

2020 Foresight Through Hindsight: *Expert Advice on the New Title IX Regulations*



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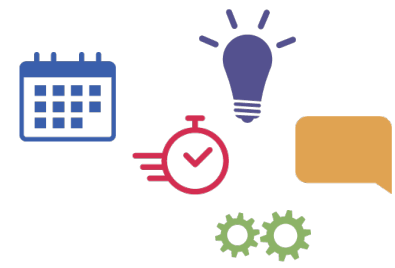
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Foresight Through Hindsight: *Reflections on Implementation*



Implementation Considerations: *From Where We Sit*



- Policy
- Procedure
- Practice
- Personnel
- Preparation

Status and Litigation





Status of Regulations

- Released by ED informally on its website May 6, 2020
- Published in Federal Register on May 19, 2020
- Effective date: August 14, 2020

Pending Litigation



- *Know Your IX v. Devos*, 1:20-cv-01224 (D. Md.) filed May 14, 2020 by the ACLU.
- *Commonwealth of Pennsylvania v. Devos*, 1:20-cv-01468 (D.C. Cir.) filed June 4, 2020.
 - CA, PA and NJ leading a coalition of 18 Attorneys General
- *State of New York v. Department of Education*, 1:20-cv-04260 (S.D.N.Y) filed June 4, 2020.
- *Victim Rights Law Center v. Devos*, 1:20-cv-11104 (D. Mass) filed June 10, 2020 by the National Women's Law Center.

Recent Court Cases

“If credibility is in dispute and material to the outcome, due process requires cross-examination.”
Doe v. Baum 903 F.3d 575, 585 (6th Cir. 2018)

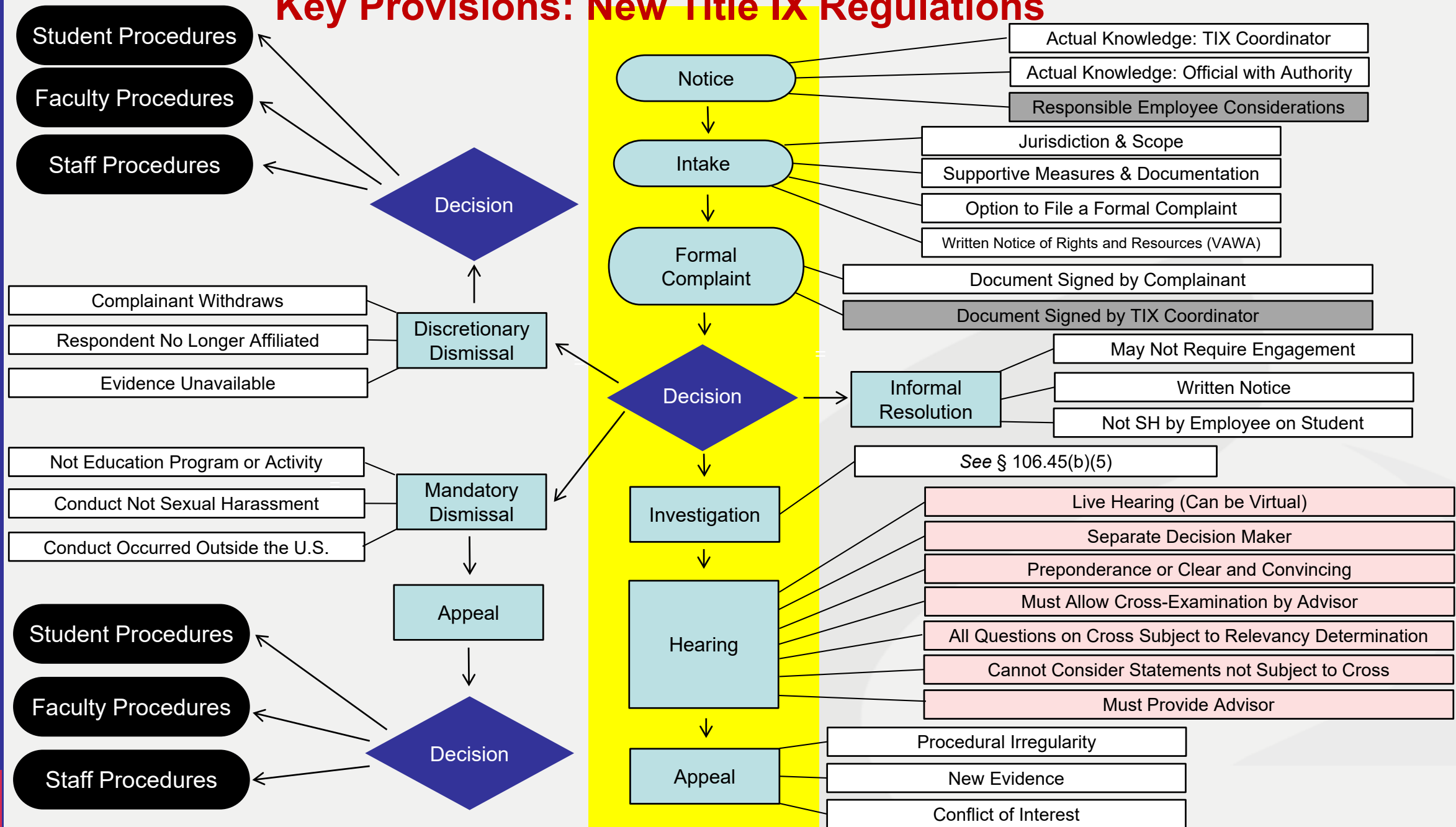
When a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses (whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses.” *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 136 (Cal. Ct. App. 2019)

In a DV case, the state court ruled, “...procedures were unfair because they denied Respondent a meaningful opportunity to cross-examine critical witnesses at an in-person hearing.” *Boermeester v Carry*, No. B290675, 2020 WL 2764406 at *1 (Cal. Ct. App. May 28, 2020)



“[N]otions of fairness in Pennsylvania law include providing the accused with a chance to test witness credibility through some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge evidence against him or her.”
Doe v. Univ. of the Sciences, No. 19-2966, 2020 WL 2786840 at*5 (3d Cir. May 29, 2020)

Key Provisions: New Title IX Regulations



Assessment at Intake



Response to Notice



- Respond promptly in manner not deliberately indifferent
- Supportive measures for complainant
- Follow Title IX grievance process before any discipline

Did Title IX receive a “formal complaint?”



To be a formal complaint, a report must:

- allege sexual harassment;
- be made by a person who (i) allegedly experienced the conduct complained of, and (ii) is participating or attempting to participate in a program or activity,
- be a document that “indicates the complainant is the person filing,”
- be made against a respondent, *and*
- request an investigation.

