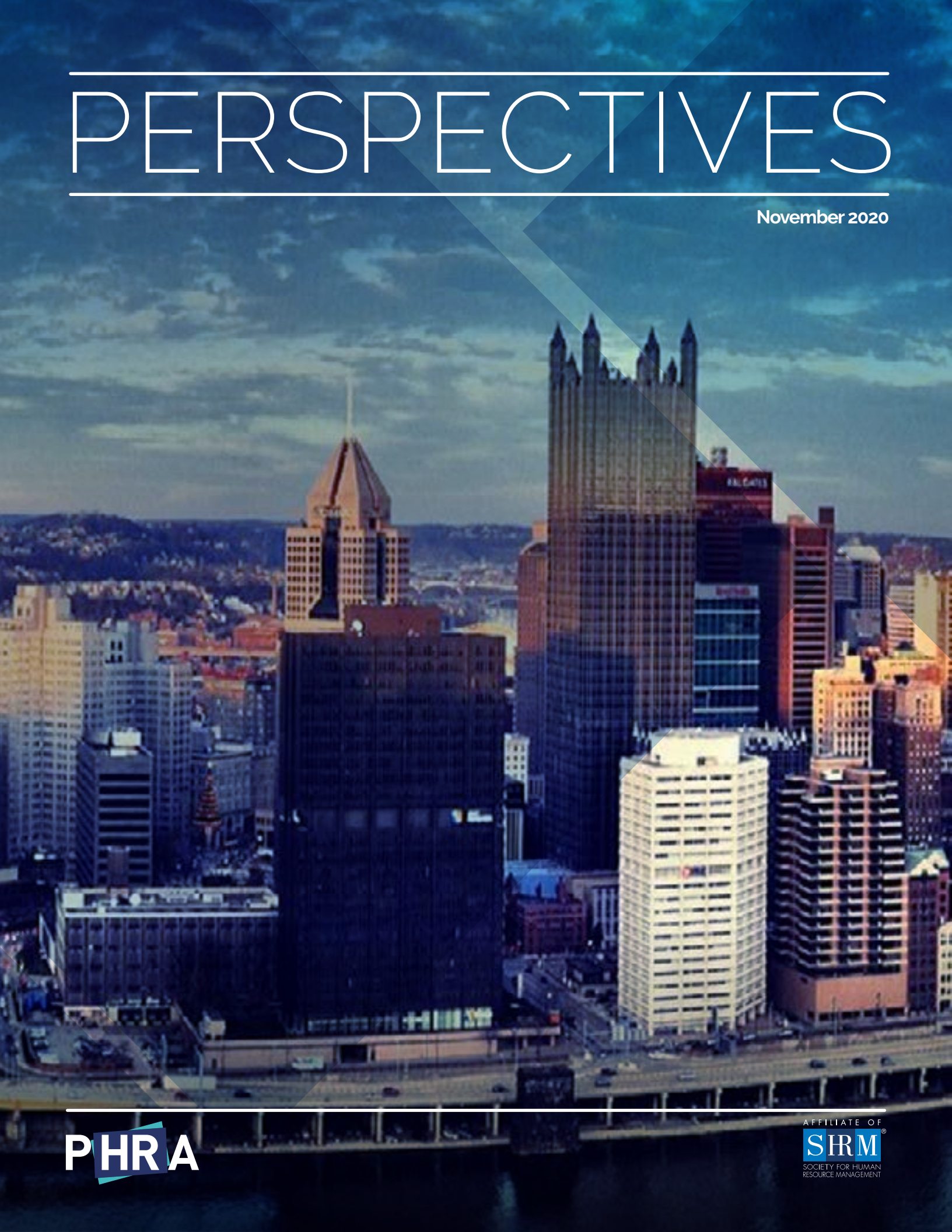

PERSPECTIVES

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Don't Get Stuck in the Weeds: 11 Tips for Complying with the New Title IX Regulations

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Human resources departments in a range of organizations may be interested in new developments in the Title IX arena for two reasons. First, the new federal regulations may apply to your employees. And second, even if Title IX doesn't apply, these regulations may provide a harbinger of what's to come more broadly in the employee harassment and discipline claims arena.

- To learn more, PHRA members are invited to attend the PHRA Employment Law Day zoom seminar on December 14, "What Human Resources Managers Can Learn from the New Title IX Regulations from the Department of Education."

