complying with the US Department of Education's updated final regulation on sexual assault and harassment under Title IX a culmination of three years of activity. These regulations are effective August 14, 2020 and unlike the prior guidance will carry the full weight of law.

Robert Cain, DO: It is a pleasure to introduce today's presenter from HMBR Debbie Osgood, Debbie is a partner in HMBR's education practice. Ms. Osgood is a nationally recognized expert on the civil rights laws and regulations that govern educational institutions. Having joined the firm after 25 years at the Department of Education's Office for Civil Rights. At HMBR Debbie has represented educational institutions, including public and private colleges and universities accrediting entities and nonprofit organizations on a wide range of educational policy and legal issues. Her area of specialty is educational civil rights, including general discrimination issues, sexual harassment and sexual violence gender equity and athletics, racial harassment and accommodations for students and employees with disabilities. Thank you again for joining us today.

Robert Cain, DO: I'm going to turn the presentation over to AACOM's Senior Vice President for medical education and research Dr. Mark Speicher for a few brief comments on the AACOM Task Force on ethics and professionalism Dr Speicher.

(Scree share AACOM Task Force on Ethics and Professionalism Webpage 2:38)

Mark Speicher: Thanks, Dr. Cain and I join Dr. Cain welcoming everyone today. I'm going to share my screen briefly. You should be able to see one of the web pages on the AACOM website and I wanted to introduce you to some of the work on the task force on ethics and professionalism, because as you can see the work involves model policies, including a

model POLICY ON HIS CIVIL RIGHTS equity resolution for all faculty, students and employees.

Mark Speicher: This policy is made available to AACOM members, free of charge. And it is currently being revised in light of the new rules. So sometime, towards the end of July or early August, you'll be receiving a notice at your COMs that the ethics and professionalism task force has revised their policy in light of the new rules and of course will be doing so in cooperation with HMBR and make sure that the information that we give you is all consistent. I'd like to thank my colleagues in the government relations department for making this webinar possible. It is absolutely AACOM's goal to serve you in this area, and we want to be available to you, but also make best practices available to you from some of your peer COMs so I encourage you to check out the website. I'll post the link in the chat, and I thank you again for coming to this webinar today.

Mark Speicher: And now I'm going to stop sharing my screen. Like I said, I'll post the link in the chat and turn the presentation over to Debbie Osgood of HMBR.

Debbie Osgood: Thank you. Thank you, Dr. Cain and Dr. Speicher for your very kind remarks and I really appreciate the invitation to speak with you all today about the new Title IX regs and Dr. Cain already hit on some of the biggest points, which is you have 60 think it's 59 days now to before the rules will be implemented and these rules are intended to have the force of law. Unlike previous policy guidance that was issued by the department. So I'm not going to share my screen and hopefully that will work. Someone can let me know if it's not working.

(The final Title IX Regulations on Sexual Harassment - HMBR Slide 1 4:53)

Debbie Osgood: Okay. So as Dr. Cain mentioned before joining my law firm a few years back I was at the Department of Education Office for Civil Rights for 25 years and, you know, over the time that I was there that I was at the department under four different presidential administrations both Republican and Democratic And so I saw the ebb and the flow of the Title IX roles as they changed over the course of particular in different administrations and I certainly know that this has been a source of great frustration for higher ed institutions, and I wish I could tell you that the dust has finally settled with issuance Of the final regulations, but as we'll get to see, I really don't think that's true and encourage you all to really stay tuned in this area.

(Agenda - HMBR Slide 2 5:53)

Debbie Osgood: Okay, so today we're going to talk first I'm going to give you a pretty quick overview of high level overview of what the title regs require and then I'm going to talk about what schools educational institutions have to do to comply with the new regulations by August 14 you'll see here that we're going to talk about policies and procedures revisions, with which Dr. Speicher is talked about we will also talk

about changes you may need to make to your human resources in your organization. And then finally talk about changes you you'll want to be thinking about relating to the culture on your campus. The department estimated that schools will need to spend between 48 and \$62 million over the next 10 years to implement the new rules, so I'm sure that makes everybody very unhappy.

(Final Title IX Regulations Addressing Sexual Assault - HMBR Slide 3 6:52)

Debbie Osgood: The new rules were issued on May 6. They were published in the Federal Register on May 19 so that's their official issuance date and as we've been saying there they will be effective August 14. They were issued with quite a bit of fanfare, both in the media and from the Department of Public Relations team. There was a press release a fact sheet to final summary overview and a couple of comparison charts. Also, the Department issued a couple of YouTube videos about the new regulations, including the one that secretary DeVos is in on in the picture of the snapshot and also a video from OCR assistant secretary Ken Marcus and all of these materials are available on the department's website, which was at the bottom of the slide.