If the Title IX Coordinator received a formal complaint, must they dismiss it?



MUST dismiss if the alleged conduct --

- would not constitute “sexual harassment” as defined in § 106.30,
- did not occur in the institution’s education program or activity, **or**
- did not occur against a person in the United States.



Mandatory Dismissal

Upon dismissal, must:

- promptly send written notice of dismissal and the reason to both parties, and
- offer an appeal based on procedural irregularity, new evidence, and conflict of interest/bias

If the report was not a formal complaint, is it nonetheless covered by the Regulations?



Section 106.44(a): recipients must follow “a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures, against a respondent.”

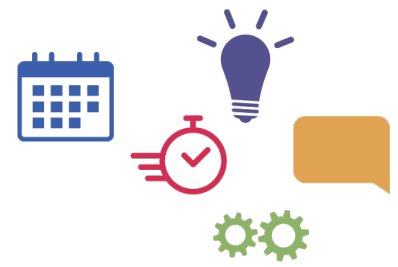
If covered by the Regulations, will the Title IX Coordinator initiate a formal complaint?



When the complainant has not made a formal complaint, yet the alleged conduct falls under Title IX, the Title IX Coordinator must either:

- close the report—for example, when the complainant does not want an investigation and the Title IX Coordinator determines one is not necessary, or
- become the signatory on a formal complaint and initiate a 106.45-compliant process—this is necessary if the Title IX Coordinator intends to pursue a process that could result in discipline.

Definition of Sexual Harassment



Sexual harassment includes three categories of misconduct on the basis of sex:

- *quid pro quo* harassment by an employee;
- severe, pervasive, and objectively offensive unwelcome conduct; and
- sexual assault, dating violence, domestic violence, or stalking as defined under the Clery Act and VAWA

Severe, Pervasive, and Objectively Offensive Unwelcome Conduct



Standard for evaluating alleged conduct:

- so severe, pervasive and objectively offensive
- effectively denies equal access to a program or activity
- as determined by a reasonable person

A Word About Discretionary Dismissals



MAY dismiss if:

- complainant notifies Title IX Coordinator in writing that they want to withdraw;
- respondent is no longer enrolled or employed; or
- specific circumstances prevent gathering evidence to reach a determination as to the formal complaint or allegations.

Supportive Measures





Supportive Measures

- When are they provided?
- What type of measures?
- For whom should they be provided?
- How do you provide supportive measures?
- Why supportive measures?



Supportive Measures

- Designed to “restore or preserve equal access”
- Cannot be punitive or disciplinary against any party.
- Cannot unreasonably burden the other party.
- Must be as appropriate and as reasonably available.
- Must be without fee or charge to complainant or respondent.
- Must be provided before or after Formal Complaint or where no Formal Complaint
- Engage in an interactive discussion with Complainant
 - Consider, offer, and provide

Supportive Measures—Examples



- Seating changes
- Leave of absence for complainant
- Accommodating re-taking of a missed examination
- Counseling
- Modifications of work or class schedules
- Campus escort services
- Mutual No Contact Directives
- Changes in work or housing locations
- Increased security
- Monitoring of certain areas of campus
- Extensions of deadlines



Respondents and Revisiting

- Must be provided to Complainants and Respondents
- Reassess the supportive measures on an ongoing basis
- Document all of your decisions – to give supportive measures and not to give supportive measures

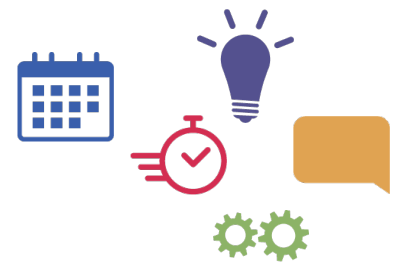


Emergency Removal

- Can a Respondent be removed from the education programs or activities prior to the conclusion of a formal complaint?
 - Yes.
 - Must undertake an individualized safety and risk analysis
 - Determine the immediate threat to the physical health or safety of any student or other individual arising from the allegations justifies removal
 - Provide Respondent with notice and an opportunity to challenge.