Title IX of the Education Amendments of 1972 provides that, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," 20 U.S.C. § 1681(a) (emphasis added). The U.S. Department of Education issued new regulations under Title IX relating to sexual harassment and sexual violence, which became effective August 14, 2020¹. The new federal regulations follow on the heels of Pennsylvania's June 30, 2020 deadline for all schools to adopt and post a policy to prevent sexual harassment and sexual violence on campus and to accept reports pursuant to an online reporting system². In addition, new case law from the United States Court of Appeals for the Third Circuit (which includes Pennsylvania) makes it clear that all colleges – even private colleges – must allow individuals accused of sexual misconduct violations the opportunity to defend themselves at live hearings with cross examination³.

The U.S. Supreme Court has held that Title IX extends to employees of federally funded education programs who allege sex-based retaliation claims⁴. And, in 2017, the Third Circuit permitted an employee (a medical resident) whose employer received federal education funds to maintain a Title IX sex discrimination lawsuit even though she had never filed a charge with the Equal Employment Opportunity Commission⁵. In the employment context, typically filing a timely administrative agency charge is a prerequisite to maintaining a lawsuit under Title VII of the Civil Rights Act and under the Pennsylvania Human Relations Act.

The new Title IX federal regulations provide in great detail each recipient's obligation to respond to allegations of sexual harassment. In fact, there is so much detail that it may be easy for recipients to be overwhelmed and feel unsure of how to proceed. For example, previously many recipients had assigned the same person to receive a report, to investigate it, to recommend discipline, and even to administer discipline. This is no longer permitted. Instead, the new federal regulations require neutral decision makers for disciplinary decisions and for appeals, which means that such individuals must not have been involved earlier in processing the same report.

¹ 85 FR 30026.

² 24 P.S. §20-2003-J.

³ *Doe v. University of the Sciences*, No. 19-2966 (3d Cir. May 31, 2020).

⁴ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171 (2005).

⁵ See *Doe v. Mercy Catholic Medical Center*, 850 F.3d 545 (3d Cir. Mar. 7, 2017).

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Some of the requirements may be particularly difficult for smaller recipients to implement. Luckily, the regulations allow and encourage recipients to work together and/or with external providers to help fill any gaps.

HERE ARE ELEVEN TIPS FOR ACHIEVING COMPLIANCE:

Tip 1. Think about the big picture first. The key is to remember two overriding principles: (1) recipients need to proactively provide supportive measures to individuals who report sexual misconduct; and (2) recipients must ensure that their disciplinary procedures are fundamentally fair. More on each of these requirements later; Tip 1 is to remember that this is the big picture.

Tip 2. Get human resources involved. That's right. The new federal regulations repeat the Department of Education's position that Title IX applies to employees of recipients of federal education funds as well as students. So it makes perfect sense to ask human resources to join the compliance team.

Tip 3. Implement the easy stuff ASAP. This includes a non-discrimination statement and a place for people to file reports of discrimination and sexual misconduct, twenty-four hours seven days a week. Personnel at smaller recipient institutions may wear several hats. Make sure at least one person is also called a Title IX Coordinator. Publish this person's name and contact information with the non-discrimination statement on your website and add it to your school catalogs and handbooks. Tell the Title IX Coordinator(s) to keep track of any and all reports that come in – regardless of whether the reports come through the online reporting system or through other sources, such as human resources, employees, vendors, social media, or other contacts. If your institution maintains a hotline for financial and other complaints, consider whether to direct reports of sexual misconduct to this hotline as well.

Tip 4. Be prepared to offer supportive measures. Each recipient's Title IX Coordinator(s) should be prepared to respond directly to each and every report that comes in to offer supportive measures, and to describe the school's processes for investigation and discipline if the complainant wishes to pursue that avenue. Supportive measures might include for example: a ride to the hospital (and information on which local hospitals have SANE nurses on staff); assistance with contacting the police to report a crime; information about sexual assault support groups in the community; information about how to preserve evidence; information about where to find counseling and other support services; escorts to parking lots; and changes in class and/or work schedules, among other potential needs. This tip requires assembling a list of potential services so that the Title IX Coordinator(s) can easily provide information if and when a report comes in. Supportive measures can be anything at all that will ensure continued access to the institution's education, programs, and activities.

Tip 5. Impose discipline and remedies only after a hearing that determines responsibility. If discipline is warranted, the recipient should follow a fundamentally fair process. The regulations provide an exception and recipients are permitted to remove any individual from the campus or property immediately without

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a hearing when an individual's presence poses a safety threat to the community. In such situations, a disciplinary hearing should be held quickly while the removal order is still in effect.

