



September 12, 2022

Dr. Miguel Cardona  
Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue SW  
Washington, DC 20202

Catherine E. Lhamon  
Assistant Secretary, Office for Civil Rights  
U.S. Department of Education  
400 Maryland Avenue SW  
Washington, DC 20202

**Re: Docket ID ED–2021–OCR–0166, RIN 1870–AA16, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance**

Dear Secretary Cardona and Assistant Secretary Lhamon:

The National Network to End Domestic Violence (NNEDV) welcomes the opportunity to comment in response to the Department of Education’s (the Department”) proposed regulations under Title IX of the Education Amendments of 1972 (“Title IX”). We are delighted that the Department is working to undo harmful changes and respond to the needs of survivors of gender-based violence by proposing new regulations to effectuate the law’s purpose.

NNEDV has been a leading national voice for domestic violence survivors and their advocates for thirty years. NNEDV represents the 56 state and U.S. territory coalitions to end domestic violence, who in turn represent nearly 2,000 local domestic violence programs nationwide, and the millions of victims they serve every year. NNEDV was instrumental in crafting and passing the Violence Against Women Act (VAWA) in 1994 and all subsequent reauthorizations, including its reauthorization in 2022.

Confidentiality Institute, a project of the Danu Center for Strategic Advocacy, is a national policy and technical assistance provider on issues of confidentiality, collaboration, and information management by professionals serving violence survivors. Confidentiality Institute works closely with the National Network to End Domestic Violence and is a named consulting partner on federally funded technical assistance projects involving confidentiality issues.

We are pleased to see and support other expert comments from organizations working to address sex discrimination in education. Our comments focus on two areas not explored in other comments: the dating violence and domestic violence definitions and confidentiality.

**Definitions: Sex-based harassment, (3) Specific Offenses (ii) Dating Violence (iii) Domestic Violence § 106.2 (3)(ii)(iii)**

We ask the Department to reconsider the proposed dating violence and domestic violence definitions, which are Specific Offenses of Sex-based harassment in § 106.2 (3)(ii)(iii).

The current dating violence definition in Section (ii) is strong in its simplicity, but would benefit from additional elements to cover coercive behaviors used to threaten and intimidate survivors. The domestic violence definition in Section (iii), a partial cross-reference of the definition from the Violence Against Women Act Reauthorization of 2022 (34 U.S.C. 12291(a)(12)) should be modified. The two terms describe the same patterns of behavior, therefore, we recommend that they be combined for simplicity. Please see Appendix A for a side by side comparison of the definitions in VAWA 2022, proposed Title IX, and our recommendation.

The preamble states:

“The Department’s proposed definition of “domestic violence” would not include all of the language from the definition of “domestic violence” in VAWA 2022 because in the Department’s current view, some of the VAWA 2022 definition of “domestic violence” is not applicable to Title IX. The Department, therefore, proposes including the specific portions of the VAWA 2022 definition of “domestic violence” that are applicable to Title IX to avoid confusion given the expanded definition in the VAWA 2022 reauthorization, which added “in the case of victim services, includes the use or attempted use of physical abuse or sexual abuse, or a pattern of any coercive behavior committed, enables or solicited to gain or maintain power and control over a victim, including verbal, psychological, economic, or technological abuse that may or may not constitute criminal behavior.”

The omitted language from the second half of the VAWA domestic violence definition, however, is the more appropriate language for the Title IX context. The proposed rule carries over the criminal-focused section of the VAWA 2022 domestic violence definition rather than the broader, more descriptive elements of the VAWA 2022 definition. Plainly, the criminal-focused portion of the VAWA definition is not well aligned with the goals of the Title IX protections. VAWA is in the jurisdiction of the Judiciary Committee and is primarily administered by the U.S. Department of Justice, and it is important in those contexts to have a definition which references crimes - crimes for which

perpetrators can be arrested, tried and incarcerated. In the Title IX context, however, it is important to focus on the nature of the offense rather than specific criminal acts.

By referencing only the criminal legal section of the VAWA definition, the proposed regulation introduces criminal legal concept into to civil procedure context. While this is never appropriate, it is especially concerning in the Title IX context, where opponents to Title IX protections often conflate criminal and civil rights and protections. We strongly recommend that the final rule use a domestic violence definition that does not reference crimes.