Informal Resolution





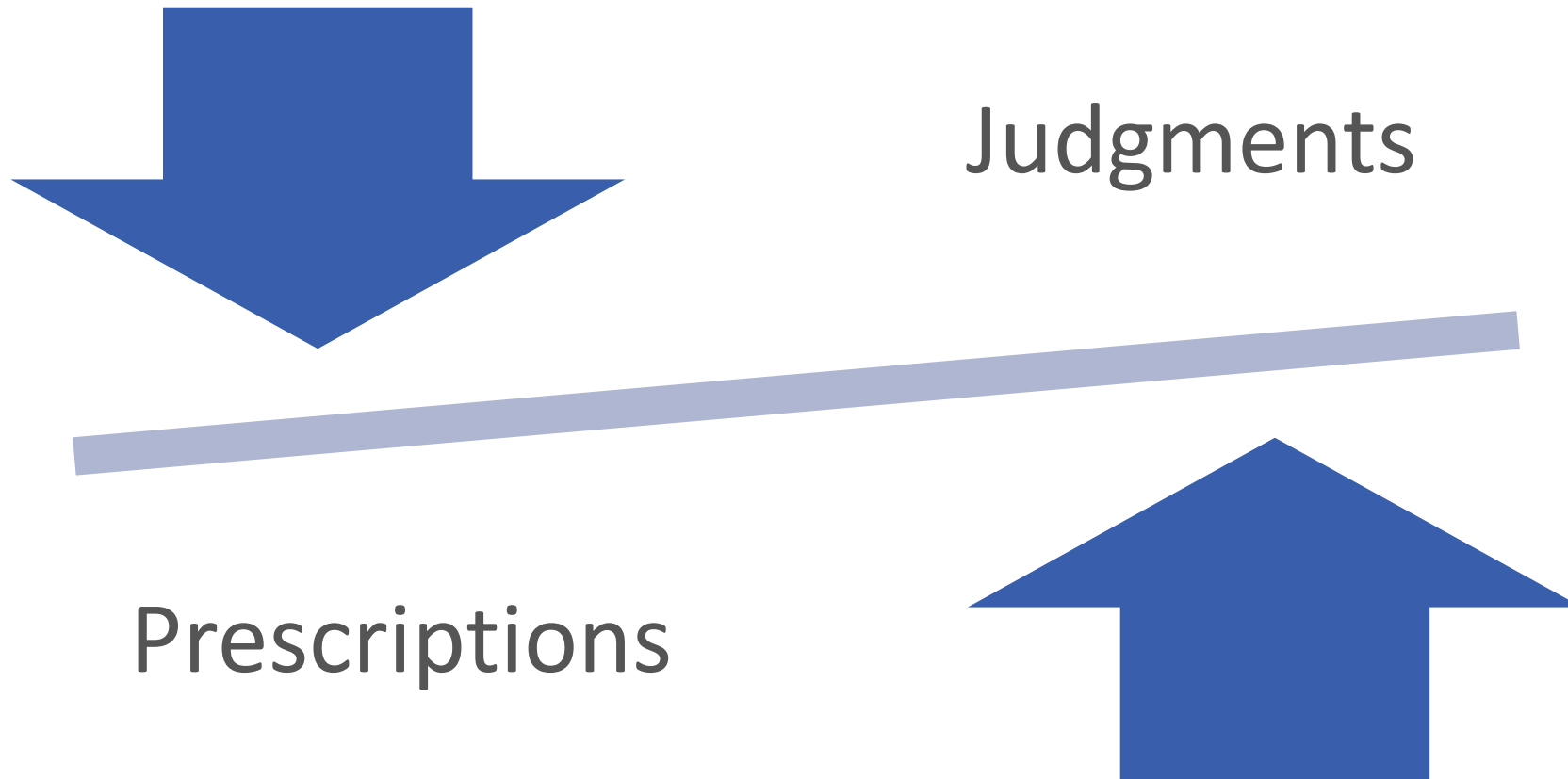
Informal Resolution

- ED declined to require *or* allow informal resolution processes to be the “default.”
- Formal Complaint *must* be filed to pursue Informal Resolution
- Cannot offer Informal Resolution in formal complaints alleging an employee sexually harassed a student.
- Requires parties’ voluntary, **written** consent.
- May include broad range of strategies – mediation, arbitration, restorative justice.

Grievance Process

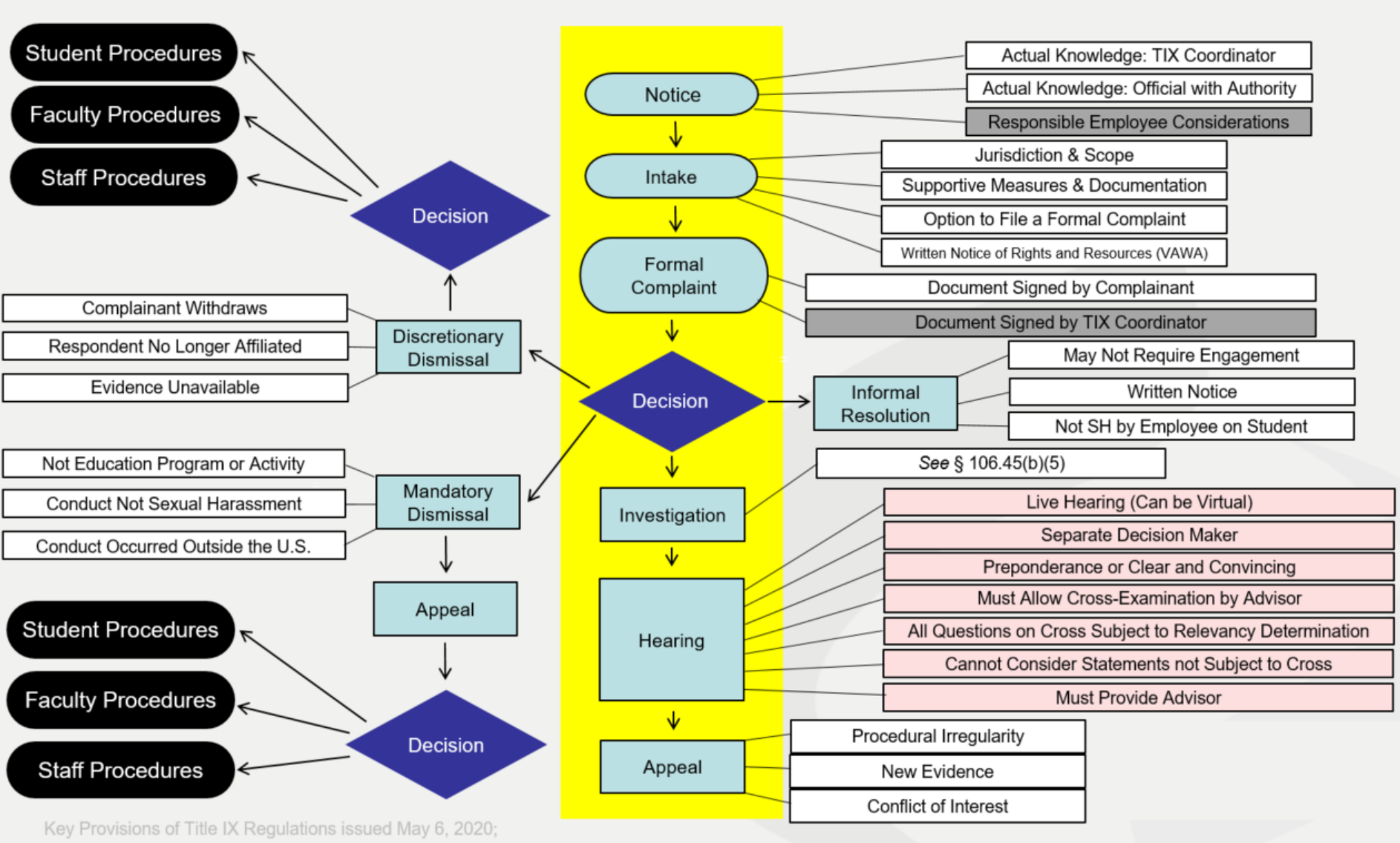


The Title IX Grievance Process: A Delicate Balance





Key Provisions: New Title IX Regulations

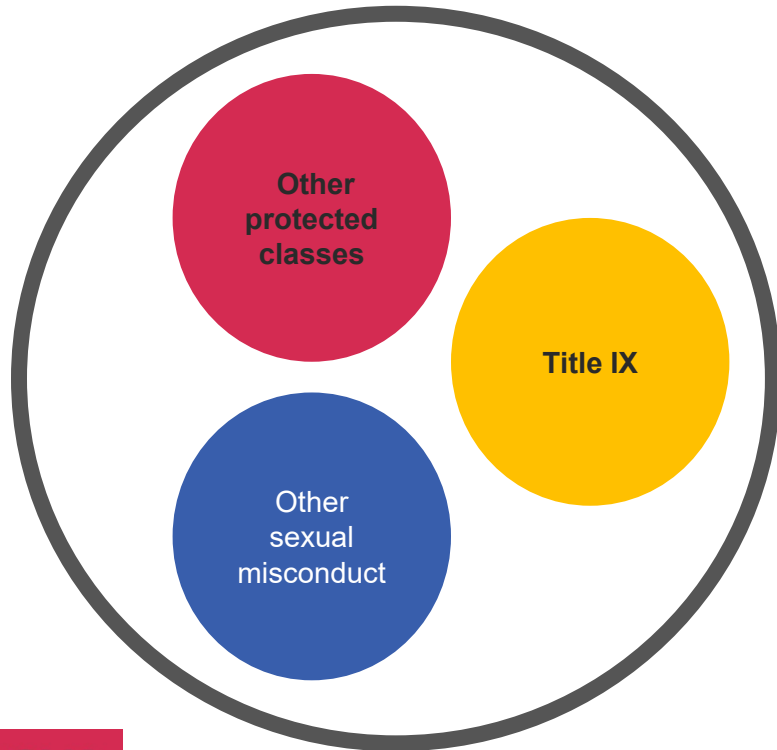


Key Provisions of Title IX Regulations issued May 6, 2020;

