

May 4, 2018

Ms. Suzanne H. Plimpton
Reports Clearance Officer
Office of the General Counsel
National Science Foundation
2415 Eisenhower Avenue
Alexandria, Virginia 22314

Re: Public comments for proposed article-Reporting Requirements Regarding Findings of Sexual Harassment, Other Forms of Harassment, or Sexual Assault-FR Doc. 2018-04374

Dear Ms. Plimpton:

On behalf of the Council on Governmental Relations (COGR), American Council on Education (ACE), Association of American Universities (AAU), Association of Public and Land-grant Universities (APLU), College and University Professional Association for Human Resources (CUPA-HR), American Association of State Colleges and Universities (AASCU), and the National Association of Independent Colleges Universities (NAICU), we appreciate the opportunity to comment on the *Federal Register* notice entitled, [“Reporting Requirements Regarding Findings of Sexual Harassment, Other Forms of Harassment, or Sexual Assault”](#) issued March 5, 2018. We welcome the opportunity to work with the National Science Foundation (NSF) toward our joint goal of eliminating sexual harassment and sexual assault from the scientific and education workplace. We, and the institutions we represent, believe that a safe and harassment-free work environment for all students, faculty, and personnel is essential if colleges and universities are to carry-out their missions, model appropriate behaviors, and enable students to achieve the preparation necessary to flourish in their careers and contribute to society.

We support NSF efforts to institute reporting requirements to enable receipt of timely and pertinent information pertaining to principal investigators (PIs) and co-PIs at awardee institutions. We believe, however, that elements of Proposed Article X may have unanticipated consequences which do not optimally align with NSF’s objectives or sufficiently advance our collective efforts to address and eliminate harassment in the scientific workplace. We offer the following questions, comments, and recommendations in response to the *Federal Register* notice.

1. Reporting the placement of a PI or co-PI on administrative leave may have a chilling effect.

NSF’s proposal would require institutions to report if the “awardee places the PI or any co-PI on administrative leave relating to a[n]... investigation of a violation of awardee codes of conduct, policies, regulations, or statues relating to sexual harassment, other forms of harassment, or sexual assault.” As defined in the new reporting requirement, “administrative leave” captures a vast array of temporary actions which could be and frequently are preliminary to any findings or conclusions. These preliminary or interim measures are non-punitive and designed to protect all parties involved pending an outcome of an investigation. In addition, we believe a reporting requirement based on administrative leave action could chill the use of these important interim measures out of concern that NSF may create a record or take action against a PI or co-PI prematurely. As an alternative to the current recommendation, we recommend that NSF narrow this proposed reporting requirement. One option is that reporting be required only in situations where administrative leave has been imposed and the PI or co-PI has been

found responsible but is appealing the adjudication, or when the terms of a pre-adjudication leave would affect performance under the grants.

We also urge NSF to rely on existing approval processes in lieu of awardee institutions' reporting of a PI or co-PI being placed on administrative leave. NSF already has approval procedures of substituting a PI or co-PI when a leave could impact performance. The NSF approval procedures for substituting a PI or co-PI when performance is impacted provides the agency with appropriate notice of this change. Adding an additional notification requirement pertaining to that same PI or co-PI whose performance is impacted by administrative leave as an interim measure during an investigation of reported harassment risks greater costs than benefits achieved, for the explanations noted above. For these reasons, we recommend that NSF strike the requirement that notification be given to the NSF upon implementation of an interim measure.

2. Reporting requirement may have unintended consequences.

The *Federal Register* notice states that NSF "may take *unilateral action*, as appropriate, to require... suspension or termination of the award, or a reduction in the award funding amount." The mandatory reporting requirement, coupled with NSF's proposal to take unilateral actions including "suspension or termination of the award, or a reduction in the award funding amount," may have unintended consequences that could impact graduate students, research trainees, postdoctoral researchers, and other grant personnel. This could also have a chilling effect on the willingness of individuals to report harassment.

If the report to the NSF forms the basis for an NSF decision, and is subject to the Freedom of Information Act (FOIA), a graduate student, research trainee, postdoctoral researcher, or other grant personnel may be legitimately concerned that the release of such a report could impact their future employment opportunities. A graduate student, research trainee, postdoctoral researcher, or other grant personnel would also need to weigh their decision to bring forth an allegation with the understanding that such a report may lead to the removal of funding that is being used to support the research grant.