The current proposed definition references “felony or misdemeanor crimes committed by a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction.” Referencing crimes in the jurisdiction would require those implementing the Title IX protections to know the crimes in their jurisdictions and be able to evaluate offences from that perspective. Title IX is a civil protection and those tasked with evaluating offences would not be equipped to evaluate offences in this way. Indeed in many non-criminal contexts, those evaluating offences from a criminal legal framework make critical missteps. We have seen in numerous contexts, those in the position to determine if behaviors constitute domestic violence look for evidence that a crime has taken place, including police reports, orders of protection, or court records. Such evidentiary requirements are wholly inappropriate in the Title IX context. While many acts that comprise domestic violence made indeed be criminal, many survivors do not seek help from the criminal legal system and would therefore not have the types of documentation that could be requested in this context. The search for proof of a crime is inappropriate for the context and is harmful to survivors seeking relief.

The second section of the VAWA domestic violence definition is descriptive of the behaviors that constitute domestic violence without erroneously referencing crimes.

To simplify the definitions, we recommend that the Department use a combined definition for domestic violence and dating violence, as the behaviors are the same and the only distinction is about length of relationship. We recommend the following for domestic violence and dating violence, which reflects the part of the VAWA domestic violence definition that describes the behaviors that constitute domestic violence and dating violence.

(ii) Dating violence or domestic violence means violence or threatened violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, is a current or former intimate partner of the victim, or shares a child a child in common with the victim. Dating violence and domestic violence can include the use or attempted use of physical abuse or sexual abuse, or a pattern of any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a victim, including verbal,

psychological, economic, or technological abuse that may or may not constitute criminal behavior.

By using the above recommended definition, the Department would avoid confusing the civil and criminal legal frameworks and would allow stakeholders to better understand the behaviors that constitute domestic violence and dating violence.

### **Confidential Employees, §106.2, 106.44(d)**

We are pleased to see the Department is directly addressing the issue of access to confidential resources as an important element of responding to sexual harassment in the educational setting. The creation of a specific “confidential employee” category is an excellent proposal.

In the interest of consistency, we urge the Department to add the category of “victim advocates” to the list of confidential employees, and not to leave the designation of victim advocates as confidential employees up to the discretion of each school. The proposed definition of confidential employees does specifically name employees whose communications are privileged under Federal or State law; that is a much-needed change in the regulations, which we support strongly. Protecting all privileged employees (not just pastoral and professional counselors) will protect student access to confidential victim advocates in many states and territories. However, the current proposal will also leave students unprotected in other states and territories. A significant number of jurisdictions do not extend evidentiary privilege to campus-based victim advocates. Under the proposed regulation, those students must rely on their school to decide whether victim advocates are confidential employees. Victim advocates provide the same essential services in every state and territory. Access to confidential victim advocates contributes the same value to students in every school. The ability of students to access those confidential victim advocates without triggering a Title IX notification should not be an accident of geography.

Based on our technical assistance observations over the last decade, we believe this clear protection for victim advocates is necessary. We are concerned that schools will not exercise the discretion to designate their victim advocate staff as confidential employees. Though the actual guidance from the Department of Education has consistently allowed schools to designate confidential resources for students, too many schools have taken a “better safe than sorry” position and have mandated Title IX notifications by victim advocate staff. Some have even included Title IX notification requirements in partnership agreements with community-based victim advocacy programs. Many schools have asserted that only pastoral and professional counselors are exempted from Title IX notifications because only pastoral and professional counselors were specifically named in prior guidance. We can imagine the same scenario where schools believe that student communications with victim advocates who are not privileged under Federal or State law cannot be protected. Without a very clear and specific regulation that victim advocates are confidential employees, we believe that a significant number of schools will mandate Title IX notification by advocates if they are allowed discretion to do so.

We propose a fourth category of confidential employees, “victim advocates.” The definition of “victim advocates” could be based on the federal definition in the Violence Against Women Act of “victim advocate” (34 U.S. Code § 12291 (a)(48) and “victim services” (34 U.S. Code § 12291(a)(51).

