

CHIPS and Science Act Includes Efforts to STEM Sexual Harassment

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CHIPS Act of 2022

Recent legislation includes significant policy changes relating to sexual harassment for funding recipients in the STEM fields. This legislation also includes tens of millions of dollars of funding available to educational institutions and not-for-profits to address compliance, response, and prevention.

This significant change is part of the recently enacted [CHIPS Act of 2022 \(CHIPS\)](#), Subtitle D- Combating Sexual Harassment in Science (CHIPS at pages 700-714). Subtitle D points to a new direction in how the federal government and its funding recipients in higher education will combat sexual harassment in the STEM fields. Moving from the current patchwork of approaches built into contracts and grants, the CHIPS Act will create a uniform reporting structure for categories of misconduct. It also creates new opportunities to research innovative approaches for preventing and responding to sexual harassment in scientific fields. Questions remain about how these rules will be implemented in higher education. This article points to several challenges and offers suggestions for policymakers, as well as preliminary steps that institutions should take now to prepare, as various provisions come into effect over the next few years.

MOVING AWAY FROM A PATCHWORK OF SOLUTIONS?

During the last half-decade, federal agencies including the [National Science Foundation](#), [National Institutes of Health](#), and the [National Aeronautics and Space Administration](#) have issued sexual harassment reporting requirements for grant awardees, with significant differences in reporting requirements as well as inconsistencies in application and standards applied. This patchwork has not well-served institutions, nor the very students and employees these systems intended to protect.

It is no secret that many students and employees in Science, Technology, Engineering, and Math (STEM) are exposed to sexual misconduct in their work. Congress, calling harassment “pervasive” in higher education, found that “58% of individuals in the academic workplace experience sexual harassment,” (CHIPS at 700) a number that would be stunning if it were not already so well-known among those who work in educational equity. Congress also found that the impact of harassment falls harder on women and people with certain identities.

Notably, without standards set in statute, these reporting requirements have been applied to new grants awarded after the terms are

finalized, as part of the contractual obligations that a recipient willingly accepts in partial exchange for the funding.¹

Without the structure of a statute or a uniform policy across agencies, recipients have had to comply with multiple approaches. At smaller institutions with few incidents in particular, it is likely that these patchwork obligations may fall through the cracks or not be well-understood or remembered by the employees charged with such reporting and updating.

The CHIPS legislation recognizes that decentralized reporting approaches are inefficient and sub-optimal, and charges the executive branch with developing uniform approaches to reporting misconduct by award personnel for all federal agencies and updating the professional standards for the field (including the National Academies’ [“On Being a Scientist”](#) Report, CHIPS at 704).

WHITE HOUSE LED INTERAGENCY WORKING GROUP

One of the first steps required by the legislation is for the White House [Office of Science and Technology Policy](#) (OSTP) National Science and Technology Council to convene an Interagency Working Group to coordinate various federal agency efforts to prevent and respond to reports of harassment (CHIPS at 705-711). The OSTP must coordinate with a number of agencies and groups, including the Department of Education’s Office for Civil Rights, to:

- Prepare an inventory of agency policies, procedures, and resources related to sex-based and sexual harassment (within 90 days of the the CHIPS enactment);

- “[D]evelop a consistent set of policy guidelines for Federal research agencies (6 months after date inventory is submitted);
- Submit a report on implementing these guidelines (within a year of the inventory being submitted and every five years thereafter); and
- “[E]ncourage and monitor efforts of [agencies] to develop or maintain and implement policies” based on the policy guidelines it develops.

Impact on Higher Education

Subtitle D’s most practical impact on colleges and universities may be that they will only need to follow a single set of reporting requirements across funding agencies based on the coming OSTP guidelines (CHIPS at 707-709). Moving from inconsistent, or absent, reporting standards, this legislation moves towards a consistent and hopefully more efficient system for reporting in a way that conforms to FERPA and protects the privacy rights of individuals.

Recipients will have to report:

- Decisions to launch formal investigations “of sex-based and sexual harassment, including bullying, retaliation, or hostile working conditions by, or of, award personnel;”
- Administrative action related to such an allegation “that affects the ability of award personnel or their trainees to carry out the activities of the award;”

¹ This piecemeal approach already changed for the NIH earlier in 2022 through the [Consolidated Appropriations Act, 2022](#) (page 426), which gave specific authority to NIH to require recipients to report when principal investigators or key personnel are removed or otherwise disciplined for certain misconduct, including harassment and bullying.

