

34 C.F.R. § 106.44 ---

Recipient's response to sexual harassment.

Effective: August 14, 2020

(a) **General response to sexual harassment.** A recipient with **actual knowledge** of sexual harassment in an education program or activity of the recipient against a person in the United States, **must respond promptly** in a manner that is **not deliberately indifferent**. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances. For the purposes of this section, §§ 106.30, and 106.45, “education program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. A recipient’s response **must treat complainants and respondents equitably** by offering **supportive measures** as defined in § 106.30 to a complainant, and by **following a grievance process** that complies with § 106.45 **before the imposition of any disciplinary sanctions** or other actions that are not supportive measures as defined in § 106.30, against a respondent. The **Title IX Coordinator** must **promptly contact the complainant to discuss the availability of supportive measures** as defined in § 106.30, consider the complainant’s wishes with respect to supportive measures, **inform** the complainant of the availability of supportive measures with or without the filing of a formal complaint, and **explain** to the complainant the process for filing a formal complaint. The Department may not deem a recipient to have satisfied the recipient’s duty to not be deliberately indifferent under this part based on the recipient’s restriction of rights protected under the U.S. Constitution, including the First Amendment, Fifth Amendment, and Fourteenth Amendment.

(b) Response to a formal complaint.

(1) In response to a formal complaint, a recipient must **follow a grievance process that complies with § 106.45. With or without a formal complaint, a recipient must comply with § 106.44(a).**

(2) The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, **solely because the Assistant Secretary would have reached a different determination** based on an independent weighing of the evidence.

(c) Emergency removal. Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an **individualized safety and risk analysis**, determines that an **immediate threat to the physical health or safety** of any student or other individual arising from the allegations of sexual harassment justifies removal, and **provides the respondent with notice and an opportunity to challenge** the decision **immediately following the removal**. This provision may **not be construed to modify any rights** under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

(d) Administrative leave. Nothing in this subpart precludes a recipient from placing a **non-student employee respondent on administrative leave during the pendency of a grievance process** that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

34 C.F.R. § 106.45
Grievance process for formal complaints of sexual harassment.

Effective: August 14, 2020¹

(a) **Discrimination on the basis of sex.** A recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.

(b) **Grievance process.** For the purpose of addressing formal complaints of sexual harassment, **a recipient's grievance process must comply with the requirements of this section.**² Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, **must apply equally to both parties.**

(1) **Basic requirements for grievance process.** A recipient's grievance process must—

(i) **Treat complainants and respondents equitably** by providing remedies to a complainant where a **determination of responsibility** for sexual harassment has been made against the respondent, and **by following a grievance process that complies with this section** before the imposition of any disciplinary

¹ Amendments to these regulations are currently under consideration. Be sure you rely on the most current regulations.

² BP 3205/P is that grievance process.

sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. **Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity.** Such remedies may include the same **individualized services** described in § 106.30 as “supportive measures”;³ however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent;

(ii) Require an **objective evaluation of all relevant evidence**—including both inculpatory and exculpatory evidence—and provide that **credibility determinations** may not be based on a person’s status as a complainant, respondent, or witness;

(iii) Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, **not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.** A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, **receive training** on the definition of sexual harassment in § 106.30, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including

³ 34 C.F.R. § 106.30 in part states: “**Supportive measures** means non-disciplinary, non-punitive **individualized services** offered as appropriate, as reasonably available, and without fee or charge **to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.** Such measures are **designed to restore or preserve equal access** to the recipient’s education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment.”

hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, **including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.**⁴ A recipient must ensure that **decision-makers receive training on any technology** to be used at a live hearing and on **issues of relevance of questions and evidence**, including **when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant**, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that **investigators receive training on issues of relevance** to create an **investigative report** that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section. **Any materials used to train** Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and **must promote impartial investigations and adjudications of formal complaints of sexual harassment**;

How to avoid prejudging the facts: *i.e.*, avoiding confirmation bias and authority bias:

(iv) Include a **presumption that the respondent is not responsible** for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process;

⁴ **DFA’s note:** In addition to biases against a protected category, types of potential biases include: confirmation bias, beauty bias, authority bias, and hindsight bias.

(v) Include **reasonably prompt time frames** for conclusion of the grievance process, including **reasonably prompt time frames for filing and resolving appeals and informal resolution processes** if the recipient offers informal resolution processes, and a process that allows for the temporary delay of the grievance process or the **limited extension of time frames for good cause with written notice to the complainant and the respondent** of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities;

What if you are using an outside investigator who can not begin the investigation until two months later?

