

August 16, 2019

Richard N. Reback
National Aeronautics and Space Administration
300 E Street SW
Room 6087
Washington, D.C. 20546

Via email: civilrightsinfo@nasa.gov

Re: Public comments on proposed Reporting Requirements Regarding Findings of Sexual Harassment, Other Forms of Harassment, or Sexual Assault- FR Doc. 2019-14653

Dear Mr. Reback:

On behalf of the Council on Governmental Relations (COGR), American Council on Education (ACE), Association of American Universities (AAU), Association of Public 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 and 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 July 10, 2019, corrected notice July 17, 2019. We welcome the opportunity to work with NASA 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.

Last year, our organizations submitted comments and participated in stakeholder meetings regarding the new NSF terms and conditions regarding findings of sexual harassment, other forms of harassment, or sexual assault. We are committed to addressing sexual harassment and sexual assault on our campuses, in our labs, and in our education programs. We support NASA's efforts to institute reporting requirements to enable receipt of timely and pertinent information pertaining to principal investigators (PIs) and Co-Is at awardee institutions. We believe, however, that elements of the proposed reporting requirements may have unanticipated consequences which do not optimally align with NASA's objectives or sufficiently advance our collective efforts to address and eliminate harassment in the scientific workplace. The higher education associations listed above offer the following questions, comments, and recommendations in response to the *Federal Register* notice.

1. Reporting administrative action taken regarding a PI or Co-I to NASA during an investigatory process.

NASA's proposal would require institutions to report if "the PI or the Co-I is placed on administrative leave or if the recipient has imposed any administrative action on the PI or the Co-I." As defined in the new reporting requirement, "administrative action" captures a vast array of temporary actions which could be and frequently are preliminary to any findings or conclusions. Such actions can relate to activities including "but not limited to the following: teaching, advising, mentoring, research,

management/ administrative duties, or presence on campus.” 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 actions could chill the use of these important interim measures out of concern that NASA may create a record or take action against a PI or Co-I prematurely. As an alternative to the current recommendation, we recommend that NASA narrow this proposed reporting requirement. One option would be to require reporting only in situations where administrative leave has been imposed and the PI or Co-I has been found responsible but is appealing the adjudication, or when the terms of a pre-adjudication leave would affect performance under the award.

We also urge NASA to rely on existing approval processes in lieu of awardee institutions’ reporting of administrative actions taken regarding the PI or Co-I. NASA already has approval procedures for substituting a PI or Co-I when a leave could impact performance. The NASA approval procedures for substituting a PI or Co-I 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-I whose performance is impacted by administrative leave during an investigation of reported harassment risks incurring greater costs than the benefits achieved. For these reasons, we recommend that NASA strike the requirement that notification be given to NASA for any administrative action and focus on those that impact performance of the NASA-funded project.

2. Clarification is needed on reportable action.

We have additional questions about what is included under the term “administrative action.” The proposed reporting requirement describes “Administration Leave/ Administrative Action” as “Any temporary/ interim suspension or permanent removal of the PI or Co-I, or any administrative action imposed on the PI or the Co-I by the recipient under organizational policies or codes of conduct, statutes, regulations, or executive orders, relating to activities, including but not limited to the following: teaching, advising, mentoring, research, management/ administrative duties, or presence on campus.” But there is no real definition of what constitutes an administrative action.

The 116th Congress is currently considering H.R. 36 “Combatting Sexual Harassment in Science Act of 2019.” The legislation, as passed by the House of Representatives, includes language calling on the Director of the Office of Science and Technology Policy to develop policy guidelines that define administrative action as “*administrative action, related to an allegation against grant personnel of any sexual harassment or gender harassment, as set forth in organizational policies or codes of conduct, statutes, regulations, or executive orders, that affects the ability of grant personnel or their trainees to carry out the activities of the grant.*”

We ask that NASA consider including this language in the final NASA reporting requirements.

3. The reporting requirement may have unintended consequences.

If the report to NASA forms the basis for a NASA 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. This would be especially troubling in a situation that results in no findings. 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, which may be detrimental to their career progress. To mitigate these unintended consequences, we recommend revising the language of the new reporting requirement to emphasize the NASA process to substitute a PI or Co-I, rather than suspension or termination of the award. We appreciate the process proposed by NASA that will allow “the recipient, at any time, to propose a substitute investigator if it determines the PI or any Co-I may not be able to carry out the funded project or activity and/or abide by the award terms and conditions.” We also understand that upon receipt of and review of the information, NASA “may, if necessary and in accordance with 2 CFR 200.338, assert its programmatic stewardship responsibilities to initiate the substitution or removal of the PI or any Co-I, reduce the award funding amount, or where neither of those previous options is available or adequate, to suspend or terminate the award.” Before taking such a drastic course of action as terminating the award, we request that NASA work with the Authorized Organizational Representative (AOR) to discuss and exhaustively explore all other options.

4. Clarity is needed on confidentiality and use of reported information.

We are very concerned about the prospect that sensitive personnel information, not otherwise public, could become public under FOIA. We ask that NASA carefully examine this issue and modify the proposed reporting requirements with clarifying language which sufficiently addresses these concerns. This will be particularly important if NASA chooses to maintain the reporting obligations in the new term and condition, which will result in the information arising from matters under an investigation that may not even lead to a finding of a violation. NASA should make clear in the new reporting requirements how it will handle reported information. Will it be shared with other agencies? Although we strongly recommend that NASA not mandate the reporting of all kinds of administrative actions, should the agency maintain that proposed requirement, it will be important for NASA to have a way to update its records following an institutional finding of no responsibility. Prior to implementation, NASA 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 NASA, the agency should clearly note that in any archived material pertaining to that report.

