



**Joint Guidance on Federal Title IX Regulations:
Analysis of Section 106.44(c): Emergency Removal
May 20, 2020**

Note: This document focuses on a summary analysis of Section 106.44(c) of the 2020 Final Title IX Regulations,¹ specifically the requirements related to emergency removals. For a full overview of the changes from the Proposed Regulations, see *Title IX Text for Text Proposed to Final Comparison* and *Title IX Summary Proposed to Final Comparison*, available at system.suny.edu/sci/tix2020

Section 106.44(c): Emergency Removals

Section 106.44(c) of the Final Rule imposes a high threshold to justify the emergency removal of a respondent (whether a student or employee) from an education program or activity, but recognizes that, in certain instances, the removal action may be appropriate for the institution to avoid a deliberately indifferent response. The Joint Guidance outlines a five-step process for evaluating the necessity of an emergency removal and implementing it according to the Final Rule’s mandatory and discretionary procedures.

Remember always that an emergency removal is not tantamount to a determination of responsibility or a sanction. This section preserves an institution’s discretion to address genuine emergency situations subject to required determinations, while protecting the respondent’s “due process” and “fundamental fairness” rights to notice and an opportunity to challenge a removal action. An emergency removal must not effectuate, in any way, a pre-judging of the allegations against the respondent, who is entitled to a presumption of non-responsibility pending the completion of a grievance process under §106.45.

The Department states that it will not second-guess an emergency removal decision under §106.44(c), provided that the institution has adhered to the requirements to support its action and even if the Department would have weighed the evidence of risk differently.

¹ The effective date for these regulations will be August 14, 2020 and will apply prospectively. The Department has stated it will provide technical assistance during the transition period and after the effective date.

When is an emergency removal allowed?

Section 106.44(c) enables an institution to respond quickly to an emergency. An institution may remove a respondent on an emergency basis whether a grievance process is underway or not. This section does not impose a temporal restriction on when an emergency removal may be considered and implemented, because risks arising from sexual harassment can occur at any time.

Specifically, there must be an emergency situation “arising from” alleged conduct that could constitute “sexual harassment” as defined in § 106.30. An emergency removal is not limited to instances where the complainant has reported an alleged sexual assault or rape, but could also be justified to address alleged severe, pervasive and objectively offensive verbal or online harassment. The identification of an immediate risk situation is not limited to the details of the alleged sexual harassment incident itself, but may also evaluate and respond to a respondent’s related post-incident actions or behaviors.

If the respondent’s actions pose an immediate and identified threat, but do not “arise from” allegations of “sexual harassment” (for example, where a student has brought a weapon to school unrelated to any sexual harassment allegations), § 106.44(c) does not apply, and the institution is free to respond under its code of conduct or in accordance with applicable laws.

Step 1 – Conduct a prompt individualized safety and risk analysis

Section 106.44(c) requires an “individualized safety or risk analysis,” which cannot be based upon generalized, hypothetical or speculative beliefs or assumptions that a respondent could pose a risk to someone’s physical health or safety. Because the safety and risk analysis is “individualized,” it focuses upon the particular respondent and examines the specific circumstances “arising from the allegations of sexual harassment” posing an immediate threat to a person’s physical health or safety. There is no “one-size fits all” for an individualized safety and risk analysis. Section 106.44(c) does not limit the factors that an institution may consider in the required analysis, leaving institutions with some flexibility to apply existing risk assessment protocols and applicable State laws and best practices.

An institution must determine the most-efficient manner to undertake the analysis in light of the surrounding circumstances and exigencies. Section 106.44(c) is silent on this issue, again entrusting the choice to the institution’s discretion. The institution may designate a specially trained employee or convene an interdisciplinary threat assessment team to oversee and review the analysis.

While this section does not override any existing institutional structures for evaluating risk, it makes clear that all designated personnel must be free of bias and avoid conflicts of interest, and their involvement in the removal analysis could preclude their later participation in the grievance process. Institutions may need to review their existing reporting and evaluation structures to ensure that they will not produce conflicts of interest or bias in violation of the regulation.

Section 106.44(c) is also silent regarding the scope and type of evidence necessary to support the individualized safety and risk analysis. The Department has declined to require that the “assessment be based on objective evidence, current medical knowledge, or performed by a

licensed evaluator,” seeking to leave flexibility in the institution’s choice in how to conduct risk analysis. Nothing in the regulations precludes an institution from adopting a policy or practice of relying on objective evidence, current medical knowledge, or a licensed evaluator in its emergency removal process.