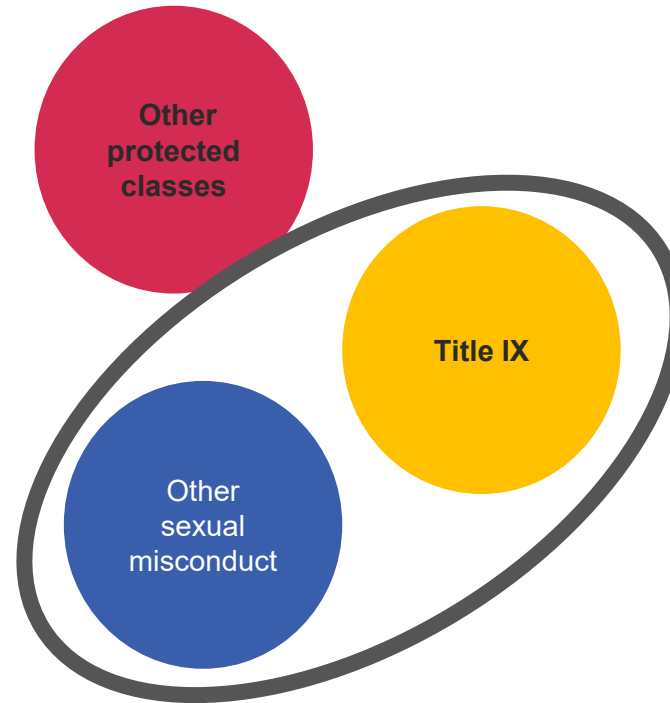


Policy Framework Options

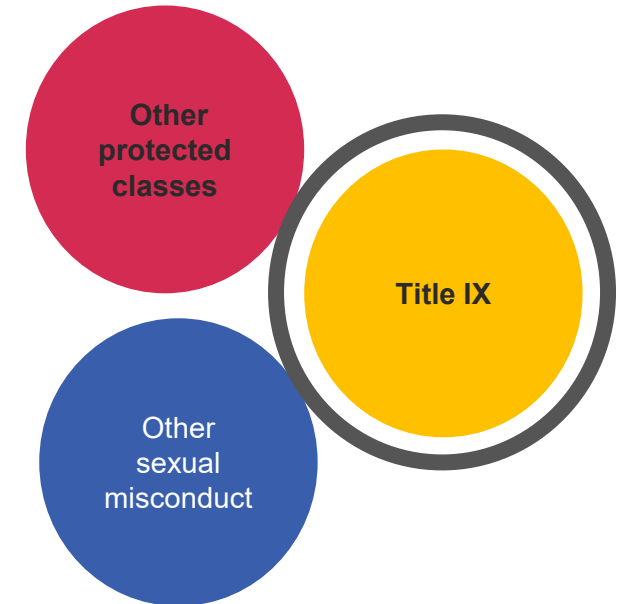
All Protected Classes



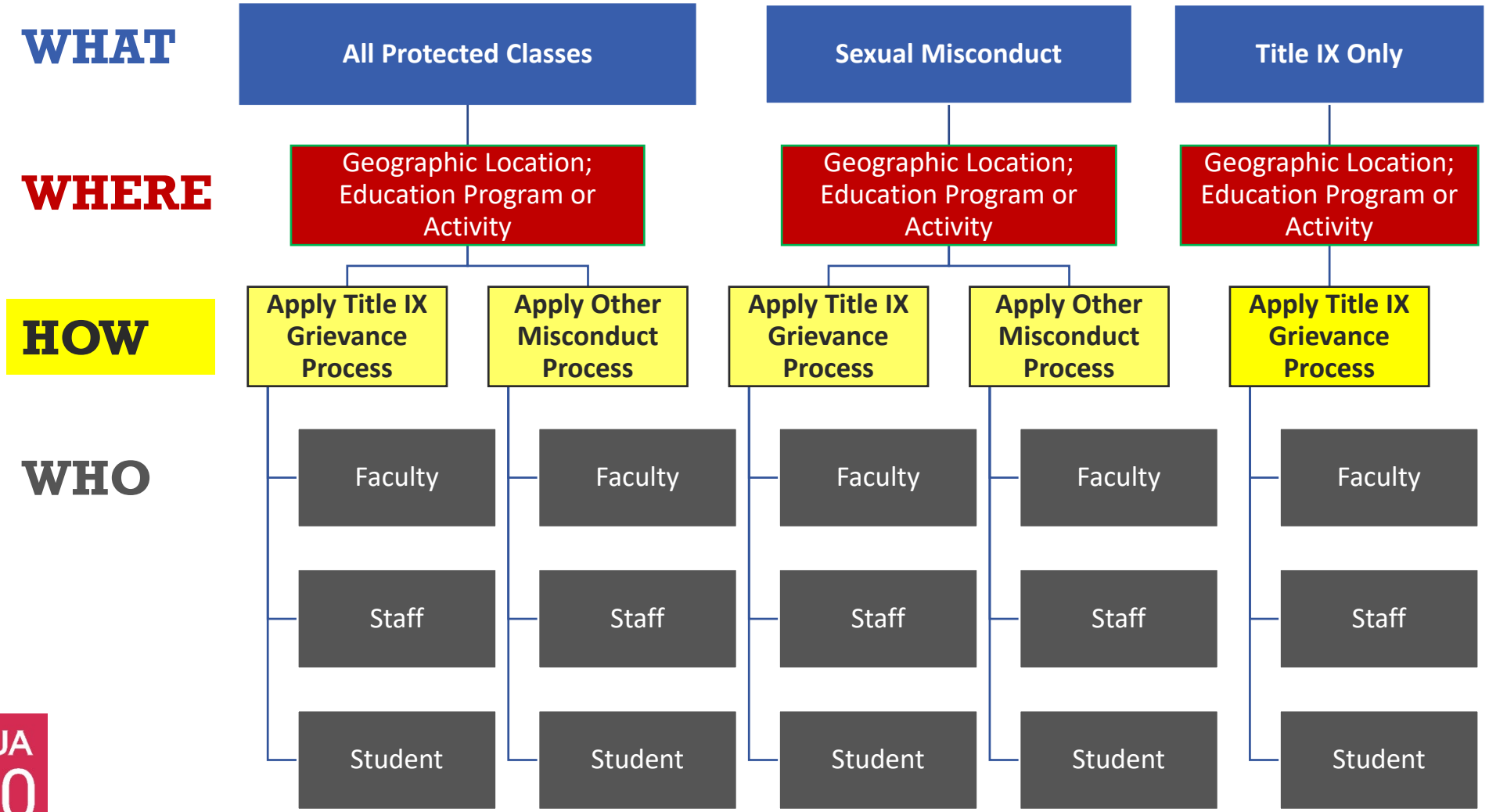
Sexual Misconduct

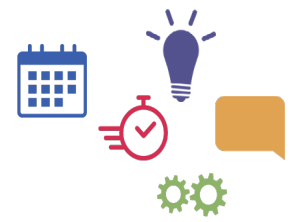


Title IX Regulations Only



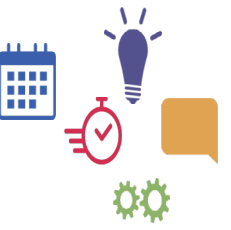
Procedural Frameworks





All Protected Class Misconduct

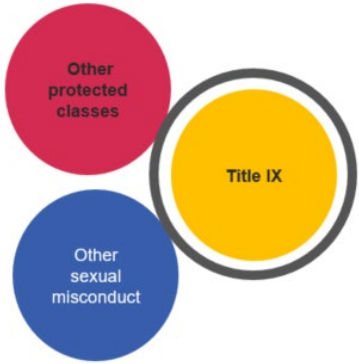
Challenges	Benefits
<p>Additional process in cases where not legally required</p>	<p>Uniform approach to resolution for all civil rights and all sexual misconduct</p>
<p>Additional resources (e.g. advisors, hearing officers, appeal officers, time)</p>	<p>Message to community about equal importance of all forms of discrimination and harassment and awareness of intersectionality</p>
<p>Implications of expanded scope in terms of personnel (e.g. broader and more complex apparatus, timeliness of resolutions)</p>	<p>More streamlined process: fewer decision points</p>
<p>Elevates protected class misconduct over other misconduct (e.g. physical assault, honor code, other personnel matters)</p>	<p>Easier alignment when multiple protected classes are implicated</p>



