



OFFICE OF THE VICE PRESIDENT - RESEARCH AND GRADUATE STUDIES

OFFICE OF THE PRESIDENT
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(via email: splimpto@nsf.gov)

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

Re: Reporting Requirement Regarding Findings of Sexual Harassment, other Forms of Harassment, or Sexual Assault

Dear Ms. Plimpton:

On behalf of the University of California (UC), thank you for the opportunity to comment on the National Science Foundation's (NSF's) proposed reporting requirement for sexual harassment, other forms of harassment and sexual assault (SHHSA), as published in the *Federal Register* on March 5, 2018 (Docket ID FR Doc. 2018-04374). At the outset, we wish to make clear that UC shares the NSF's commitment to eliminating all forms of harassment in the workplace, and appreciates the NSF's desire to ensure appropriate management of projects it funds at institutions of higher education (IHEs) and to receive timely notification when a (co-)PI is found to have committed harassment or a sexual assault. UC's system-wide Policy on Sexual Violence and Sexual Harassment (SVSH Policy) notes UC's commitment to creating and maintaining a community dedicated to the advancement, application and transmission of knowledge and creative endeavors through academic excellence, where all individuals who participate in University programs and activities can work and learn together in an atmosphere free of harassment, exploitation, or intimidation.

We submit this response to the NSF's request for comments for its proposed rule-making on behalf of UC's ten research-intensive campuses and five medical centers, and the UC-managed Lawrence Berkeley National Laboratory. This response was coordinated with relevant offices across the system, including Title IX, Academic Personnel, Vice Chancellors for Research, Human Resources, Academic Senate, and General Counsel. These offices, in turn, consulted with many other UC colleagues.

UC has identified three considerations that frame our approach to addressing the issues raised around SHHSA:

- NSF's legitimate concerns about the status of its funded projects as part of its stewardship responsibilities.

- The University's authority and obligation to investigate sexual violence/sexual harassment (SVSH) complaints according to its procedures and to take appropriate action for substantiated complaints.
- The need to protect the integrity of SVSH investigations and the privacy of complainants, (co-)PIs and their co-workers and students during an investigation.

We describe below our thoughts on balancing these considerations.

Current Practices

As stated above, UC supports the underlying intent of the NSF's proposed policy and is fully committed to ensuring that it properly protects its faculty, staff, and students from all forms of illegal harassment. UC has made significant efforts in recent years to address SVSH in its community by implementing a system-wide policy explicitly prohibiting SVSH, as well as [system-wide procedures](#) for investigating and adjudicating complaints of SVSH. Moreover, UC has expanded its SVSH prevention efforts, including mandated annual training for all faculty and staff. In addition, every UC campus now has a confidential advocacy office to support those in our community who experience SVSH. Campus Title IX offices have added staff and improved their ability to timely and fairly respond to and investigate reports of SVSH.

An effective SVSH investigation requires impartiality, discretion, and professionalism. These factors ensure a fair and thorough factual inquiry, and protect the privacy, safety, and reputations of all involved parties. In accordance with UC's SVSH Policy, an investigation should be completed within 60 business days (*i.e.*, approximately three calendar months), but that timeline may be extended for good cause. The imperative of protecting privacy and respecting due process during an investigation is why we are particularly concerned with the proposed requirement that universities report to the NSF certain open investigations, *i.e.*, those where a (co-)PI has been put on leave during the course of the investigation. Such a requirement can compromise investigations, interfere with the rights of both the reporting party and the party under investigation, undermine due process, lead to misunderstandings of the NSF's role in investigations, and damage careers, including those of the (co-)PIs, co-workers and students.

UC is not aware of other federal grant-making agencies proposing similar terms that would require reporting of SVSH or other forms of harassment. We are concerned that the NSF's policy will open the door to a patchwork of possibly conflicting and burdensome requirements from different agencies seeking to follow the NSF's lead. Moreover, IHEs will likely have a variety of approaches in their handling of SHHSA complaints that should be considered in formulating policy. We detail below our specific concerns with the proposed NSF term.

Privacy

Reports of SVSH and assault potentially contain highly sensitive information not only about the respondent, but about the reporting parties and witnesses, who may be concerned about retaliation and other adverse effects on their careers. Given the sensitivity of the subject matter, and applicable laws regarding student and employee privacy, the Title IX offices that respond to complaints of SVSH generally limit their communications regarding open investigations to those

who have a need to know. Historically, research administrators not directly involved in the incident under investigation have not had a need to know information regarding Title IX investigations. Those involved in the investigation, including the Title IX officer, would not necessarily know whether the subject is a NSF (co-)PI, nor would a research administrator who communicates with NSF necessarily know that an investigation of the (co-)PI is in process. Accordingly, we are concerned that fulfilling the currently proposed reporting requirements would force the Title IX office to share sensitive information with persons outside the need-to-know circle. This could jeopardize the integrity of the investigation, particularly if “Authorized Organization Representatives,” *i.e.*, individuals authorized to sign on behalf of the proposing or recipient organization, are compelled to report these investigations to the NSF. We are also concerned that sensitive information would need to be conveyed to a prime grant recipient by a subawardee, especially when this is done at the investigation stage, creating both privacy and reputational concerns.

In addition, grantee organizations need to be assured that the NSF will appropriately handle, store, and maintain the confidentiality of such sensitive information, and the NSF should clarify whether the information would be protected from potential subpoenas or other legal action.

Clarity/Definitions

While we appreciate the NSF’s effort to clarify some of the initial points raised in its February 8, 2018 Important Notice No. 144, we still have questions regarding the scope of the requirement and how it can be fulfilled. If the NSF’s intent is to include other forms of harassment, such as racial harassment or workplace bullying, these would be governed by different UC policies and handled by different offices.

We note that the definition of “Findings/Determinations” is open to differing interpretations. While we understand that this would include violations of an IHE’s policies, we question whether it would also include, for example, criminal convictions, civil court judgments or settlements.

In addition, the proposed reporting requirement, and the accompanying statement that NSF may take unilateral action based on the information reported, could signal to researchers accused of harassment and to those who have made the accusations that the NSF will review and possibly modify or overturn an IHE’s decision regarding administrative leave, investigatory procedures or discipline. It is also unclear whether the NSF wants to be informed about any harassment committed by a (co-)PI, or only harassment within an academic context.

Impact on Project Members

Consequences for violations of SVSH or other harassment policies are determined at the end of the investigation when the preponderance of the evidence shows the employee violated policy. We are concerned that the reporting requirement as written could irreparably damage NSF-funded projects and the reputations of individuals working on them – even when no harassment is ultimately found to have occurred. Participants on the NSF project, including postdoctoral researchers, staff and students, may also experience adverse impacts in their current and future

professional endeavors and livelihoods. Indeed, NSF project members may be reluctant to report harassment in their workplace if they believe such a report could disrupt or terminate their project.

Adequacy of Current Notification Requirements

Current NSF terms and conditions require notifying the NSF if the PI/PD or co-PI/PD will be disengaged from the project for greater than three months, or devote substantially less time to the project than anticipated in the approved proposal (defined as a reduction of 25% or more in time). We believe these terms already capture the NSF's need to know about a project leader's significant absence or reduction of effort. UC fully recognizes that it is a serious matter when, after due process has transpired, one of its scholars must be disciplined for such reasons as SHHSA, and UC would continue to notify extramural funders of the (co-)PI's projects, including the NSF, of the need to make a managerial change. The NSF would continue to be able to evaluate such proposed changes in project leadership on their merit.

We thank the NSF for raising these important issues and for the opportunity to provide comments. We are available for further consultation.

Sincerely,



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