- Total number of investigations with no finding of misconduct;
- Findings of misconduct (including an institutional process that has completed appeals, determinations made in a court of law, or other disciplinary action taken);
- Annual updates for these cases.

It is not clear whether these submissions will be statistical in nature or whether (as is likely) specific information or narratives will be required for individual cases. CHIPS requires that OSTP ensure the guidelines are consistent with FERPA (CHIPS at 709).

INTERSECTION WITH EXISTING AGENCY REQUIREMENTS

INTERIM REPORTING

The legislation specifically states that recipients will not be required to “provide interim reports to Federal research agencies.” While the language does not go deeper than this, this may represent a shift from the current reporting requirements of some agencies that include early and interim steps such as placement on administrative leave (NSF at 47941; NASA at 13935) in addition to final determinations. It is not clear how no “interim reports” squares with the requirement to report on decisions to “launch” formal investigations, or even what it means to “launch” an investigation and whether administrative leave is or is not reportable. It is also not yet clear whether “formal investigation” is intended to be consistent with the definition in the Title IX 2020 Regulations, or if the guidelines will use another standard. The regulators will likely wish to be clear on what is and is not reportable (and the recipients will definitely need such guidance).

NOTIFICATION TIMELINES

Further, other aspects of the new requirements may be different than some of the current agency terms and conditions. For instance, the NSF and NASA require that reports be made within 10 business days (NSF at 47941; NASA at 13935) while NIH requires notification within 30 days (NIH May 10 Announcement). CHIPS does not specify a timeline, but we should expect that the new timeline will be uniform across all agencies.

REPORTING OF INCIDENTS BEYOND THOSE COMMITTED BY PRINCIPAL INVESTIGATORS

The CHIPS Act expands the range of employees whose misconduct must be reported to funding agencies. NASA and NSF require reports of administrative actions and final determinations of harassment committed by Principal Investigators and Co-PI’s (NSF at 47941-47942; NASA at 13935-13936), while NIH requires reports of “Program Director/Principal Investigator or other Senior/Key personnel” who are “removed [from their positions] or otherwise disciplined” “due to concerns about harassment, bullying, retaliation, or hostile working conditions” (NIH May 10 Announcement). The CHIPS legislation covers “award personnel” (CHIPS at 708-709), a considerably broader group. It is not defined whether “award personnel” includes students, but reviewing other parts of this section of the legislation show that the main identified concern of Congress is the experience of students, and regulators may take that “spirit” of the legislation into account.

SCOPE OF REPORTING AND DEFINITIONS OF MISCONDUCT

The CHIPS Act also broadens the scope of incidents that must be reported to funding agencies and includes definitions of misconduct that may be more encompassing than existing

federal anti-discrimination and civil rights laws, such as Title VII and Title IX.

Currently, NASA and NSF include reporting of “a conviction of a sexual offense in a criminal court of law” (NSF at 47941, NASA at 13935). The NIH requirements are silent on this issue. The CHIPS Act would require reporting “a determination of a sexual offense in a court of law” (CHIPS at 708-709) which may be inclusive of civil determinations of sex offenses as well as criminal determinations.

Also to be determined are definitions of covered conduct. NSF and NASA require reporting of sexual harassment by PI’s and co-PI’s as well as “other forms of harassment” which includes non-gender and non-sex based harassment that is otherwise protected under law or policy (NSF at 47941; NASA at 13935). NIH includes a broader statement about “safety and/or work environments” such as “harassment, bullying, retaliation, or hostile working conditions” without necessarily tying these to sex, gender, or other protected classes.

The CHIPS legislation does not precisely define the violations for which it seeks reporting, beyond pointing to “sex-based or sexual harassment, including bullying, retaliation, or hostile work environments.” But definitions in current federal law and regulation already differ (*compare* the [Title VII definition](#) of hostile work environment to the [Title IX Regulatory](#) [p. 30574] definition of hostile work environment), and the regulators would do well to conform and be clear about standards so that institutions can consistently comply.

