

To: Office for Civil Rights (OCR), United States Department of Education (ED)

From: Jennifer Joy Freyd, Professor Emerit of Psychology, University of Oregon

Re: Comment in response to ED Request for Information Regarding ED-2021-OCR-0166

Date: 7 September 2022

Document Details: This Comment is 10 pages, delivered via: www.regulations.gov

I am a professor of psychology writing in response to your “Request for Information Regarding the Nondiscriminatory Administration of School Discipline” (ED-2021-OCR-0166).

While most of the proposed regulations are improvements upon the existing regulations, there is one glaring problem: the proposed requirement of mandatory reporting in institutions of higher education (§ 106.44(c) "notification requirements"). Mandatory reporting requirements, while likely well-intentioned, are deeply harmful.

The harm of mandatory reporting has been established in scientific research and the explanation for this effect is this: Sexual violence robs survivors of autonomy and control. This is its fundamental injury. However, the injury of disempowerment doesn't always end with the assault. The science is clear: a second fundamental injury of sexual violence can occur after the event is perpetrated when other people -even well-meaning people - learn about the violence and then further intrude on the survivor's autonomy and control. This may happen, for instance, when the survivor discloses the event to a trusted other who then shares the private information with official sources against the survivor's wishes.

Mandatory reporting thus takes control away from a survivor, furthering the trauma that the survivor must endure. Research indicates that mandatory reporting is also ineffective at achieving goals as it chills disclosures and alienates victims. Importantly, mandatory reporting is fundamentally at odds with the goal of Title IX itself as it disproportionately harms women and minority students.

Instead of mandatory reporting, the Department of Education should require higher education schools have “mandatory supporting” policies, which prioritize the autonomy of the survivor. Students in higher education institutions are almost all adults, and it is vital we do not further violate their dignity and autonomy or take away their power. Disclosures of violence and harassment should not be shared without the survivor's consent.

My Qualifications

I am a psychology researcher with over four decades of experience and numerous professional awards and honors. I am Professor Emerit of Psychology at the University of Oregon, Founder

and President of the Center for Institutional Courage, and Adjunct Professor of Psychiatry and Behavioral Sciences in the School of Medicine at Stanford University.

In addition, I am a member of the Advisory Committee, 2019-2023, for the Action Collaborative on Preventing Sexual Harassment in Higher Education of the National Academies of Science, Engineering, and Medicine. I also serve as the Editor of one of the premier academic journals on trauma, the *Journal of Trauma & Dissociation*.

For more than 30 years my research has focused on the psychology of trauma including mental health impacts and the nature of trauma disclosure. I am best known for my theories of betrayal trauma, institutional betrayal, DARVO, and institutional courage (Freyd, 1994, 1996, 2018; Freyd & Birrell, 2013). I have expertise on the consequences of campus sexual assault and harassment and the role of institutional response to that violence. My laboratory investigates the impact of interpersonal and institutional trauma on mental and physical health, behavior, and society at the University of Oregon and I conduct collaborative research at the Center for Institutional Courage and at Stanford University. I have published over 200 scholarly articles, and I am the author of the Harvard Press award-winning book *Betrayal Trauma: The Logic of Forgetting Childhood Abuse* (Freyd 1996). My book *Blind to Betrayal*, co-authored with Pamela J. Birrell, was published by Wiley in March 2013 and has seven foreign translations. In the spring of 2014, I was invited two times to the U.S. White House due to my expertise in understanding sexual assault and institutional betrayal. I am a Fellow of the American Psychological Association, the American Psychological Society, and the American Association for the Advancement of Science. I have received numerous awards including being named a John Simon Guggenheim Fellow. In April 2016, I was awarded the Lifetime Achievement Award from the International Society for the Study of Trauma & Dissociation.