(vi) **Describe the range of possible disciplinary sanctions and remedies** or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility;

(vii) State whether the **standard of evidence** to be used to determine responsibility is the **preponderance** of the evidence standard **or the clear and convincing** evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

(viii) **Include the procedures and permissible bases** for the complainant and respondent to **appeal**;

(ix) Describe the **range of supportive measures** available to complainants and respondents;⁵ and

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

(2) Notice of allegations—⁶

(i) Upon receipt of a formal complaint, a recipient must **provide the following written notice to the parties** who are known:

(A) **Notice of the recipient’s grievance process** that complies with this section, including any informal resolution process.

(B) **[1]⁷ Notice of the allegations of sexual harassment** potentially constituting sexual harassment as defined in § 106.30, **including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. [2]Sufficient details⁸** include the

⁵ See Fn. 1 above and 34 C.F.R. § 106.30 for the definition of “supportive measures.”

⁶ **DFA’s note:** This section describes what must go into the letters provided to the complainant and respondent at the initiation of the grievance process.

⁷ **DFA’s note:** The bracketed numbers, i.e., “**[1]**”, are not in the regulation. DFA has inserted them to create a checklist for what must go into the letters to the complainant and respondent.

⁸ **DFA’s note:** Due Process here for the respondent means “notice” of the allegations being raised, specific enough that the respondent has a meaningful opportunity to defend him/herself.

identities of the parties involved in the incident, if known, **[3]** the conduct allegedly constituting sexual harassment under § 106.30, and the **[4]** date and location of the alleged incident, if known. The written notice must include a **[5]** statement that the respondent is **presumed not responsible** for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process. The written notice must **[6]** inform the parties that they may have an **advisor of their choice**, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and **[7]** may **inspect and review evidence** under paragraph (b)(5)(vi) of this section. The written notice must **[8]** inform the parties of **any provision in the recipient's code of conduct that prohibits knowingly making false statements** or knowingly submitting false information during the grievance process.

[8] Also include a copy of your current BP 3205 and 3205P.

(ii) If, in the course of an investigation, the **recipient decides to investigate allegations** about the complainant or respondent that are **not included in the notice** provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must **provide notice of the additional allegations** to the parties whose identities are known.

(3) **Dismissal of a formal complaint—**

(i) The recipient **must investigate the allegations in a formal complaint**. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient **must dismiss** the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; **such a dismissal does not preclude action under another provision of the recipient's code of conduct.**⁹

(ii) The recipient **may dismiss** the formal complaint or any allegations therein, if at any time during the investigation or hearing: A complainant notifies the Title IX Coordinator in writing that the complainant **would like to withdraw** the formal complaint or any allegations therein; the **respondent is no longer enrolled or employed** by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

(iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must **promptly send written notice of the dismissal and reason(s)** therefor simultaneously to the parties.

(4) Consolidation of formal complaints. A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one

⁹ If Title IX/BP 3205 do not apply, think: BP3207/P on HIB; BP 3210/P on Nondiscrimination; BP 3211/P on Gender Inclusive Schools; and/or normal school discipline process.

respondent, references in this section to the singular “party,” “complainant,” or “respondent” include the plural, as applicable.

FERPA Issues: _____

(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must—

(i) Ensure that the **burden of proof** and the **burden of gathering evidence** sufficient to reach a determination regarding responsibility **rest on the recipient** and not on the parties provided that the **recipient cannot access, consider, disclose, or otherwise use** a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are **made and maintained in connection with the provision of treatment to the party, unless** the recipient obtains that party’s voluntary, **written consent** to do so for a grievance process under this section (if a party is not an “eligible student,” as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR 99.3);

(ii) Provide an **equal opportunity for the parties to present witnesses**, including fact and expert witnesses, and other inculpatory and exculpatory evidence;¹⁰

(iii) **Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;**¹¹

¹⁰ Solicit such evidence from the parties.

¹¹ **Query:** How to do this and avoid retaliation, real or perceived; or avoid interfering with the investigation?

(iv) Provide the parties with the **same opportunities to have others present** during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;

(v) **Provide, to a party** whose participation is invited or expected, **written notice** of the date, time, location, participants, and purpose **of all hearings**, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

(vi) Provide both parties an **equal opportunity to inspect and review** any **evidence** obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, **including the evidence upon which the recipient does not intend to rely** in reaching a determination regarding responsibility and **inculpatory or exculpatory** evidence whether obtained from a party or other source, **so that each party can meaningfully respond** to the evidence prior to conclusion of the investigation. **Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review** in an electronic format or a hard copy, and **the parties must have at least 10 days to submit a written response**, which the investigator will consider prior to completion of the investigative report. The recipient must **make all such evidence** subject to the parties' inspection and review **available at any hearing** to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and

(vii) Create an **investigative report** that **fairly summarizes relevant evidence** and, **at least 10 days prior to a hearing** (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, **for their review and written response**.