To mitigate these unintended consequences, we recommend revising the language of the new reporting requirement to emphasize the NSF process to substitute a PI or co-PI, rather than to suspend or terminate the award, and consider how it may protect identities of persons who bring forth such allegations. In addition, to help maintain privacy, NSF should not require institutions to submit identifying information of any individual other than the PI or co-PI, including any personally identifiable information of the individual(s) who made the complaint. We also strongly recommend that in such cases the NSF provide for streamlined authority to the awardee institution to make a provisional PI or co-PI substitution so that the grant work may move forward as the institution awaits NSF approval. Revising Chapter 8 of the NSF General Grant Conditions to specifically allow awardee institutions to provisionally replace the named PI with an alternate PI with appropriate scientific background would materially advance the shared goals of NSF and the grantee community in this area.

3. Clarity needed on confidentiality of reported information and use of information.

We are very concerned about the prospect that sensitive personnel information, not otherwise public, could become public under FOIA. We ask that NSF carefully examine this issue and modify Proposed Article X with clarifying language which sufficiently addresses these concerns. This will be particularly important if NSF chooses to maintain the reporting obligations in the current draft which will result in the provision of information arising from matters under investigation, some of which will, in the

ordinary course, not lead to a subsequent report to NSF of a finding of a violation. NSF should make clear in the terms and conditions its commitment regarding the handling of reported information. For example, will it be shared with other agencies? Will it be subject to FOIA? Although we strongly recommend that NSF not mandate the reporting of interim measures, should the agency maintain that proposed requirement, it will be important to know how this information will be updated following an institutional finding of no responsibility or that the complaint cannot be sustained? Prior to implementation, NSF should be confident that its internal processes and protocols will fully address reasonable concerns. At the minimum, if a report is triggered before an investigation concludes and the investigation yields no “finding/determination,” which would require the awardee to provide further information to NSF, the agency should clearly note that in any archived material pertaining to that report.

4. The term “other forms of harassment” should conform to the definitions used by institutions

Proposed Article X says, “The awardee is required to notify NSF: (1) of any findings/determinations regarding the PI or any co-PI that demonstrate a violation of awardee codes of conduct, policies, regulations or statutes relating to sexual harassment, **other forms of harassment**, or sexual assault; and (2) if the awardee places the PI, or any co-PI, on administrative leave relating to a finding or investigation of a violation of awardee codes of conduct, policies, regulations or statutes relating to sexual harassment, **other forms of harassment**, or sexual assault.” We presume the term “other forms of harassment,” for the purposes of this reporting requirement, is intended to refer to institutional usage of that term. In implementation of this proposal, NSF should confirm this.

5. Clarification needed on reportable action.

We have additional questions per that same clause in Proposed Article X: “The awardee is required to notify NSF: (1) of any findings/determinations regarding the PI or any co-PI that demonstrate a violation of awardee codes of conduct, policies, regulations or statutes relating to sexual harassment, other forms of harassment, or sexual assault; and (2) if the awardee places the PI, or any co-PI, on administrative leave relating to a finding or investigation of a violation of awardee codes of conduct, policies, regulations or statutes relating to sexual harassment, other forms of harassment, or sexual assault.”

We read this to mean that institutions must report (1) any finding by the institution that the PI or co-PI has violated the institution's own codes of conduct or policies barring harassment of employees or students; and (2) any final determination by a federal, state, or local agency charged with enforcing anti-discrimination laws that the PI or co-PI violated the law barring harassment of employees or students. To ensure accurate reporting, we ask you to confirm our interpretation is correct. If this is a correct interpretation, we suggest that NSF modify the language to make clear that awardees need only report findings of a violation of codes of conduct, policies, regulations, or statutes by amending the language to read as follows: “(1) of any findings/determinations that the PI or any co-PI violated the awardee’s codes of conduct or policies relating to sexual harassment, other forms of harassment, or sexual assault; and (2) any final determination by a federal, state, or local agency charged with enforcing anti-discrimination laws that the PI or any co-PI violated the law barring harassment of employees or students.”

6. Intersection with privacy regulations and state laws could pose conflicts.

How will the new reporting requirements coincide with the Family Educational Rights and Privacy Act (FERPA) or other federal privacy regulations or state laws, which may prohibit sharing information on student and personnel matters outside of the institution? Will there be overlap or redundancy? Will

there be conflicting legal obligations for institutions to parse? When the NSF reporting requirement conflicts with other privacy regulations or laws, how are recipients to make the determination about which legal obligation takes precedent?

