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PERSPECTIVE

Don't turn classrooms into courtrooms and retraumatize victims

By Theane Evangelis

Should cross-examination be required in school disciplinary proceedings? This question has taken on renewed importance with the California Supreme Court set to decide whether California law requires cross-examination for school disciplinary proceedings involving gender-based violence and the Biden administration's review of the Trump administration's rules mandating cross-examination in hearings involving sexual assault. Cross-examination is not only unnecessary, but harmful and sexist, in school settings.

Requiring cross-examination in school disciplinary proceedings is not presumptively fair. Just ask any victim of sexual assault. While it may seem a well-worn path to some, cross-examination can subject victims to retraumatization. This is one of the reasons that sexual assault remains underreported today. Mandating cross-examination won't solve this problem; it will exacerbate it. Classrooms are not meant to be courtrooms.

Nor is cross-examination necessary for equitable truth-seeking. There are better methods than cross-examining victims. One solution, and a better solution? An investigatory system. In this system, the ultimate decisionmaker also investigates the facts of the case.

This is far from a revolutionary or novel view. Multiple European countries use an investigatory system — even in criminal proceedings — meaning individuals can lose their most basic right, their freedom, without the right of cross-examination and with the judge investigating the facts. If it is good enough for criminal proceedings in these advanced countries, it is at least worth considering in school disciplinary proceedings here.

In fact, the American Bar Association's Commission on Domestic and Sexual Violence also advocated strongly for such an approach. In its recommendations for improving campus student conduct processes for gender-based violence, it expressly recommended against importing criminal-style proceedings, which would undoubtedly include the right to cross-examine, into the school disciplinary system.

This detailed recommendation relied heavily on interviews of professors, criminal defense attorneys, school administrators, and gender-based violence experts. Its recommendation echoes many of the concerns raised in this opinion: cross-examination causes retraumatization; an investigatory system makes long-term responses to sexual assault more affordable for schools;

choice is to just assume that fairness and the truth are only attainable if we treat school proceedings as if they are subject to the very unique procedural requirements of criminal trials in the United States. Adversity and greater harm to students should not be built into our campus disciplinary systems. We should do more, and we can do more, to protect students while also seeking truth. ■

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and an investigatory system avoids many harms built into the adversarial system that we see on TV and in the courtroom. On the other hand, there is no reason that an investigatory system is any less efficient at equitable truth-seeking than an adversarial system where victims' reputations are put on trial.

Whether intentional or not, proponents of cross-examination in school disciplinary proceedings gloss over the harm caused by cross-examination and disregard a less damaging (and more efficient) system. Many Americans blindly assume its unique process is inherently better. But that's not supported by empirical research or otherwise, especially when we are trying to protect students who are in their late teens and early twenties.

Worse yet, cross-examination is often imposed only on victims of gender-based violence, and not in other school disciplinary proceedings, even for violent offenses. The result is two separate tracks — one procedural system for gender-based violence cases and another for all other cases — that treats victims of sexual assault (who are largely women) separate and unequal. And the implication is clear: Women can't be trusted. That is not only false, it is immeasurably harmful.

It is true that school disciplinary proceedings concerning sexual assault on campus are not easy and raise a host of concerns. But certainly the wrong

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