Debbie Osgood: So there are a number of common themes and the new regulations and I thought it would be important to remind everyone of what those are here as we go through the specifics. So one of the major goals that the department had was to provide to ensure that due process and fundamental fair process was provided as part of the investigation of any sexual harassment complaint. Another goal was to avoid bias into make sure that decisions were being made impartially. Department also wanted to provide more respect I think, for the autonomy of the complainant in these cases. So that they could make their own choices about whether they want an investigation or something else. Um, the department also says that these rules will pride for greater clarity and consistency and that they give schools, a lot of discretion and I'm not sure that we all would agree with those last two, but that is the goals that the department has described.

(Keep in Mind... - HMBR Slide 4 8:46)

Debbie Osgood: So keep in mind as you're, as you're looking through these regulations and thinking about them that the rules are largely the same as what was proposed in November 2018 although there are some important clarifications that we'll talk about today. And the document itself is massive when it was first issue by the Department it was over 2000 pages, of which only the last 30 pages are there actual rest regulations. And so, one tip I would give is really focus on the regulations. Because those are the new rules. That's the language that courts and OCR is going to be looking to as they implement the rules going forward.

Debbie Osgood: Obviously, that the very, very lengthy preamble is helpful as guidance about what the department, thinks have different parts of the new rules, but again it's not legally binding in the same way that the

regulations are and as I said, we need to stay tuned in this area that there have already been 4 lawsuits filed in federal court challenging the department's new rules, expect that there will be even more. There's also been talk of congressional action. And as you know, we have national elections later this year. Vice President, Joe Biden has already said that he'll reverse the new regulations, if he's elected so we definitely need to stay tuned. Although the regulations are final. There is a chance that there will be changes to all or parts of the rules.

(Supreme Court Title VII Decision - HMBR Slide 5 10:23)

Debbie Osgood: I also wanted to briefly mention the decision issued by the Supreme Court earlier this week. This decision was really a historic and landmark decision was issued on Monday. In the Court said that title VII, which is a civil rights law that protects against discrimination on the basis of sex in employment that also includes discrimination on the basis of sexual orientation and on the basis of gender status. This is a huge victory for advocates in this area, who have been arguing that the discrimination, the discrimination on the basis of sex is obviously sexual orientation or transgender discrimination. We don't know yet what the Department of Education is going to say about how this ruling from the Supreme Court affects Title IX, we do know that in the past OCR has looked at Title VII case law to interpret Title IX. So I, you know, if I were to make a bet, I would say that the department would come out and say that Title IX also protects against discrimination on the basis of sexual orientation or transgender status, but importantly The Supreme Court did not address the issue of whether schools need to provide separate bathroom or facilities issues for transgender individuals for students or employees and that's very consistent with the position taken by the Trump administration. So the controversies that are in the media and in the courts relating to facilities are still pending and have not been resolved by this Court decision.

(What Do the Final Title IX Regulations Require? - HMBR Slide 6 12:02)

Debbie Osgood: So what did, what do the final regulations require? Very big picture.

(Title IX Regulations - What's New or Different? - HMBR Slide 7 12:05)

Debbie Osgood: There are four categories. I would say one they updated the general procedural requirements two there's a higher standard of liability that we'll talk about. And three for the first time in the over 45 year history of Title IX, there are specific regulatory provisions that address sexual harassment. You may know that the EOC Title VII regulations have had language addressing sexual harassment for some time, but this is the first time that these obligations and these requirements are in regulations as opposed to policy guidance. And as Dr. Cain suggested this was very intentional on the part of part of the department about with the department wanting these rules to have more permanence than policy guidance, which could be easier to change if the administration changes.

Debbie Osgood: Finally, for the sexual harassment or sexual misconduct that's outside of the scope of Title IX are these regulations regulation simply do not apply. We'll talk about that, but it's very important, as you're looking at these regulations and you'll hear about, for example, that they don't apply to most off campus sexual misconduct. You want to be thinking about whether okay if Title IX doesn't apply to us do we still want to prohibit that misconduct as part of a different policy, perhaps your student code.

(Updated (General)Procedural Requirements - HMBR Slide 8 13:39)

Debbie Osgood: So I'll talk a little bit more specifically about each of these in terms of the general procedural requirements. The Title IX coordinator, the non discrimination notices the grievance procedures and the anti-retaliation provision, these have all been in the regulations, since the beginning they apply to all sexual sex discrimination matters not just sexual harassment and basically the new regs update these rules to reflect more current technologies so when you are providing the contact information for the Title IX coordinator, you know, must include the email address, which is what schools have been doing even without that requirement.