All Sexual Misconduct*

*Whether or not the conduct qualifies as Sexual Harassment as defined by the regulations

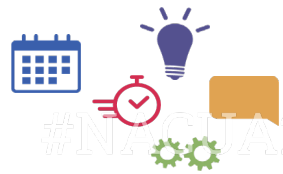
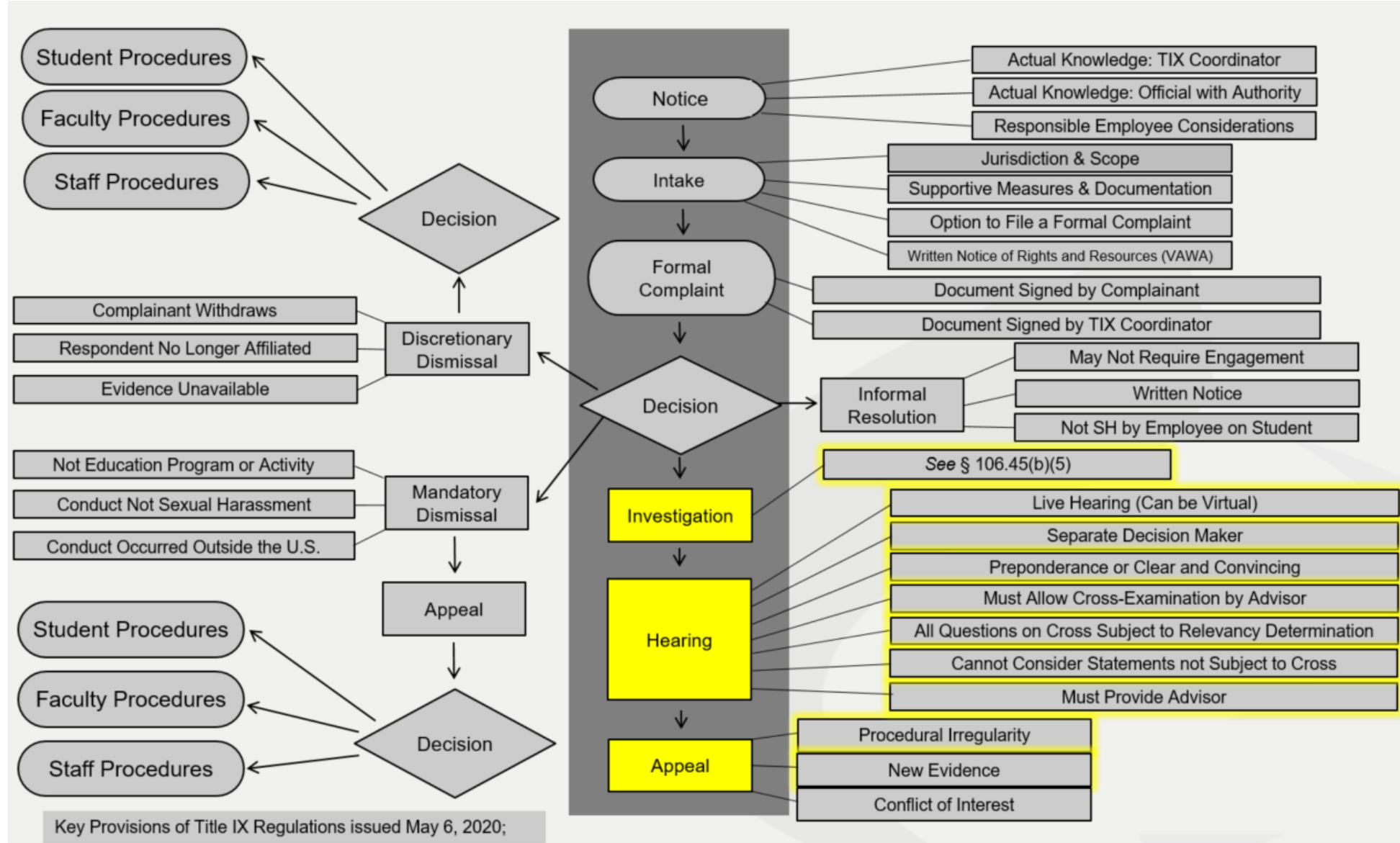
Challenges	Benefits
Additional process in cases where not legally required	Uniform approach to resolution for all instances of sexual misconduct
Additional resources (e.g. advisors, hearing officers, appeal officers, time)	Message to community about equal importance of all forms of sexual misconduct
Implications of expanded scope in terms of personnel (e.g. broader and more complex apparatus, timeliness of resolutions)	More streamlined process: fewer decision points
Community perception that school is applying Title IX prescriptive regulations too broadly (extends to cover additional conduct than is required under the law)	Parity between Title IX sexual harassment and other sexual misconduct, regardless of jurisdiction; accessible and user-friendly
Distinguishes sexual harassment from other protected classes	Continuity of practices (i.e. messaging to the community that the conduct we are addressing has not changed)