5. The intersection with privacy regulations and state laws could pose conflicts.

We have concerns about how the new reporting requirements will coincide with the Family Educational Rights and Privacy Act (FERPA) and other federal privacy regulations or state laws, which may prohibit sharing information on student and personnel matters outside of the higher education institution. We have concerns that there may be overlap or redundancy that could create conflicting legal obligations for higher education institutions. It is possible that conflicts between the NASA reporting requirement and other privacy regulations and laws may cause confusion for recipients and create questions about which legal obligation takes precedent.

6. Subrecipient reporting should be the subrecipient’s responsibility.

The proposed reporting requirement includes the requirement that “Recipient agrees to insert the substance of this term and condition in any subaward/ subcontract involving a co-investigator. *Recipient*

will be responsible for ensuring that all reports, including those related to co-investigators, comply with this term and condition.” We recommend that if a subrecipient has a reportable finding/determination, compliance with this rule shall be the direct responsibility of the subrecipient. Due to privacy concerns, it is not appropriate for the primary award recipient to have direct knowledge of the investigation being conducted by a subrecipient. The primary award recipient’s responsibility should be limited to passing through the appropriate terms and conditions from the prime award for inclusion in the subaward. We suggest that the subrecipient provide the subrecipient’s report directly to NASA. Any changes that directly impact the performance of the subaward or the prime recipient’s obligation to NASA should be communicated via the prior approval requirements of the subrecipient’s subaward. Any temporary/interim suspension or permanent removal of the PI or Co-I should be in accordance with the subrecipient’s policies or codes of conduct, as well as any relevant statutes, regulations, or executive orders.

7. Interaction with pending Title IX rules and other existing federal and state rules.

Colleges and universities have a clear and unambiguous responsibility under Title IX of the Education Amendments of 1972 to respond to allegations of sexual harassment, including sexual assault. Colleges and universities are committed to upholding civil rights and to creating and maintaining campus environments that are safe, supportive, and responsive.

There are laws in addition to Title IX that address sexual harassment involving employees –most notably Title VII of the Civil Rights Act of 1964, but also numerous state and local laws. The overlapping but different requirements imposed by the new term and condition, Title VII, and state and local anti-discrimination laws could cause confusion and create conflicting obligations for institutions that are committed to complying with all applicable laws. Federal policy needs to give institutions enough flexibility to ensure that all legal and other obligations—no matter their source—are properly addressed when resolving sexual harassment allegations.

The U.S. Department of Education published a proposed Title IX rule in late 2018 and the higher education community submitted comments in January 2019.¹ When the rule is finalized later this year, colleges and universities will likely undertake changes in campus structures in regards to the implementation of the final rule. This, as well as the new terms and condition from NSF, NASA, and other federal agencies, without coordination or shared definitions, can make the process confusing and more complicated for the person reporting the harassment and the institution implementing the various rules. This is especially true as the Title IX offices are often the offices tasked with carrying out the new rules, while the AOR has the ultimate reporting duty to NASA. We ask wherever possible, NASA utilize existing definitions and harmonize with other federal agencies regarding existing rules and reporting requirements.

¹ <https://www.acenet.edu/news-room/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf> and <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Higher-Education-Regulation/AAU-Title-IX-Comments-1-24-19.pdf> and <https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Higher-Education-Regulation/AAU-Title-IX-Comments-1-24-19.pdf>

8. An appeals process is needed.

NASA 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 procedures. A NASA appeals procedure is particularly necessary in cases in which an interim measure (e.g. administrative action) is imposed and reported to NASA but where the PI or Co-I is ultimately found not responsible. The outcome of an appeals process, whether at NASA or the institution, should be promptly shared between NASA and the institution. Also, please know that institutions welcome the opportunity to work with NASA in the development of an appeals process.

9. Submission of notification to NASA should be secure.

The *Federal Register* notice indicates that notifications must be submitted by the AOR via email to NASA's Office of Diversity and Equal Opportunity via email at: civilrightsinfo@nasa.gov. We recommend that NASA consider submission of notifications via a secure web portal rather than through e-mail.

10. Sufficient time is needed for the recipient to report notification of placement on administrative leave to NASA.

We support efforts to encourage swift reporting to NASA of findings or a determination of a violation relating to sexual harassment or sexual assault. The proposed reporting timeframe of seven (7) business days, however, may not allow institutions adequate time, particularly in the case of an administrative action. In the National Science Foundation (NSF) "Notification Requirements Regarding Findings of Sexual Harassment, Other Forms of Harassment, or Sexual Assault" published on September 21, 2018, the final term and condition allows for ten (10) business days for notification to NSF from the date of the finding/ determination, or the date of the placement of a PI or a Co-PI by the awardee on administration leave." While the difference is slight, it is helpful, and we believe there should be harmonization among the federal science agencies on these new terms and conditions wherever possible.

11. Conclusion

According to the *Federal Register* notice, "upon receipt and resolution of all comments, it is NASA's intention to implement the new term through revision of NASA's "Agency Specific Requirements to the Research Terms and Conditions, the Grant General Conditions, and the Cooperative Agreement-Financial and Administrative Terms and Conditions." We strongly encourage NASA's Office of Civil Rights 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 NASA to consider convening a small roundtable discussion with key stakeholders from universities to discuss the new reporting requirements before implementing them. An open and comprehensive dialogue between NASA and the community is essential if we are to combat and end sexual harassment in the scientific workplace.

Thank you for considering our comments. Our organizations are committed to working with NASA to most effectively address harassment, sexual harassment, and sexual assault in the scientific workplace.

We look forward to a future discussion on this issue.

Sincerely,

Council on Governmental Relations

American Council on Education

Association of American Universities

Association of Public and Land-grant Universities

College and University Professional Association for Human Resources

American Association of State Colleges and Universities

National Association of Independent Colleges and Universities