Debbie Osgood: Secondly, with respect to the nondiscrimination notice you have an obligation to publish that. And again, the department merely updated that requirement to say that you have to publish it on your website, which again is something that most institutions had already been doing

(Higher Liability Standards - Deliberate Indifference - HMBR Slide 9 14:38)

Debbie Osgood: A higher standard of liability that I mentioned is the deliberate indifference standard and I want to read to you the probably the most important sentence and all the regulations. It says that a school must respond in a manner that is not deliberately indifferent to actual notice of sexual harassment that is in an education program or activity and against the person in the United States. In each of those highlighted terms it is very significant deliberate indifference is really something, it's not that you made a mistake. It's that was a clearly unreasonable mistake that you made.

(New Requirement for Sexual Harassment - HMBR Slide 10 15:20)

Debbie Osgood: I'll come back to discussing the some of the other definitions, when we get down to the policy changes.

Debbie Osgood: I mentioned that these new Title IX regulations add new specific requirements relating to sexual harassment, for the first time and the regulations and as we'll talk about, as you're thinking about changes, you need to make to your Compliance Program there are two questions you want to ask one is the misconduct within the scope of Title IX. And if it's not the Title IX regulations don't apply and you as an

institution have discretion about how you want to address that misconduct. If you still want to address that misconduct.

Debbie Osgood: If the conduct is within the scope of Title IX, then you must not respond in a manner that is deliberately indifferent. So for all cases you will need to provide supportive measures what used to be called interim measures and for conduct within the scope of Title IX second question is to ask whether a formal complaint was filed. If not, you still have to write a supportive measure, but if yes then you have to follow the specific requirements for sexual harassment grievance process. And I want to just make a point that the department's move to use the deliberate indifference standard and the Title IX administrative context look cases that go to OCR was intended to align the standard with a standard that's been used in private litigation for many years to comply with a couple of Supreme Court decisions. So now the deliberate indifference standard will apply and sexual harassment cases that are filed with OCR or that are part of private litigation.

(Obligation to Respond to Sexual Harassment - HMBR Slide 11 17:17)

Debbie Osgood: This is a chart. I always like to have a diagram to kind of encapsulate the process that I'm thinking about it. And again, the two questions are: If you look at the scope of Title IX and then you look at whether it was a formal complaint and the answers to those questions will just dictates what steps you need to take.

(What Steps Do Schools Need to Take by August 14, 2020 - HMBR Slide 12 17:41)

Now we're going to move on and talk about what schools actually need to do and steps they need to take by August 14.

(Steps to Take By August 14, 2020 - HMBR Slide 13 17:48)

And I would say that the first thing you want to do, and probably have already done is to bring your experts and stakeholders together to talk about how to make these changes. Three big categories of changes that need to be made are to your sexual harassment policies and procedures. You're also going to have to make some changes to your organizational structure, particularly in identifying who has the authority to respond to take corrective action in response to sexual harassment because that's the, those are the only individuals on the campus, aside from the title IX coordinator that can trigger your obligation to respond. And you also want to address climate. Climate at your campus through training and clear communications and we'll talk a little bit more about each of these as we go on.

(Checklist - Requirements for Title IX Sexual Harassment Policies and Procedures - HMBR Slide 14 18:42)

Debbie Osgood: So let's talk about the requirements for the policies and procedures that need to be changed. And here you have a kind of a

checklist for the I summarize, I think eight different requirements. And so let me get to the first one.

(Requirements for Title IX Sexual Harassment Policies and Procedures - HMBR Slide 15 19:00)

The first one is that this new regulation be clear that Title IX regulations apply to both students and employees. You'll need to decide what standard of evidence want to use in what in the policies that apply to students in the policies that applied to employees. Many institutions and I think AACOM is it going in this direction, you use a single unified or umbrella policy and procedure for addressing all types of sexual harassment. The key is that the standard of evidence has to be the same for all different types of sexual harassment cases.

Debbie Osgood: For states that have state law requirements relating to the standard of evidence or institutions that have collective bargaining agreements with faculty or staff, you'll need to carefully consider what those standards of evidence are in the state law or the collective bargaining agreement and decide how to make the standard evidence, evidence consistent across your policy.

(Requirements for Title IX Sexual Harassment Policies and Procedures - HMBR Slide 16 20:15)

Debbie Osgood: So I'm gonna go back now to what we talked a little bit about this before but sexual misconduct that's within the scope of Title IX. So this is the these are kind of the four key factors that we talked about ahead statement I read earlier. First, there has to be actual notice. Second, the conduct must be, must meet the definition of sexual harassment under the new regs, it must occur in an educational program or activity and against a person in the United States.