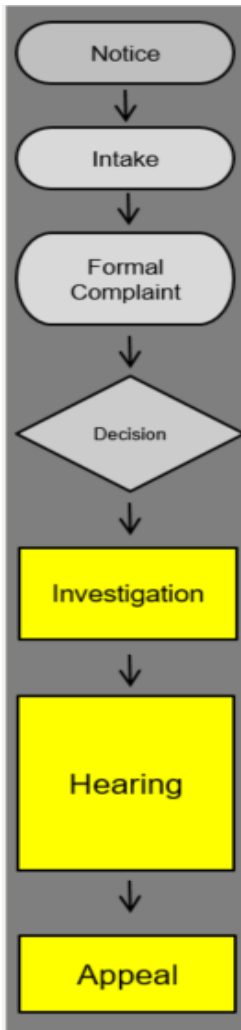
Title IX Regs - Sexual Harassment

Challenges	Benefits
Hyper-technical application of regulations that is inconsistent with value of treating all sexual misconduct equally	Ease of policy drafting
Less alignment with other processes; complex and discretionary decision-making throughout	Does only what is required under the law; narrowly tailored
Schools will need to determine how to regulate conduct beyond Title IX jurisdiction; continuing effects analysis	Narrows scope of changes needed; requires additional resources in the fewest number of cases
Still need to consider Title VII for employee conduct, necessitating parallel or tiered processes	Easier to explain changes to the community because changes are tied strictly to legal requirements