In my research, I have collected information from tens of thousands of research participants, including from thousands of individuals who have experienced sexual trauma and institutional betrayal on campus (e.g. Gómez, Rosenthal, Smith, & Freyd, 2015; Rosenthal, Smidt, & Freyd, 2016; Rosenthal & Freyd, 2022; Smith & Freyd, 2013; 2017). In addition, I have published numerous research articles with a focus on the impact of trauma disclosures and I have specifically authored and co-authored peer-reviewed scholarly articles and editorials about reporting policies, including the award-winning 2018 *American Psychologist* article “Compelled Disclosures of College Sexual Assault” with Holland and Cortina. My articles about mandatory reporting include:

- Freyd, J.J. (2016). [The Problem with “Required Reporting” Rules for Sexual Violence on Campus](https://www.huffpost.com/entry/the-problem-with-required_b_9766016), *Huffington Post Blog*, 25 April 2016. https://www.huffpost.com/entry/the-problem-with-required_b_9766016
- Holland, K. J., Cortina, L. M., & Freyd, J. J. (2018). [Compelled disclosure of college sexual assault](http://dx.doi.org/10.1037/amp0000186). *American Psychologist*. 73(3), 256-268. <http://dx.doi.org/10.1037/amp0000186>

- Holland, K. J., Cortina, L. M., & Freyd, J. J. (2019). [Advocating alternatives to mandatory reporting of college sexual assault: Reply to Newins](#) (2018). *American Psychologist*, 74(2), 250-251. <http://dx.doi.org/10.1037/amp0000415>
- Holland, K. J., Freyd, J. J., & Armstrong, A. (2022) [Mandatory Reporting Is Exactly Not What Victims Need](#) *The Chronicle of Higher Education*, 22 July 2022.

In addition to my research and writing on the topics relevant to this comment, I was one of the primary architects of the University of Oregon mandatory supporting (rather than reporting) policy that has been in effect since September 2017. This trauma-informed and evidence-based model policy has highly effective.

Student Perspective: “Mandatory reporting is *rapey*”

“Mandatory reporting is *rapey*,” said the first-year law student sitting across from my desk in my faculty office.

I’m a sexual violence researcher. I know the research evidence: mandatory reporting in higher education is both ineffective and harmful.

But *rapey*?

“What do you mean, it is *rapey*?” I asked her.

“Well,” she explained, “the powerful institution ignores your boundaries and then invades your private sexual victimization experience against your consent.” Then a flash of hurt and anger crossed her face. She asked me: “How is that *not* *rapey*?”

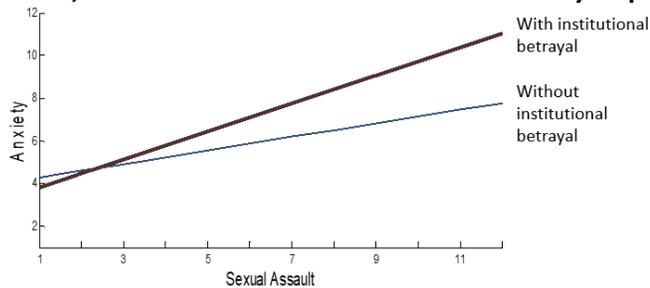
This student, like so many others I have spoken to over the years, had been telling me about her experiences of sexual violence and gender discrimination at her prior undergraduate university and now at her law school. Included was a sexual assault she endured in her freshman year – that one perpetrated by another student in her friend group - and most recently sexual and gender harassment perpetrated by one of her law professors. The student explained to me that her experiences with mandatory reporting and its aftermath were in both cases worse than the assault and harassment itself. She fell behind in her academic work, quit most of her club sports, and almost dropped out of law school. For this student and many others, institutional betrayals such as the effects of mandatory reporting, creates profound harm.

Research Evidence: Institutional Betrayal is Harmful

Research indicates that what happens after sexual assault and harassment can be as powerful as the assaults themselves. When others respond poorly, the harm can be powerful. Research indicates that institutional betrayal is associated with symptoms of depression, anxiety, difficulties with sleep, dizziness and other physical symptoms, PTSD, and suicidal tendencies (e.g. Adams-Clark & Freyd, 2021; Andresen, Monteith, Kugler, Cruz, & Blais, 2019; Lind, Adams-Clark, & Freyd, 2020; Monteith, Baharaini, Matarazzo, Soberay, & Smith, 2016; Smith & Freyd, 2013; Smith & Freyd, 2017).