7. Subrecipient reporting should be the subrecipient's responsibility.

We recommend that if a subrecipient has a reportable finding/determination, compliance with this reporting requirement should be the direct responsibility of the subrecipient. Due to privacy concerns, the primary award recipient should not have direct oversight obligation pertaining to the investigation or any findings/determinations by the subrecipient. The primary award recipient's responsibility should be limited to passing through to the subrecipient the appropriate terms and conditions on the subrecipient document. We suggest that the subrecipient provide the subrecipient's completed report to NSF within the designated timeframe via a secure portal to the government directly. The subrecipient should inform the prime through the available prior approval process of any changes that will directly impact the performance of the sub-award during the period of performance. Removal of subrecipient PI or co-PI shall be in accordance with the subrecipient institution's policy and any laws or regulations.

8. Appeals process needed.

NSF should provide for an appeals process for any determinations made with the new term and condition. This should also be coordinated with any institutional appeals process and is especially important as institutions often have complex multi-layered appeals processes. An NSF appeals process is particularly necessary in cases where an interim measure (e.g. administrative leave) is imposed and reported to NSF but where the PI or co-PI is ultimately found not responsible. The outcome of an appeals process, whether at NSF or the institution, should be shared between NSF and the institution.

9. Awardee notification process to NSF needs clarification.

There is an "and" between clause (1) "of any findings/determinations regarding the PI or co-PI that demonstrate a violation of awardee codes of conduct, policies, regulations or statutes relating to sexual harassment, other forms of harassment, or sexual assault; **AND**, (2) if the awardee places the PI, or any co-PI on administrative leave..." It does not appear that the intent of the NSF in this section is to require both that a PI or co-PI violate a code of conduct ... **AND** be placed on administrative leave related to a finding before the NSF is notified, because later in that section in two places related to reporting, the text shows with an "or." This should be clarified in the final implementation.

10. Submission of notification to NSF should be secure.

The *Federal Register* notice indicates that notifications must be submitted by the Authorized Organization Representative via email to NSF's Office of Diversity and Inclusion at: harassmentnotifications@nsf.gov. We recommend that the NSF consider submission of notifications via a secure web portal rather than through email.

11. Sufficient time needed for grantees to offer a thoughtful plan to NSF.

We support efforts to encourage swift reporting to NSF of findings or a determination of a violation relating to sexual harassment, other forms of harassment, or sexual assault. The proposed seven (7) business day reporting timeframe, however, may not allow institutions adequate time to name a new PI or create a "plan for continued oversight and implementation of the project during the administrative leave period of the reported PI or co-PI." We recommend that the initial report not require such a plan and allow for institutions to submit such a plan within 30 days of the initial report.

12. Clarification of applicability needed.

The *Federal Register* notice contains implementation language stating that this new term and condition, (i.e. reporting requirement), will apply to “all new NSF awards and funding amendments to existing awards made on or after the effective date.” We presume NSF expects to receive notice whenever there is a finding or determination as described in Proposed Article X, occurring after the effective date of the applicable award or funding amendment. Clarification on this point would be helpful.

In summary, we believe the **proposed requirement is vague and risks leaving institutions unsure of when reporting is required, for the reasons addressed in this comment letter.** The new reporting requirement states that NSF grant recipient institutions must notify NSF of any “findings/determinations” that “demonstrate a violation of awardee codes of conduct, policies, regulations, or statutes relating to sexual harassment, other forms of harassment, or sexual assault.” The new reporting requirement does not distinguish between formal processes and informal corrective actions that may be taken without invoking the full procedural rights and protections that apply in a formal investigation. **In our view, awardee institutions should be encouraged to use good faith efforts to communicate to NSF when a PI or co-PI should be removed from a grant following a final determination, pursuant to an institution’s processes.**

According to the *Federal Register* notice, “upon receipt and resolution of all comments, it is NSF’s intention to implement the new term through revision of the NSF Agency Specific Requirements to the Research Terms and Grants.” We strongly encourage NSF’s Office of Diversity and Inclusion and the newly formed cross-agency task force on sexual harassment to thoroughly review and consider the comments received from the higher education and scientific communities before taking any action to implement these new reporting requirements. We also encourage NSF to consider convening a small roundtable discussion with key stakeholders from the university and scientific communities to discuss the new reporting requirements before NSF implements the new requirements.

Thank you for considering our comments. Our organizations are committed to working with NSF to most effectively address harassment, sexual harassment, and sexual assault in the scientific workplace. We look forward to a future discussion on this issue with NSF Director Cordova and the Office of Diversity and Inclusion.

Sincerely,

American Association of State Colleges and Universities
American Council on Education
Association of American Universities
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
Council on Governmental Relations
National Association of Independent Colleges and Universities