Specifically, we suggest the following definition (with proposed redlines from the current VAWA definition):

- (a) An employee of a recipient who acts as a “victim advocate.” Victim advocate means a person **designated by the institution**, whether paid or serving as a volunteer, **to who provides** services to victims of domestic violence, sexual assault, **sexual harassment**, stalking, or dating violence ~~under the auspices or supervision of a victim services program.~~ Victim services or services means services provided to victims of domestic violence, dating violence, sexual assault, **sexual harassment**, or stalking, including telephonic or web-based hotlines, legal assistance and legal advocacy, economic advocacy, emergency and transitional shelter, accompaniment and advocacy through medical, civil or criminal justice, immigration, and social support systems, crisis intervention, short-term individual and group support services, information and referrals, culturally specific services, population specific services, and other related supportive services.

The VAWA Victim Advocate definition is modified slightly for the Title IX context by inserting “designated by the institution” and striking “under the auspices or supervision of a victim services program.” The phrase “under the auspices or supervision of a victim services program” works in the VAWA grant context for nonprofit organizations that apply for VAWA funds, but does not work as well in the Title IX context.

This solution will avoid a patchwork implementation of confidentiality. School-to-school shifting exceptions to victim advocate confidentiality create barriers to student access to victim advocate services. It could cause students to seek no help at all because they don’t trust that their autonomy will be respected. We know that the Department of Education recognizes the autonomy of students who have experienced harassment, and values their access to truly confidential victim services. If students feel safe to seek help from a school-based victim advocate, they will get the information they need about Title IX reporting and investigation and may consequently be more likely to make a report, which allows the school to directly address the harm to the educational environment. Seeking services will also help students secure mental health support, continue their education, and make safety plans.

Thank you for your consideration of our recommendations. If you have any questions, please contact Monica McLaughlin, NNEDV Director of Public Policy at [mmclaughlin@nnedv.org](mailto:mmclaughlin@nnedv.org).

Sincerely,



Deborah J. Vagins  
President and CEO  
NNEDV



Alicia Aiken  
Director, Confidentiality Institute  
Principal, Danu Center for Strategic Advocacy

## APPENDIX A

### Side by Side Domestic Violence and Dating Violence Definitions

<b>VAWA 2022</b>	<b>Proposed Title IX rule</b>	<b>Recommendation</b>
<p data-bbox="201 354 537 390"><b>34 U.S.C. 12291(a)(12)</b></p> <p data-bbox="201 428 591 1877"><b>Domestic violence</b> The term domestic violence includes felony or misdemeanor crimes committed by a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction receiving grant funding and, in the case of victim services, includes the use or attempted use of physical abuse or sexual abuse, or a pattern of any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a victim, including verbal, psychological, economic, or technological abuse that may or may not constitute criminal behavior, by a person who— “(A) is a current or former spouse or inti-mate partner of the victim, or person similarly situated to a spouse of the victim; “(B) is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner; “(C) shares a child in common with the victim; or “(D) commits acts against a youth or adult victim who is protected from those acts under the family or</p>	<p data-bbox="612 354 821 390"><b><u>§ 106.2 (3)(iii)</u></b></p> <p data-bbox="612 428 1003 1297"><b>Domestic violence</b> meaning felony or misdemeanor crimes of violence committed by a person who: (A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim; (B) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner; (C) Shares a child in common with the victim; or (D) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.</p>	<p data-bbox="1023 354 1227 390"><b><u>§ 106.2 (3)(ii)</u></b></p> <p data-bbox="1023 428 1419 1409"><b>Dating violence or domestic violence</b> means violence or threatened violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim, is a current or former intimate partner of the victim, or shares a child a child in common with the victim. Dating violence and domestic violence can include the use or attempted use of physical abuse or sexual abuse, or a pattern of any other coercive behavior committed, enabled, or solicited to gain or maintain power and control over a victim, including verbal, psychological, economic, or technological abuse that may or may not constitute criminal behavior.</p>

<p>domestic violence laws of the jurisdiction.”</p> <p><b>34 U.S.C. 12291(a)(11)</b></p> <p><b>Dating violence</b> The term dating violence means violence committed by a person—</p> <p><b>(A)</b> who is or has been in a social relationship of a romantic or intimate nature with the victim; and</p> <p><b>(B)</b> where the existence of such a relationship shall be determined based on a consideration of the following factors:</p> <p><b>(i)</b> The length of the relationship.</p> <p><b>(ii)</b> The type of relationship.</p> <p><b>(iii)</b> The frequency of interaction between the persons involved in the relationship.</p>	<p><b><u>§ 106.2 (3)(ii)</u></b></p> <p><b>Dating violence</b> meaning violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim;</p>	
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