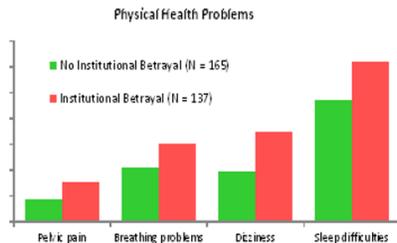
Institutional Betrayal Exacerbates Trauma Symptoms (Smith & Freyd, 2013)

- Exacerbates **Anxiety**, Dissociation, Sexual Problems, and Sexual-abuse related symptoms



Physical Health Costs of Institutional Betrayal (Smith & Freyd, 2017)

- Institutional betrayal is also associated with physical health problems, even when controlling for betrayal trauma



Research Evidence: Taking Control Away from the Victim is Harmful

A poor response from institutional actors can include obviously harmful behaviors like blaming the victim, denying the event happened, covering up the event, and punishing the victim. But here is the important point relating to mandatory reporting: the most harmful poor response of all can be taking control away from the victim (Holland, Cortina, & Freyd, 2018). Trauma theorist Judith Herman identified this dynamic very clearly:

Trauma robs the victim of a sense of power and control over her own life; therefore, the guiding principle of recovery is to restore power and control to the survivor. She must be the author and arbiter of her own recovery. . . . Many benevolent and well-intentioned attempts to assist the survivor founder because this fundamental principle of empowerment is not observed. No intervention that takes power away from the survivor can possibly foster her recovery, no matter how much it appears to be in her immediate best interest. (Herman, 2002)

Sometimes I explain *why* this is the case by drawing an analogy to concussions. One blow to the head can be dangerous. A second blow to the head soon after the first can be even more dangerous. When a person is victimized by sexual violence or discrimination it is an attack on that person's agency and a violation of that person's boundaries. Their non-consent to the behavior is specifically ignored and overridden. This is like the first concussion. When the institution subsequently takes that person's disclosure of victimization and turns it over to others against the wishes of the victim, that too is an attack on that person's agency and a violation of that person's boundaries. And like a second concussion, that institutional attack can be powerfully dangerous. This can be a life and death matter for people; institutional betrayal is associated with increased suicidality (see Smith & Freyd, 2014 and Monteith, et al, 2016).

Social science research is clear about trauma disclosure and about the harm of violating survivor autonomy. First, we know from research that disclosure of sexual violence is often delayed (Foyne, Freyd, & DePrince, 2009), that it almost always happens as a process over time, and that it is highly risky for the survivor in that a good response can help but a bad response can cause profound harm (Foyne & Freyd, 2011; 2013; Harsey, Zurbriggen, & Freyd, 2017; Orchowski, Untied, & Gidycz, 2013). We also know that most victims of sexual violence first disclose not to receive practical help or action, but for emotional reasons (Orchowski, Untied, & Gidycz, 2013).

When the first disclosure goes well victims are much more likely to later seek help, promote action, etc. We know as well that victims turn to those they most trust when they make that first disclosure and we know that in colleges and universities that person is often a faculty member. We furthermore know that more than 90% of sexual violence survivors currently do not report to official university sources, ever (Rosenthal, Smidt, & Freyd, 2016). If we want to increase

reporting rates, we must first make it safe to disclose and that means respecting survivors' needs, privacy, and autonomy rather than revictimizing them.

Mandatory *Supporting*, not Reporting is the Correct Approach

So, yes, I do understand the law student's perspective: mandatory reporting in higher education *is* rapey.

I also do trust that the Department of Education does not want to be rapey. I understand that the idea of mandatory reporting is based on the premise that it will help, not harm. But the premise is simply wrong: research has made this very clear. We know based on the scientific evidence that mandatory reporting neither safe nor effective. We know that on average it is not effective at preventing violence or helping victims recover in large part because it chills reporting and creates victims who do not want to engage with a system in which their autonomy has been compromised. But it is much worse than not effective – mandatory reporting is very often deeply harmful. We know this from years of social science research (Holland, Cortina, & Freyd, 2017, 2018).