(Requirements for Title IX Sexual Harassment Policies and Procedures - HMBR Slide 17 20:47)

So actual notice this is the part that has changed in addition to other things. Actual notice is when an allegation of sexual harassment is made either to the Title IX coordinator or to a person with authority to take corrective measures. And this phrase is not the same as responsible employees that schools have designated already to report sexual harassment that they hear about or witness to the Title IX coordinator. So it would be important to identify who are the person on your campus that have the authority to take corrective measures. I think in very general terms we're clearly thinking more high level officials like Dean's and probably not individual coaches or individual faculty unless they have some supervisory responsibility. So the conduct also has to be within the definition of sexual harassment and this to has changed under the new regulations. First quid pro quo harassment, which is sort of this for that is still prohibited, second the department has incorporated the Violence Against Women categories of sexual assault, domestic violence, dating violence, stalking into the definition of sexual harassment. So if

the misconduct fits any of the VAWA categories, it fits the definition of sexual harassment under Title IX.

Debbie Osgood: On the other hand, the department has narrowed the definition of what a hostile environment is and the department is saying that harassment that it, the harassment needs to be severe and pervasive and objectively offensive enough to effectively deny equal access to the education program or the activity which would include obviously also employment. Previously the standard was severe or pervasive or persistent and while it sounds very legalistic, it really will narrow the types of sexual misconduct that will fit within this definition. So we'll be certainly watching that closely going forward.

Debbie Osgood: The goal of this narrow definition to was to, on the from the department's perspective to try and provide greater First Amendment protections to harassment that's in the form of speech. Now the final two points we've mentioned a bit already the sexual harassment requirements and the new Title IX regulations do not apply outside the United States, so they do not apply to study abroad programs. And this is an issue that the department has gone back and forth on during my time there. And finally, has landed on saying that the regulations do not apply to a person if they are not in the United States. This language that they're citing is directly from the statute. And finally, harassment must be in an education program or activity. So this answers the question about whether Title IX applies to off campus sexual harassment and the answer is sometimes it applies to off campus activities, if they are part of an education program or activity or if there's further conduct that occurs within the program or activity.

Debbie Osgood: The regulation says that schools have jurisdiction under Title IX for sexual harassment at locations events circumstances where the institution has substantial control over both the respondent and the context in which sexual harassment occurs at, you know, the public, you know, four-year universities. This will mean that, for example, if you have a fraternity or sorority that is registered with your school or officially recognized by your school and they have a building off campus that you as an institution would still have jurisdiction over that building.

(Requirements for Title IX Sexual Harassment Policies and Procedures - HMBR Slide 18 25:04)

Debbie Osgood: They also mentioned that, with or without a formal complaint, institutions must provide supportive measures whenever they have actual notice of sexual harassment. These measures are not to be disciplinary and not to be punitive. They are intent, they should be individualized and essentially the department is suggesting that schools use the same type of interactive process that they use or disability accommodations to determine whether supportive measures are appropriate and if so what supportive measures are appropriate. These measures have to be provided to both parties. You want to very carefully document

decisions that you make about the supportive measures in case there is a challenge to these your determination and white you decide to give to water or more of the parties because I certainly see that there's a strong possibility that particularly at OCR there will be more cases filed by complainants saying that the supportive services that you provided a word sufficient or adequate to restore preserve equal access for the complainant and then they're probably will be more cases filed by respondents saying that the supportive measures unreasonably burden of the respondent. I'm going to recommend and this is not a mute regulations, but it's a strong recommend recommendation that you have a way for the party's to challenge the supportive measures internally through your internal grievance process so that if you have that process and if the claim goes through that process, then if the case goes to OCR, OCR is likely to defer to the decision made in your internal process.

(Requirements for Title IX Sexual Harassment Policies and Procedures - HMBR Slide 19 27:07)

Debbie Osgood: We've talked a lot about formal complaint. So let's talk about what that is formal complaint is one that is signed and file back complainant and the complainant must be participating or attempting to participate in the educational or employment program or activity. So I want to emphasize that this requirement requires, it's mandatory that the complainant still be participating in the program or activity. The complaint a complaint may be filed by the Title IX coordinator, but to move forward this complainant would still need to be participating or attempting to participate in the program or activity. And on the other side, you may dismiss a complaint if the respondent is no longer enrolled or employed at your institution. And this is not a mandatory requirement this is a permissive provision that says you may dismiss and it's something you want to put in your policies and procedures and decide how you want to address. And finally, you want to make clear that how you're going to address of sexual misconduct that occurs outside the scope of Title IX and it's not filed in a way with formal complaint.