CLIMATE SURVEYS AND OTHER OVERSIGHT

Beyond required reporting, the legislation tasks the NSF and OSTP to “consider issuing guidelines that require or incent:”

- Recipients to assess organizational climate through climate surveys, focus groups, or exit interviews;
- Recipients publicly publishing the results of their investigations and adjudications of reportable incidents of sex-based and sexual harassment, “disaggregated by sex and, if practicable, race, ethnicity, disability status, and sexual orientation;”
- Recipients publicly publishing the number of (total) reports of sex-based and sexual harassment;
- Recipients “regularly” (a term that is undefined) assessing and improving policies, procedures, and interventions to reduce prevalence and improve reporting;
- Certification by applicants for awards that they have a code of conduct, posted publicly on their website, “for maintaining a healthy and welcoming workplace;”
- Recipients having in place policies and mechanisms to address the needs of those who are harassed (including reintegrating to the recipient); and
- Recipients working “to create a climate intolerant of sex-based and sexual harassment and that improves diversity and inclusion.”

Some or (perhaps more likely given the Congressional impetus) all of these enumerated ideas may become optional or mandatory. The legislative language affords significant flexibility

to the NSF and OSTP to analyze each idea, but institutions should be aware of and prepare for the possibility that these will either be mandatory or incentivized (potentially including positive notation or points in consideration of future grant awards). These are generally written vaguely, which will afford some discretion to NSF and OSTP to provide details.

Once these guidelines are promulgated (scheduled to be about 270 days after the law was enacted), federal agencies will have another 270 days to develop or maintain policies consistent with the guidelines and disseminate the policies to recipients (CHIPS at 711).

RETROACTIVITY

One question that the legislation leaves open is the retroactivity of its new reporting requirements. NSF and NASA used the award contracting process to add terms and conditions for future awards that include reporting. To the extent that such terms only bind future awards, they did not cover awards already in place. The CHIPS Act requires policy changes, backed by the weight of statute and, while it is not stated firmly whether these policies are retroactive, the language about changing policies and promulgating them to all recipients (not just as part of the terms of new awards) may mean that agencies will apply these standards prospectively and retroactively, regardless of the status or timeline of an award.

FUNDING OPPORTUNITIES

Perhaps most critical towards the long term efforts to reduce the impact of harassment and violence on STEM programs, the NSF Director can make awards (CHIPS at 702-704) to:

- a. Research the factors contributing to, and consequences of sex-based and sexual harassment for STEM students, trainees, and employees, especially the impact on “racial and ethnic minority groups, disabled individuals, foreign nationals, sexual-minority individuals, and others.”
- b. Examine prevention and response approaches, that can reduce incidents and their impact including remediating negative impacts and “fostering respectful and inclusive climates.” The legislation specifically encourages development of “innovative, evidence-based strategies, policies, and approaches to prevent and address” harassment.
- c. Researching alternatives to the current power dynamic in STEM academics and research.
- d. Establishing a center to coordinate and manage this work.

The legislation will require a number of studies, including a charge to the National Academies (CHIPS at 712) to assess the state of research in this space and progress made towards goals, whether prevalence is decreasing with these efforts, and where to focus future efforts at change. It also requires a study of the implementation of the law’s requirements by the Government Accountability Office (CHIPS at 713).

A CALL TO ACTION

In some ways, this law is a major statement from Congress, and one that comes with funding directed specifically to addressing these persistent harms. Congress references the \$500,000 cost to train a STEM Ph.D (who may leave the field due to sexual harassment, resulting in both a potential reduction of earnings for the student as well as the concomitant loss of taxes paid due to the reduced salary).

But beyond the fiscal, accounts of promising students run out of STEM careers because of sexual harassment should give us all pause. How many great discoveries have we missed out on because that inventor left the field? Many students feel they cannot report their harasser either because they are the only person or one of just a few who can supervise their specific research, because the harasser reasonably appears to have the power to convince peers not to take the student as a transfer, or because the prominence of the harasser as a rainmaker of funding makes them seem untouchable (or all of the above). Congress calls out the challenges of the current power dynamic and specifically calls for research on changing it.

This Act should be a clarion call to higher education leaders to consider other models that do not contribute to the feelings of absolute helplessness for students and early career professionals who are harassed by their superiors and do not have other options in which to continue their careers.

Congress may be signaling that if we do not affirmatively develop these alternative models, they will further regulate the field. However much impact this federal legislation may have, lasting change will come only through the commitment of higher education institutions—and especially Presidents, Provosts, and Vice Presidents of Research—to address STEM sexual harassment in a meaningful and effective manner.



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