Tip 6. Create fundamentally fair disciplinary hearings, especially for severe discipline such as suspensions and expulsions. The new Title IX regulations provide exhaustive particulars about the process and the procedures. This is where it pays to remember the big picture, especially for smaller recipients that do not see many reports each year. Consider focusing on the checklist of procedural guarantees that public colleges must provide for student disciplinary hearings. 22 Pa. Code §505.3. The state checklist certainly does not address all the details of the Title IX regulations, but it does demonstrate the big picture of a fundamentally fair disciplinary proceeding and there is nothing in the list that is contrary to the Title IX requirements, so it is a good place to start. Pennsylvania's public college disciplinary hearing requirements are as follows:

- Written notice of charges containing a description of the alleged acts of misconduct, including time, date and place of occurrence, and the rules of conduct allegedly violated.
- Advance written notice of the time and place of the hearing.
- An opportunity for submission of written, physical, and testimonial evidence and for reasonable questioning of witnesses.
- Time to allow the accused student or employee to prepare a defense.
- An impartial hearing officer/panel. Have a different person make decisions than the person who conducted the investigation.
- A written summary or audio record of the hearing.
- A decision based upon evidence sufficient to make a "reasonable person believe that a fact sought to be proved is more likely true than not."
- A written decision, setting forth facts and reasons with reasonable specificity, issued within 30 working days after the close of proceedings.
- Allow the respondent to have an advisor present at the hearings to consult and interact privately with the respondent, rather than to "represent" the respondent. Under the new Title IX regulations, this advisor can also handle any questioning of witnesses.
- Treat the respondents and the complainants as equally as possible. This means allowing each to speak to the decision makers, each to review the evidence, and each to have an advisor, for example.

Tip 7. Provide equal appeal rights so that dissatisfied complainants and/or respondents can complain to the school directly before taking the issue externally to the courts or to federal or state agencies.

Tip 8. Get your policies in order. It is important that policies and procedures be revised to meet the new requirements and to ensure consistency, as well as to provide guidance to personnel charged with implementing such policies. It is not uncommon for recipients to have several related policies in different places – for example, student handbooks and codes of conduct, academic catalogs, websites, employee

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handbooks, faculty handbooks, collective bargaining agreements, annual security reports, and grievance processes. The various policies may need to be reworked for consistency. Given the tendency for disciplined students and employees to bring breach of contract claims when a school does not follow its own policies, it is important to review and align policy statements insofar as possible regardless of where they are found.

The new Title IX regulations provide for many suggested and required elements for the sexual misconduct policy. At a minimum it is important to recite that the school prohibits sexual misconduct, to define sexual misconduct, to define consent, and to list the possible sanctions and remedies that may follow a determination of responsibility. Policies should clearly identify the individuals and offices with whom information will be shared. In addition to policies, institutions may also want to draft form notices, investigation procedures, rules for disciplinary hearings, rules of decorum, rules for informal dispute resolution, and other similar supporting documents.

Tip 9. Training. For many years, ongoing training in sexual misconduct awareness and prevention has been required for all employees. The new Title IX regulations require additional specialized training for the individuals who will be receiving reports and complaints, investigating, conducting disciplinary hearings, making decisions, hearing appeals, or conducting informal resolution processes. In addition, recipients may choose to provide training for campus personnel who may serve as advisors to students and for employees throughout the investigatory and disciplinary process.

Tip 10. Consider collaboration with other recipients and/or with law firms. Compliance may be more readily achievable for recipients that can share the cost of training, policy writing, investigations, and/or decision-making with other recipients that hire the same attorneys to assist.

Tip 11. Check in with risk management. Many insurance companies offer training materials that recipients may be able to adapt for their own purposes. In addition, consider adding informed counsel to your policy's list of panel counsel to ensure that you will be ready to respond to any incidents that may occur. This will help to avoid the assignment of your matter to an attorney who is unfamiliar with Title IX.

Schnader can assist educational programs of all sizes to comply with the new requirements. We can help you determine whether your institution might be subject to Title IX. We can help to sort through the various and sometimes seemingly conflicting mandates, review and write new policies, train the personnel involved in the process, and assist the personnel charged with receiving, supporting, investigating and/or adjudicating reports of sexual misconduct on campus. We can also assist with creating compliant reporting schemes, investigations, and disciplinary procedures. In addition, our attorneys can serve on an as-needed basis as hearing officers, student or employee advisors, investigators, and even Title IX coordinators. Finally, we have many attorneys who are experienced as mediators and arbitrators and in other forms of alternative dispute resolution. Thus, we stand ready to assist with the entire process.

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