(Requirements for Title IX Sexual Harassment Policies and Procedures - HMBR Slide 20 28:03)

Debbie Osgood: Moving on the department has included with the new regulations essentially a laundry list of in all of your grievance process really, processes or processes related to sexual harassment, you must include this is what I'm calling a laundry list of the basics. Many of these, you've seen before treat complaints respondents equitably objectively evaluate the evidence there should not be any is a conflict of interest. Reasonably prompt timeframes. We've heard before. You want to note what the disciplinary sanctions and remedies could be and talk about what supportive measures are available to the parties and how they can be accessed. Things that have changed in this list is that now there is a requirement that you provide training for Title IX coordinators, investigators, decision makers and individuals who facilitate informal

resolution. We know that institutions have been providing a lot of training already because they think it's best practice because it's required by VAWA and or because it's required by state law, but now it's also required by the Title IX regulations. And the regulations, take that one step further and require that you post your chain training on your public website. So that's going to be very interesting going forward.

Debbie Osgood: You also need to include an explicit presumption that the respondent is not responsible at the start of the investigation well in your policies and also in your notice letters. I mentioned the standard of evidence, you need to choose whether you want to use either the preponderance standard because the phrase is something that is more likely than not, or a feather above 50% or the clear and convincing standard, which has been called a highly probable standard. You'll need to choose one of these and use them for all of your sexual harassment policies and procedures for students and for employees.

Debbie Osgood: Another new provision that's another new part of the basic requirements is that you must include appeal procedures it previously was your choice. But now, it must be included. And there's also new restrictions related to attorney client related privilege issues. (Requirements for Title IX Sexual Harassment Policies and Procedures - HMBR Slide 21 31:02)

Now going to talk about what is probably the most controversial part of the new rules, which is that the rules, the new Title IX rules have specific rules for how institutions must conduct investigations and adjudications. Some of this, you'll see him and say, oh, we've already been doing this so written notice is something that schools have been doing. Of the regulations make clear that the burden of proof than the burden of gathering the evidence rest with the school. That parties have an equal opportunity to present witnesses consistent with the, with the department's interim guidance in this area, they are not allowing gag orders or, you know, rules that prohibit parties from talking to other people.

Debbie Osgood: Moving down the rules require access to evidence which also was part of the interim policy and as part of the VAWA requirements. The rules require that the draft investigation report be given to the parties for review and response at least 10 days before any hearing. And that there be a written determination made by the decision maker about responsibility and here is, here are the biggest changes right: The department is now saying that schools may no longer use a single investigator model that they must provide a live hearing and every case of that is making a decision about whether someone violated your sexual harassment policy. You also must permit the parties to have an advisor of their choice and the decision maker at the hearing cannot be the same as the title IX coordinator or the investigator. That's very different for many schools that have been using a single investigator model and will require substantial change for those schools in terms of how they do the adjudication of these cases.

(Requirements for Title IX Sexual Harassment Policies and Procedures -
HMBR Slide 22 33:11)

Debbie Osgood: For the live hearing itself. You probably have seen in it. We're going to continue seeing a lot of external training for schools on how to ensure that you're hearing officers know what they're doing, essentially, but the rules require that the decision makers, so this will be either be the hearing officer of his own one or the chair of the hearing panel if there's more than one hearing officer that, that person is essentially responsible for conducting and running the hearing. And made sure that it is proceeding in an orderly way that it's being recorded, either with an audio recording or a transcript. The hearing itself can be held at one location or can be held virtually, which obviously many schools are doing now and the look location is your choices. So it's the school's choice. The caveat is that you have to make sure that if you have a virtual hearing the technology has to allow all parties and our advisors to see and hear one another and to see and hear any witnesses.

(Requirements for Title IX Sexual Harassment Policies and Procedures -
HMBR Slide 23 34:21)

Debbie Osgood: The live hearing also includes a provision, like your requirement also include a provision that if a party does not have an advisor that the institution or the school must provide a free advisor for the party at the hearing. There has been a lot of discussion about how to get how who should be the free advisor, whether it should be a lawyer. There's a lot of I'm sure external resources where you can get advisors and I know that some institutions are talking with their local law schools to see whether there's some clinic that can be tied together with these procedures so that you could use a law student, you could train them how to being an advisor and then use them as sort of a pool for your parties, if they had not selected an advisor and the department is requiring that the advisors conduct the cross examination. Some schools and some courts have said that that the parties strict conduct the cross examination. Others have said that the hearing officer should conduct the cross examination of the party skip questions to the hearing officer, they do the cross examination, but the department has come down with it's rule, which is that only the advisors can be allowed to do cross examination of both parties and the witnesses.