The US government should not be ordering institutions of higher education to betray and harm their students. The proposed changes would have exactly this impact on thousands and thousands of students who will be victimized over the next years by sexual and gender-based violence and discrimination. The consequences of the proposed notification requirements on all university students – both undergraduate and graduate students -- would be profoundly negative (Holland, Freyd, & Armstrong, 2022; Langin, 2022).

It is certainly commendable to wish that victims get support and that institutions be held accountable but mandatory reporting is most definitely not the way to achieve either of these commendable goals. Rather, mandatory *supporting* is a step in that direction. At the University of Oregon, we created such a mandatory supporting policy that has been in effect since 2017. Students have the option to talk to their professors while maintaining control over their privacy and autonomy. Except for a small set of designated mandatory reporters, faculty and staff are obligated to respect each student's wishes regarding privacy or not and to offer information about support resources. This is what a helpful response looks like: one that is respectful of the adult students, that is trauma-informed, and that helps prevent harm and future violence.

This is not just about students' mental and physical health. Mandatory reporting is also harmful to the educational rights of students and disproportionately to women and students with marginalized identities. Mandatory reporting directly interferes with the rights of students to write essays about their experiences of violence and discrimination, to discuss such experiences

in class, to discuss openly and honestly such experiences with their teachers and mentors, and to discuss such experiences at public education events like Take Back the Night.

It is clear to those of us who research sexual violence, work with students, and work with survivors that the chilling, paternalistic, and ultimately punishing regime of mandatory reporting is counter to the goals of Title IX, which is of course about protecting educational equity.

Ethical Imperatives: Consider the Belmont Report for Ethical Guidance

The scientific evidence and research literature is clear that mandatory reporting for adult students does not work and that it is worse than not working -that it is harmful. But it is not just being grounded in the science that should compel the Department of Education to revise the proposed regulations regarding mandatory reporting. It is also the ethical imperative of the situation.

It may be useful to consider the *Belmont Report* (<https://www.hhs.gov/ohrp/regulations-and-policy/belmont-report/index.html>) which guides the US government's regulations regarding the ethics of human subject research (45 CFR 46). Three ethical principles are the foundation of the *Belmont Report*: respect for persons, beneficence, and justice. I believe these principles are just as relevant to implementing Title IX.

Respect for Persons is based on two principals: (1) Acknowledge and treat individuals as autonomous. (2) Protect those with limited autonomy. While children have limited autonomy, adult students should be treated as autonomous. When the Department of Education treats adults as children this paternalism is deeply disrespectful to those adult persons. When ED instead treats adults as autonomous adults this approach is respectful, healing, and empowering.

Beneficence means *maximize benefits and minimize possible harms*. We know from research and trauma-informed clinical theory that mandatory reporting is associated with much harm including physical and mental illness symptoms. When the Department of Education requires adults have their privacy violated and their consent ignored, this is not beneficence. When ED instead respects the privacy and respects consent, this is modeling a world in which power is used to heal and nurture, not control and coerce.

Justice means treat people fairly. Mandatory reporting disproportionately harms women and those with marginalized identities. When the Department of Education requires mandatory reporting of adult disclosures this creates *injustice*. When ED instead requires mandatory supporting for all this promotes justice.

I believe that if the OCR at the Department of Education applies these Belmont Report principals of Respect for Persons, Beneficence, and Justice to the Title IX regulations, there will be no

sweeping or draconian mandatory reporting policy. Instead there will be respect, healing, and justice.

In Conclusion

Most students in higher education are adults, not children. These adults deserve to be acknowledged and treated as autonomous. Mandatory reporting is not respectful, is not effective, and is harmful. It exacerbates gender inequality by disrespecting and harming survivors of violence. The Department of Education should revise the notification requirements of the Title IX regulations such that most faculty and staff in higher education are mandatory supporters, not reporters.

Thank you.

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