



Joint Guidance on Federal Title IX Regulations: 106.30(a): Supportive Measures

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Note: This document focuses on discussion of the Final Rule Section 106.30(a), specifically the definition of “supportive measures.” 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

§ 106.30: Supportive Measures

Final Rule § 106.30 defines “supportive measures” as non-disciplinary, non-punitive individual services offered to the complainant or respondent; the Rule does not say that such services need to be provided to witnesses. These services must be offered “as appropriate, as reasonably available, and without fee or charge.” The Rule lists services such as “counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures” -- much the same services as listed in previous OCR guidance as “interim measures.” Under § 106.44(a), a Title IX Coordinator must consider a complainant’s wishes with respect to supportive measures.

Interim suspension or expulsion of a respondent is not included in the list of supportive measures; indeed, the Department indicates a suspension, even pending a disciplinary proceeding, is a disciplinary sanction that can only be applied after a finding of responsibility. However, where a respondent poses an immediate threat to the physical health or safety of the complainant or anyone else, § 106.44(c) allows for their emergency removal prior to the conclusion of a grievance process (or even where no grievance process is pending) and § 106.44(d) allows the school to place a non-student employee respondent on administrative leave while a grievance is pending. *See* Joint Guidance memos on “[Emergency Removal](#)” and “[Administrative Leave](#)” for further discussion of these provisions.

§ 106.30(a) requires that services that are provided to either the complainant or the respondent be kept confidential unless disclosure is necessary to provide the service; for example, a no contact order requested by one party would have to be disclosed to the other party in order to be implemented.

As “complainant” [is defined](#) in the Rule as any individual who is alleged to have been subject to possible sexual harassment – not just any individual who has filed a complaint – supportive measures have to be offered regardless of whether a formal complaint has been filed. This clearly would apply to current students and employees. However, application of this provision to complainants who are not “participating in or attempting to participate in the [recipient’s]

education program or activity” is not so clear. The Rule and its Preamble leave open questions about what sort of supportive measures would be “appropriate” and “reasonably available” for a student or employee from another school who reports sexual harassment to the respondent’s school, or for some other individual not associated with the respondent’s school. Similar questions arise for an alumnus or former employee of the respondent’s school, particularly if they have no interest in participating in any of that school’s education programs or activities.

Similarly, “respondent” [is defined](#) as an individual reported to have engaged in possible sexual harassment. Prior to the Final Rule, many schools have provided some supportive measures to respondents to help them deal with the demands and stress of an investigation. The Rule now requires that they be offered to a respondent regardless of whether a formal complaint has been filed against that individual.

The list of possible supportive measures would seem to address at least one much-debated issue: if the complainant and the respondent live in the same dorm and the complainant wants that to change, who moves? OCR guidance from 2017 warned against automatically moving the respondent: “[i]n fairly assessing the need for a party to receive interim measures, a school may not rely on fixed rules or operating assumptions that favor one party over another....” [Question 3, September 2017 Q&A on Campus Sexual Misconduct](#). This guidance did not provide much help in situations where neither party was willing to move, nor does the language of the Final Rule § 106.30(a) that supportive measures should be “designed to restore or preserve equal access to the recipient’s education program or activity without unreasonably burdening the other party....”

However, by defining housing changes as non-disciplinary, could the regulations make it permissible for a school to move either party without that party being able to challenge the decision? The Preamble addresses this: “The Department declines to include an explicit statement that schedule and housing adjustments, or removals from sports teams or extracurricular activities, do not unreasonably burden the respondent as long as the respondent is not separated from the respondent’s academic pursuits, because determinations about whether an action ‘unreasonably burdens’ a party are fact-specific.” 85 Fed. Reg. 30026, 30182 (May 19, 2020). Double-negative notwithstanding, this seems to indicate that a school can’t automatically move the respondent (or the complainant, for that matter), but “... must take into account the nature of the educational programs, activities, opportunities, and benefits in which the party is participating, not solely those educational programs that are ‘academic’ in nature.” *Id.* Similarly, removal for a sports team or other school-related activity must be based on a fact-specific analysis.

Another much-debated issue addressed in the Preamble relates to no-contact orders. While the regulations specifically include mutual orders, the Preamble notes that one-way orders *may* be appropriate if based on a fact-specific inquiry. Examples given include helping to enforce a restraining order, preliminary injunction, or other order of protection issued by a court, or where a one-way no-contact order does not unreasonably burden the other party (no further explanation is given for the latter). 85 Fed. Reg. 30184. Neither the regulations nor the Preamble seem to require a similar fact-specific inquiry for mutual no-contact orders, particularly those prohibiting communication between the parties; however, such an inquiry would be required if the order is to include avoiding physical proximity between the parties (with the inquiry to include consideration of other methods to protect the parties, e.g., an alternate housing assignment for the complainant). *Id.*

The Preamble notes that the regulations do not “expressly require” a recipient to continue providing supportive measures upon a finding on non-responsibility, nor does it require a recipient to terminate such measures: “A recipient may choose to continue providing supportive measures to a complainant or a respondent after a determination of non-responsibility.” 85 Fed. Reg. 30183.

The requirement for confidentiality could raise an issue regarding credibility and motive. Consider a situation in which the complainant is on the verge of academic dismissal when they report being sexually assaulted and, as a result of the report, the complainant is allowed to remain in school. If the respondent knew this, they could argue that the complainant falsely accused them precisely in order to get this accommodation. In *Doe v. Ohio State University*, 311 F.Supp.3d 1881 (S.D. Ohio April 24, 2018), the plaintiff (the respondent in the university complaint process) faced a similar situation and the court held that the timing of the complainant’s request to remain in school and her report of sexual assault could bear on her credibility generally, including her claim that she had been incapacitated at the time of the alleged assault.

The regulation provides that the Title IX Coordinator is responsible for offering (§ 106.44(a)), and coordinating the implementation of (§ 106.30), supportive measures. This might require a change at some schools, where arrangement of supportive measures may have previously been the (sole) responsibility of Student Conduct, HR, or some other office or individual. However, the Preamble does say that a school can designate more than one employee as a Title IX Coordinator if necessary in order to fulfill this and other required responsibilities. 85 Fed. Reg. 30183.

Finally, § 106.45(b)(10)(ii) requires schools to create and maintain for a period of seven years records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. If a school does not provide a complainant with supportive measures, the school must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. “Thus, if a recipient determines that a particular supportive measure was not appropriate even though requested by a complainant, the recipient must document why the recipient’s response to the complainant was not deliberately indifferent.” 85 Fed. Reg. 30181 n. 801. Note that there is no similar recordkeeping requirement regarding the reasons for not providing supportive measures to a respondent.

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