(Requirements for Title IX Sexual Harassment Policies and Procedures -
HMBR Slide 24 36:04)

Debbie Osgood: I wanted to mention that if your institution is part of an academic medical center. The rules are relating to hearings, do not apply. This is a little quirk in the new rules. You do not have to provide a hearing you may, but you do not have to. If you do not provide hearing you still have to have a way for questions to be asked of each party and for the decision maker to decide which questions are relevant or not relevant.

(Requirements for Title IX Sexual Harassment Policies and Procedures - HMBR Slide 25 36:37)

Debbie Osgood: Okay, the seventh step in this ensuring that your policies and procedures comply with the new regs, you are permitted to offer informal resolution opportunities such as mediation. That's not new. That was part of the interim guidance. What is new in the regulations is that you cannot use informal resolution to resolve allegations that an employee sexual harassed a student. You also need to include the mandatory training that we just discuss and the appeals, the rules also require that your records relating to these investigations and hearings are maintained for seven years. That is an increase from three years in the proposed rules. And as I mentioned, you need to post your training materials on your website that is going to be something that some schools are going to struggle with a bit I think. A couple of recommendations we talked about providing an internal grievance process to support the challenge to offer parties a way to challenge supportive measures.

Debbie Osgood: Another recommendation I would make is to build in a regular review and revision process so that it's part of your policies and procedures that on an annual or biannual basis, you're going to be looking at them and updating them to conform with changes in a law or changes in policy.

(Title IX + Addressing Sexual Misconduct Outside the Scope of Title IX - HMBR Slide 26 38:18)

Debbie Osgood: Finally, I just wanted to remind you that, you know, again, the department saying this is the scope of misconduct that is considered a sexual harassment under the Title IX regulations. So this is the type of misconduct that can deprive someone of their civil rights or their opportunity to participate in in your program or activity, but it's important to remember that unlike the proposed regulations, the final regulations are a floor they are not a ceiling and you can go beyond those in addressing sexual misconduct on your campus.

(Requirements for Title IX Sexual Harassment - Organization Structure - HMBR Slide 27 38:55)

Debbie Osgood: Let's talk now about the second big category we talked about policies and procedures. So now let's talk about changes to your organization. Certainly, you're going to want to be clear about the lines of authority and responsibility for whatever office is charged with the Title IX responsibilities, whether it be Title IX office or an equity office that has a Title IX office within that you want to be clear who the the coordinator and the director report to instill it strongly suggested that they report to someone in senior leadership. New regulations are, you know, going to require that a lot of institutions, go back and look at their policies to make sure that they apply to employees as well as students and this includes even at-will employees. So you want to make sure that that the processes and procedures we have a cover both.

Debbie Osgood: The Title IX coordinator, I think the role is expected to still be quite robust under the new regulations. The Title IX coordinator still responsible for coordinating overall Title IX compliance and for implementing what's called effective supportive measures or what we used to call enter measures, but the change here is that the Title IX coordinator cannot be the decision maker and that changes going to be significant for how you structure, how your cases are investigated and decided. As I mentioned, you also need to make clear, who is an official with authority to take corrective action at your institution. And who are your responsible employees. Some institutions had designated all of their employees as responsible employees with the obligation to report sexual harassment. The department is not telling schools any longer. Who needs to be responsible employee or even what that is. They're just saying that you need to be clear who the official is with authority to take corrective action. I think the intent is that this would be a much smaller circle of individuals and officials at your institution than the circle of who was previously considered a responsible employee.

Debbie Osgood: The investigators again we've mentioned cannot be decision makers. So you're gonna have to decide who is going to be your decision maker. Do you want one hearing officer and you want to hearing panel? Do you want to use people that are from your institutions or internal or do you want to try and just outsources function to some external law firm like mine or to other another organization?

Debbie Osgood: And finally, you're going to need to make arrangements to have and to provide advisors for hearings. If a party does not have an advisor, that's obviously a significant additional responsibility that schools will have.

(Requirements for Title IX Sexual Harassment - Campus Culture - HMBR Slide 28 42:15)

Debbie Osgood: And finally, I wanted to talk a little bit more about changes to your campus culture and I want to talk about these in kind of two ways. One, you have to do training and you've always had to do training. So this is not really that that different. It's just that the training is now required as part of Title IX and it has to be posted on your website. So for students, you'll have to update your training to explain your updated policies and procedures. For employees, you certainly need to make clear that title IX applies. And be clear and clarify who are the employees that have this authority that we've been talking about, and who are responsible employees with an obligation to report the mandatory training applies to Title IX coordinators, investigators, decision makers, and informal resolution facilitators.