Key Provisions: New Title IX Regulations

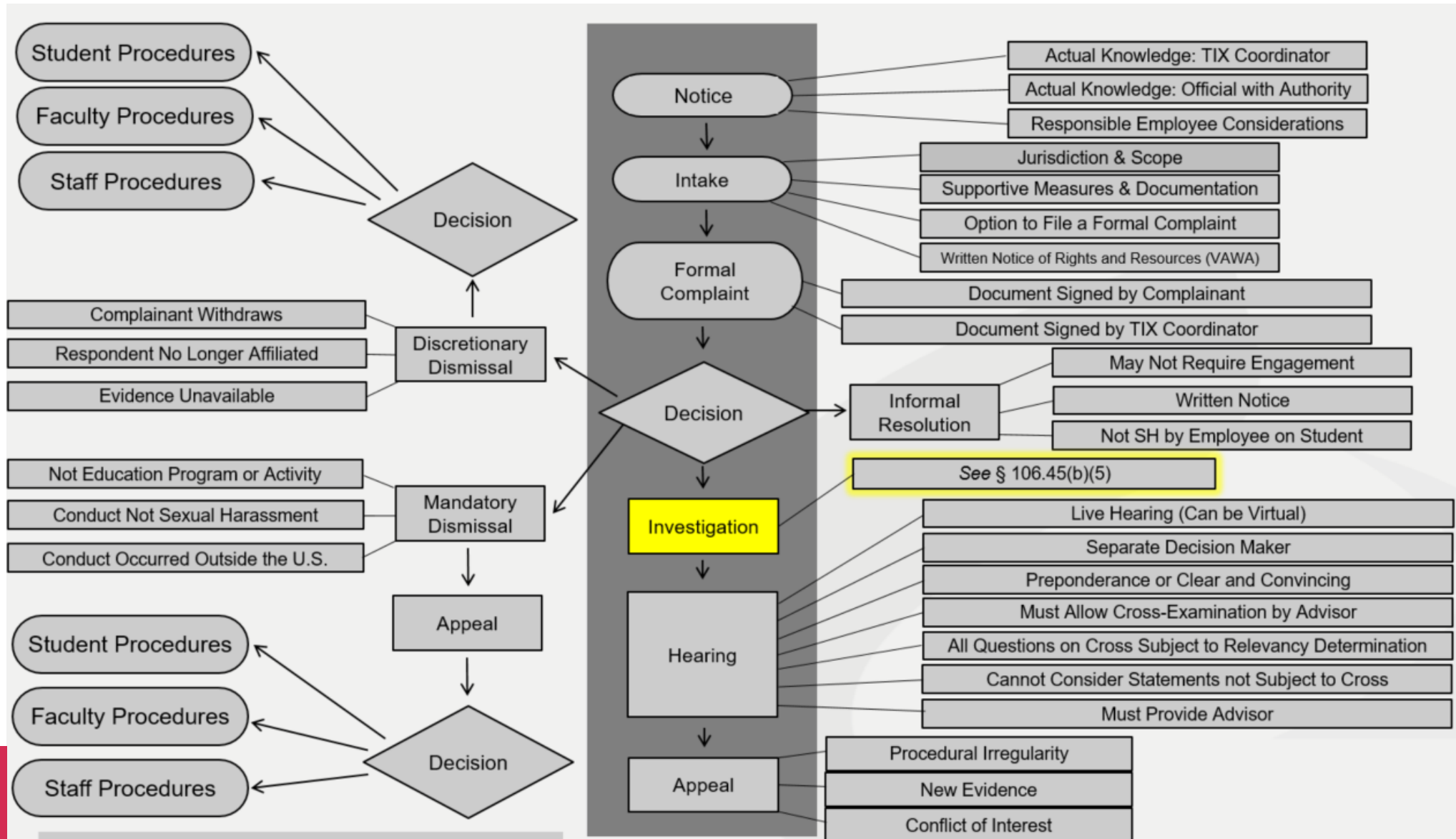


Grievance Process: The Basics



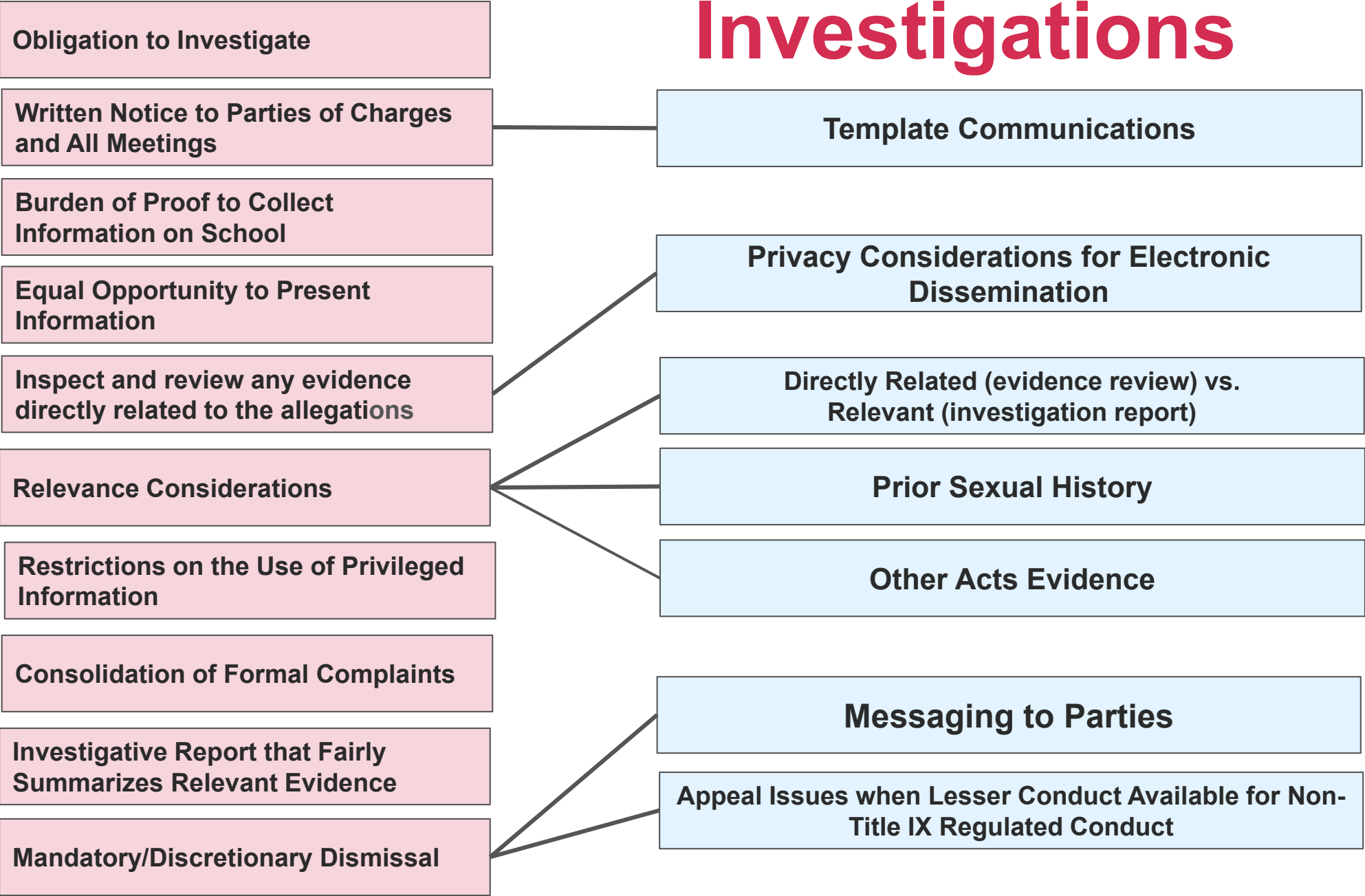
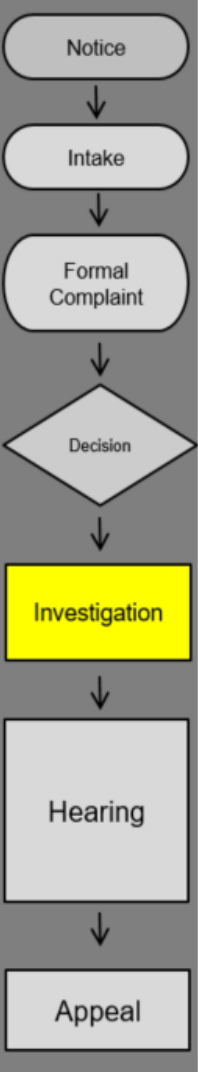
- Treat parties equitably
- Range of supportive measures
- Presumption of non-responsibility
- Reasonably prompt time frames
- Practitioners trained; free from conflict of interest and bias
- Uniform standard of evidence
- Restricted use of privileged information
- Objective evaluation of all relevant evidence
- Credibility determinations not based on person's status
- Range of sanctions and remedies
- Remedies only following a finding of responsibility
- Sanctions only following § 106.45 grievance process
- Appeal grounds