(6) Hearings.

(i) For **postsecondary institutions**, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the

proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility;¹² provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions. Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

(ii) For recipients that are **elementary and secondary schools**, and other recipients that are not postsecondary institutions, **the recipient's grievance**

¹² DFA's Note: This provision has been determined to be invalid as arbitrary and capricious. *Victims Rights Law Center v. Cardona*, 2021 WL 3185743 (D.Mass. 7/28/21). If a victim did not testify, under the original language, that victim's statement to police or as part of a Title IX investigation would not have been considered.

process may, but need not, provide for a hearing.¹³ With or without a hearing, after the recipient **has sent the investigative report to the parties** pursuant to paragraph (b)(5)(vii) of this section and **before reaching a determination** regarding responsibility, the decision-maker(s) must **afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness**, provide each party with the answers, and **allow for additional, limited follow-up questions from each party**. With or without a hearing, questions and evidence about the **complainant's sexual predisposition or prior sexual behavior are not relevant, unless** such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered **to prove consent**. The decision-maker(s) must **explain** to the party proposing the questions **any decision to exclude a question as not relevant**.

(7) Determination regarding responsibility.

(i) The **decision-maker(s)**, who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must **issue a written determination** regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.

¹³ See 3205P at p. 19 of the handout at Tab 9: Regarding formal complaints, "The District's Title IX investigative and grievance process is not required to include investigative hearings." However:

RCW 28A.645.010 Appeals—Notice of—Scope—Time limitation. (1) **Any person**, or persons, either severally or collectively, aggrieved **by any decision** or order **of any school official** or board, within **thirty days** after the rendition of such decision or order, or of the failure to act upon the same when properly presented, may **appeal the same to the superior court** of the county in which the school district or part thereof is situated, by filing with the secretary of the school board if the appeal is from board action or failure to act, otherwise with the proper school official, and filing with the clerk of the superior court, a notice of appeal which shall set forth in a clear and concise manner the errors complained of.

(ii) The **written determination** must include—

(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;

(B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;

(C) Findings of fact supporting the determination;

(D) Conclusions regarding the application of the recipient's code of conduct to the facts;

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and

(F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.

(iii) The recipient must **provide the written determination to the parties simultaneously**. The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written

determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

(iv) The **Title IX Coordinator is responsible for effective implementation of any remedies.**

(8) Appeals.

(i) A recipient must offer both parties an **appeal from a determination regarding responsibility**, and from a recipient's **dismissal of a formal complaint or any allegations therein**, on the following bases:

(A) **Procedural irregularity** that affected the outcome of the matter;

(B) **New evidence** that was **not reasonably available** at the time the determination regarding responsibility or dismissal was made, that **could affect the outcome** of the matter; and

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a **conflict of interest** or **bias** for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

(ii) A recipient may offer an appeal equally to both parties on additional bases.

(iii) As to all appeals, the recipient must:

(A) **Notify** the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;

(B) Ensure that the **decision-maker(s) for the appeal is not the same person as the decision-maker(s)** that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

(C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii)¹⁴ of this section;

(D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;

(E) Issue a written decision describing the result of the appeal and the rationale for the result; and

(F) Provide the written decision simultaneously to both parties.

(9) Informal resolution. A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section. Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and **may not offer an informal resolution process unless a formal complaint is filed.** However, at any time prior to reaching a determination regarding responsibility the recipient **may facilitate an informal resolution process**, such as **mediation**, that does not involve a full investigation and adjudication, provided

¹⁴ See pp. 5-6. The appeal decision maker must be trained, unbiased, and neutral, among other things.

that the recipient—

(i) Provides to the parties a **written notice** disclosing: The allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;

(ii) Obtains the parties' **voluntary, written consent** to the informal resolution process; and

(iii) Does **not** offer or facilitate an informal resolution process to resolve **allegations that an employee sexually harassed a student**.

(10) Recordkeeping.

(i) A recipient must **maintain** for a period of **seven years** records of—

(A) Each sexual harassment **investigation** including any determination regarding responsibility and any **audio** or **audiovisual recording** or **transcript** required under paragraph (b)(6)(i) of this section, any **disciplinary sanctions** imposed on the respondent, and any **remedies** provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;

(B) Any **appeal** and the **result** therefrom;

(C) Any **informal resolution** and the result therefrom; and

(D) All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.

(ii) For each response required under § 106.44, a recipient must 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. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

34 C.F.R. § 106.71

Retaliation.

Effective: August 14, 2020

(a) Retaliation prohibited. No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the **purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.** Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation. The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual

who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

(b) Specific circumstances.

(1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.