Debbie Osgood: The last big piece of the campus culture is to really think big picture about your communications with your client about why you are making changes to your policies and procedures. Certainly, you want to make clear that you are making the changes to comply with the new federal law, but I think it's going to be important for our institutions

and their communities to hear that the institutions are not going backwards, that you are still very committed to preventing and addressing sexual harassment and so if you're going to certainly you have to address sexual harassment, at a minimum, by complying with the new Title IX regulations. And you can do more, you can. I've been calling it Title IX plus, you can do more and you want to explain what more you're doing to your community, so they understand that. You're not going backwards, you're, you're still committed to having a very robust sexual harassment prevention program.

(Next Steps for DOE-OCR - HMBR Slide 30 44:26)

Debbie Osgood: One last point I wanted to go over very quickly, was that obviously the Department of Education now has these new rules and OCR has to decide how it's going to apply these rules to open cases. The department said it's not going to retroactively enforce the rules. Once they're issued and final on August 14 and we'll have to see how that impacts open cases and resolution agreements, we know that for new complaints or complaints filed on and after August 14 the new rules will apply. There is also a new office at the Department of Education Office for Civil Rights, which is called OPEN, which is short for outreach prevention, education and nondiscrimination. They are very, very busy trying to provide public information about what OCR is doing. And so they've made a number of videos, including the ones that I've mentioned, but they are also answering questions about the title nine regulations and issuing their response on the blog, on the blog which is on its homepage. So I just wanted to bring that resource to your attention.

(HMBR Title IX Compliance - HMBR Slide 31 45:44)

Debbie Osgood: This is a long list of services that my firm can provide. And certainly other law firms and institutions can provide. If you think that you want to outsource some of these functions, whether it outsourcing the hearing or the appeal or the investigation or the mediation. If you want someone to, you know, review your policies and procedures. This is a list of the type of services related to Title IX that you may want to outsource. We've also provided here a link to my firm's new website, which is called Title IX compliance and it's really a great website has all the information all links to all the information you need to understand what the new regulations are, and it also includes links to the department's guidance and it includes links to these two resources that we put together.

(HMBR Resources - HMBR Slide 32 46:39)

On the right, you'll see at the top of summary of the key provisions and that's a narrative explanation of the new provisions with us 15 pages long. And then you'll also see a chart that says a desktop guide and a Title IX glossary and those documents are actually one document, just so you can have a visual image of how the process should go. So you'll see in evaluation, we're asking whether sexual misconduct is within the scope

of Title IX and then later we're asking whether it's a formal complaint. Hopefully, this is a handy reference tool for you all.

Debbie Osgood: I'm going to stop sharing my screen or I guess I don't have to. If there are questions now is a good time for us to address them.

(Your Presenter - HMBR Slide 33 47:24)

Julie Crockett: Thank you so much, Debbie. We really appreciate you taking the time to speak with everyone today and we have received a number of questions.

Julie Crockett: We're going to do our best to get through the questions and answer as many as we can. So I will get started. The first question: Can you please discuss if the new Title IX regulations will impact the Cleary Act requirements.

Debbie Osgood: Sure and I do you want to say that you have my contact information as, as you may have gathered, I'm kind of a geek about Title IX and the new rules and how they've changed over time. So I am always happy to answer questions about about these these issues and if I'm stumped by any of your questions today. I certainly can follow up with you afterwards to give you the right answer. So the question was how the new Title IX regulations impact the Cleary Act and the VAYWA requirements and the bottom line is that they are separate laws and separate regulations so they should not have any impact on the complying with those with Cleary or VAYWA. Well, I will say, though, that the not a number of the changes to the Title IX regulations were purposely made to try and make these two statutes more consistent in it for schools in in applying them. One example would be the seven years of record keeping. Well that's now consistent across the two statutes.

Julie Crockett: Thank you, Debbie a next question, one of our participants has learned that students who report Title IX issues are not protected anonymously from the accused during the investigation. If so, how do we encourage students to come forward.

Debbie Osgood: Though there's a very good observation that in order to have the formal resolution process and the agreement process A complainant has to be identified and the reason for that is this going back to this concept we talked about at the beginning about due process that the person that's an accused of sexually harassing another person can't really defend themselves if they don't know who that that person is. And there was certainly a lot of concern that this was going to chill complainants from coming forward a couple things, even if a complainant chooses not to proceed with a formal resolution. Remember, they still have an obligation to provide supportive services. And so I guess one way to encourage students to come forward is to make sure that you will support them. If you will honor their wishes in terms of whether they want a formal complaint of, but just to make clear that you will support them and provide them with, you know, academic adjustments or constant

resources or whatever it is that they may indeed. During this period, I think that the question about SOMEONE WANTS TO REMAIN ANONYMOUS CAN YOU. How can you encourage them not to be and I think how should you or can you encourage them to reveal their name. And I think this goes back to trying to respect the autonomy of the complainant and their choices about whether they want to go forward with the formal process, but it's an important piece to be thinking about, because the whoever asked this question is absolutely right that the complainants identity will be revealed as part of the formal process.