Key Provisions: New Title IX Regulations

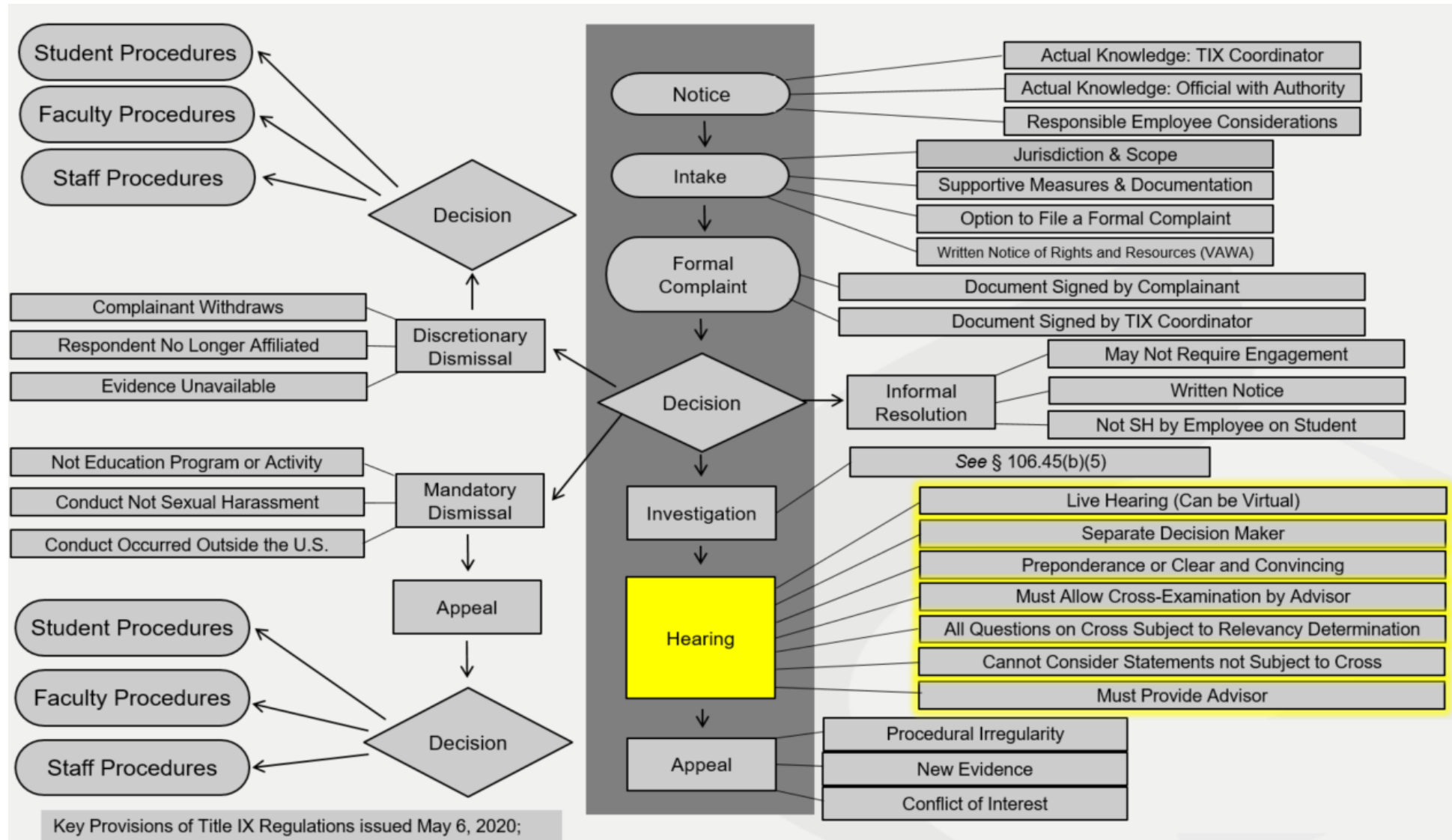


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Investigations

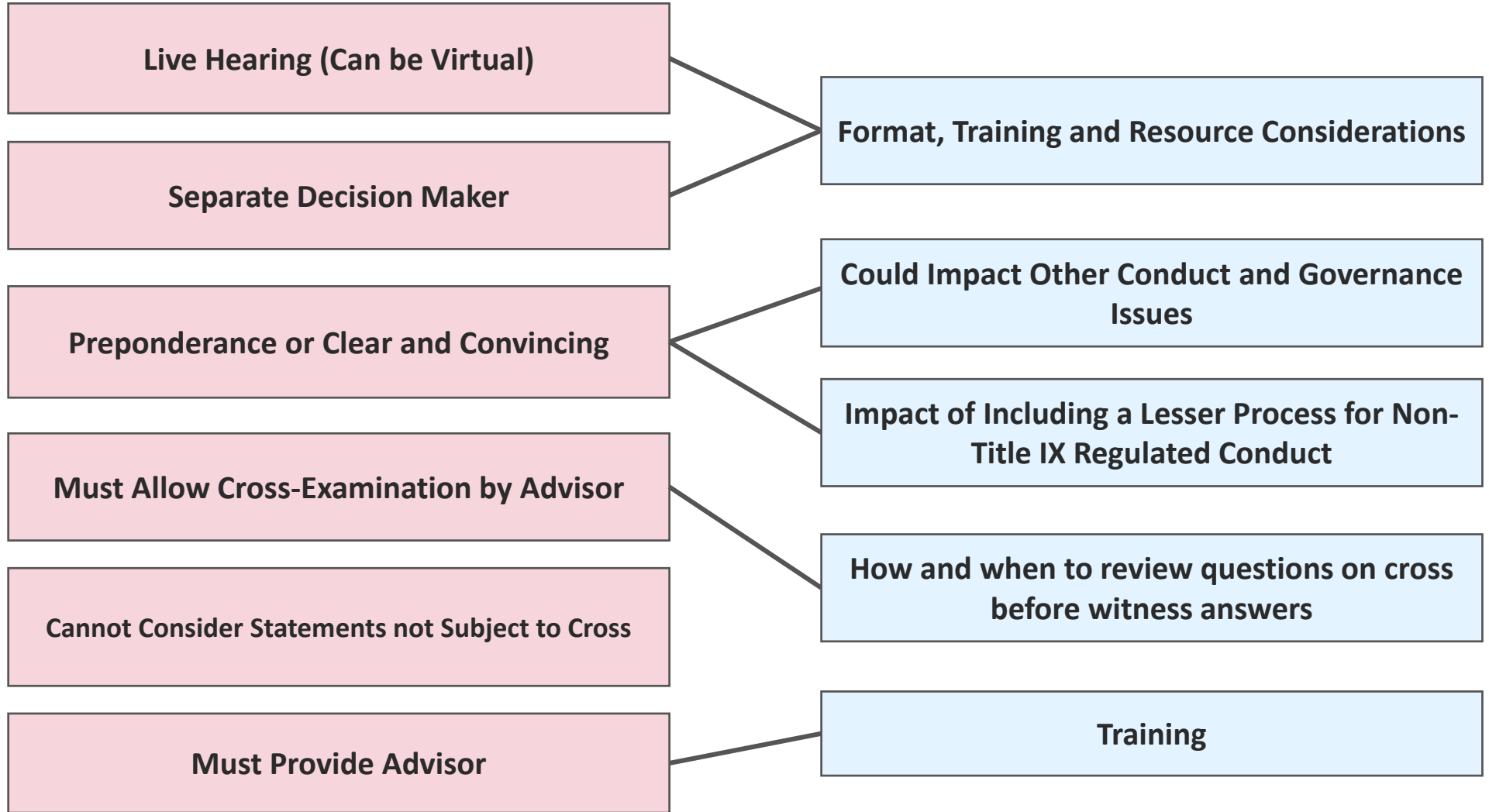
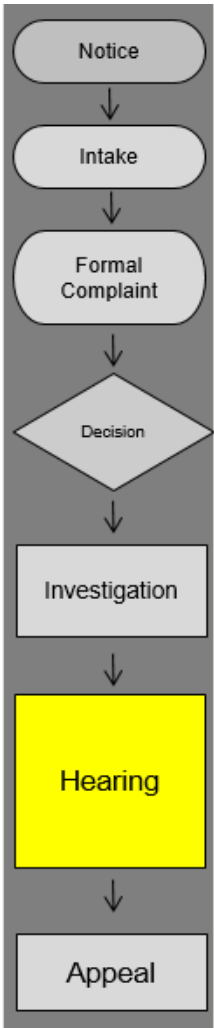


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Key Provisions of Title IX Regulations issued May 6, 2020;

Hearings



Questions?



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