Step 2 - Make the required findings

· “Immediate threat”

The individualized safety and risk analysis must confirm that there is an “immediate threat” justifying and compelling an emergency removal. Questions will arise, for example, regarding the significance and weight that should be applied to a complainant’s subjective fear of a threat versus an objective reasonable person standard. Further, the analysis should assess the respondent’s propensity, opportunity, and ability to effectuate a stated or potential threat. The determination will be fact-specific and nuanced, subject to a careful evaluation whether appropriate supportive measures are a more appropriate and less restrictive means to negate or sufficiently minimize the likelihood of a threat’s occurrence.

· “To the physical health or safety of any student or other individual”

The immediate threat must be to the “physical health or safety” of one or more individuals, who may be the respondent, the complainant, or any other individual (such as a third-party witness). “Physical” modifies both “health or safety,” which the Department states was purposefully designed to ensure that the emergency removal provision “is not used inappropriately to prematurely punish respondents by relying on a person’s mental or emotional ‘health or safety’ to justify an emergency removal, as the emotional and mental well-being of complainants may be addressed by recipients via supporting measures” 85 Fed. Reg. 30225 (May 19, 2020).

Consequently, if the respondent presents an immediate non-physical health or safety threat to another individual (e.g. emotional impacts), the responsive action must focus on appropriate supportive measures to ensure the individual’s equal access to education, not the respondent’s emergency removal.

The evidentiary lines between “physical” versus “emotional” threats and impacts may not be easily and clearly demarcated, and the determination of “physical” risks of harm justifying an emergency removal must be thoroughly evaluated and documented. Challenging factual evaluations will especially arise in the assessment of conduct with no overt act, such as speech, text messages and virtual interactions.

· “Arising from the allegations of sexual harassment”

As stated above, the emergency situation must specifically arise from the allegations of sexual harassment. For example, the Department notes that if a respondent threatens physical violence against the complainant in response to the complainant’s allegations of verbal harassment by the respondent, an immediate threat to the complainant’s physical safety would appear to be sufficiently connected to the sexual harassment allegations. Similarly, a respondent’s threat of physical self-harm after being accused of sexual harassment could justify an emergency removal.

The nexus may be more attenuated or less evident when the threat of physical harm appears directed to someone other than the complainant. *See*, 85 Fed. Reg. at 30225.

Step 3 – Evaluate the applicability of disability laws to the removal decision

A respondent may not be subject to an emergency removal without full and appropriate consideration of applicable disability laws. Persons designated to conduct the required risk analysis and to make the removal decision should be appropriately trained regarding the requirements and interplay of both Title IX and applicable disability law provisions, including the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and any relevant State laws.

Step 4 – Consider the appropriateness of supportive measures in lieu of an emergency removal

By its terms, § 106.44(c) applies only to genuine and demonstrated emergency situations. Before imposing a respondent’s emergency removal, the institution must ensure that its action does not equate to or effectuate an improper bypassing of the prohibitions in §§ 106.44(a) and 106.45(b)(1)(i) against imposition of sanctions or other actions that are not supportive measures without first following the § 106.45 grievance process.

The emergency removal analysis requires a careful and cautious balancing of concurrent factors – the institution’s obligation to offer and provide prompt supportive measures to a complainant to ensure equal educational access, the adverse impacts of separating a respondent from educational opportunities and benefits, and the institution’s obligation to protect the health and safety of its community. The Department emphasizes that “[s]upportive measures prove one avenue for [institutions] to protect the safety of parties and permissibly may affect and even burden the respondent, so long as the burden is not unreasonable.” 85 Fed. Reg. at 30231. Also, the right to remove a respondent on an emergency basis encompasses the lesser authority to instead impose a partial exclusion from specific programs or activities.

In assessing an emergency removal, an institution should consider the anticipated timing to complete an investigation and hearing, as a removal will vary in its length and impacts based upon the duration of the grievance process. The Department has not imposed any temporal limitation on the term of the emergency removal, but nothing in the regulations precludes an institution from conducting interim assessments of whether the immediate threat to physical health or safety of a student or another individual remains unchanged or has sufficiently dissipated to support the respondent’s return to programs or activities wholly or partially.

Step 5 – Provide the respondent with notice and an “immediate” opportunity to challenge the emergency removal

The respondent has the right to receive notice of the emergency removal and an immediate opportunity to challenge the action. The Department does not prescribe specific post-removal procedures to provide the required notice and effectuate the opportunity to challenge, leaving the institution with the appropriate discretion to select and implement the respondent’s rights under the circumstances. The notice should be sufficiently detailed to alert the respondent to the

specifically identified emergency threat of physical safety or harm that compelled the removal decision.

The post-removal review procedure does not have to duplicate or equate to § 106.45's grievance process. Nothing in the regulations precludes placing the burden of proof on the respondent to show that the emergency removal decision was incorrect. Careful consideration should be undertaken regarding the persons designated to receive and evaluate the respondent's challenge because their role must not result in bias or a conflict of interest that would preclude their participation in the grievance process.

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