Julie Crockett: Thank you. Another question on the participant is curious as to how to handle sexual harassment that is perpetuated by patient in a clinical setting for one of our third- or fourth-year students

Debbie Osgood: Yeah. That's a stumper. I'll talk out loud, as I'm trying to answer this. So sexual harassment by the patients. So the patient will be the respondent. And you could dismiss the case if the patient was not participating in an educational program. I would, I hesitate to give you a firm answer. My initial thinking is that the hospital setting would be considered part of the educational program. But again, if it's an academic medical center then you don't have to provide the hearing that's required under the regulations for other types of cases which makes it a little bit easier. I think that this is what I can certainly get back to the question, Questioner, about what my initial thinking is that if, if a patient is sexually harassing an employee or a student that's in an education and clinical program, you want to be protecting your students and employees from sexual harassment and so you want to look to see whether you should use the new Title IX regulation and can use a new Title IX and regulations to investigate the alleged harassment.

Julie Crockett: Okay, thank you. We can definitely share the, the question on the person who has questions information. Another question, and this is, you know, just related to that, if you can clarify the point that he made about made about not having to hold a live hearing. If the school is part of an academic medical center.

Debbie Osgood: Well, you don't have to hold the live hearing if you're part of an academic medical center, but you do have to, you know, conduct the investigation. And you have to provide the parties with a way to ask each other questions, and the decision maker still needs to be watching the questions and making sure that that they're relevant. What, what more to say about that. But it is you know when you first read the regulations. It doesn't say academic medical center anywhere. What it talks about our recipients that are elementary and secondary schools and other recipients that are not post secondary institutions and then in the preamble it clarifies that by that it means non academic, it means academic medical centers. So there is a specific provision in the regulations that talks about what you need to do it gave you a quick summary. But there's a specific provision and the regulations that addresses this.

Julie Crockett: Okay, thank you. And this question does refer to a specific section of the regulation, it says under section one of 106.45 (B3) concerning dismissals of complaints, who actually makes the decision and dismisses the complaint?

Debbie Osgood: That's a great question, because I think that if I remember correctly, this is one of the sections where they don't use the term decision maker. So I think they refer more to the recipient must dismiss the formal complaint. And I think that they are thinking of probably the Title IX coordinator, but they're not requiring that the title nine coordinator make that that decision. That would be the logical person to make it because they would be trained and familiar with your policies and procedures but I suppose you could try and select someone else to do that as well.

Julie Crockett: Hey, thank you. And another more specific section question also from Section 106 it says any person may report sex discrimination, including sexual harassment. What does this mean since sex discrimination is never mentioned again and the whole process stills only was sexual harassment.

Debbie Osgood: You know, I'm not sure exactly where that included of what I would say that you know, if someone has the Title IX regulations, if you kind of step back to those general procedural requirements we talked about at the beginning that you have to have a grievance process for all allegations of sex discrimination and then you have to have a specific grievance process for allegations of sexual harassment that that fit with him and the new rules. I suspect with that's what that's referring to is talking about other examples of sex discrimination. So if someone thinks that they were treated differently because of their sex or they didn't get promoted because of their sex of that that's they do have a way to report and make a complaint about that under Title IX but it's under the general sex discrimination part of the regulations.

Julie Crockett: Okay. And I think we have time for just one more question. Regarding the hearing officer can the hearing officer question the party's not as across examiner per se, but to obtain information or follow up on information and the investigation report?

Debbie Osgood: That's a great question. And I would say, I don't see anything in the rules to prohibit that well it's the rules actually aren't very clear about how information is presented. As part of the hearing all of them pretty specific about cross examination, but not a specific about others. So I don't see anything in the rules that would prohibit of hearing officer from asking questions. It's just that they can't conduct the cross examination.

Julie Crockett: Okay, thank you so much, Debbie. If there's no final comments. This is Julie Crockett with AACOM, I just want to thank everyone again for joining us. And a special thank you to Debbie for sharing her wealth of expertise and knowledge with us today and we thank everyone for participating. The participants will receive a recording of

the webinar that will have the information that you need to access additional materials. So thank you very much everyone, and we hope you have a wonderful afternoon.

Debbie Osgood: Great, thank you.