

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
In The Court of Common Pleas

Honorable R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No. 2015-001505

**RECEIVED**

SEP 05 2017  
SC Court of Appeals

John Doe 2, ..... Appellant,

v.

The Citadel..... Respondent.

RETURN TO MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* BRIEF OF THE  
WOMEN'S AND CHILDREN'S ADVOCACY PROJECT AT NEW ENGLAND LAW|BOSTON

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AND NOW COMES Respondent The Citadel, The Military College of South Carolina (“The Citadel”) and files the following Return to Motion for Leave to File Brief as *Amicus Curiae* Brief of the Women's and Children's Advocacy Project at New England Law|Boston:

### **INTRODUCTION**

The instant movant, the Women's and Children's Advocacy Project at New England Law|Boston (“WCAP”), has filed a Motion for Leave to File Brief as *Amicus Curiae* (“Motion for Leave”) in support of Plaintiff's contentions in this appeal. WCAP seeks leave to file its proposed Brief *Amicus Curiae* on Behalf of the Women's and Children's Advocacy Project at New England Law|Boston in Support of Appellant's Application for Further Appellate Review (“Proposed Brief”) addressing the applicability of Title IX of the United States Education Amendments of 1972 in this case. The Citadel respectfully submits that the Court should deny WCAP's Motion for Leave.

### **ARGUMENTS**

#### **A. There Is No Basis for the Court to Grant WCAP Leave to File the Proposed Brief**

In general, persons or entities may appear as “friends of the court” in several different scenarios:

“An *amicus curiae*, defined as ‘friend of the court,’ does not represent the parties but participates only for the benefit of the Court.” *United States v. Microsoft Corp.*, No. 98–1232, 2002 WL 319366, at \*2 (D.D.C. Feb. 28, 2002). Hence, it is solely within the Court's discretion to determine “the fact, extent, and manner” of participation by the *amicus*. *Id.* *Amicus* participation is normally appropriate when (a) “a party is not represented competently or is not represented at all,” (b) “the *amicus* has an interest in some other case that may be affected by the decision in the present case,” or (c) “when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *Jin v. Ministry of State Sec.*, 557 F.Supp.2d 131, 137 (D.D.C.2008) (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th Cir.1997)).

*Hard Drive Prods., Inc. v. Does 1-1*, 495, 892 F. Supp. 2d 334, 337 (D.D.C. 2012). WCAP contends that it should be granted leave to file an *amicus curiae* brief “to assist the court because the parties did not adequately address the issue below on behalf of the interests of women, girls,

and others at risk for sex-based harms that occur in connection with education." (*See* WCAP Mot. for Leave, at 3).

Respectfully, The Citadel posits that the parties have adequately and fully presented the arguments relevant to the issues on the Title IX issue in this appeal. Both parties are represented by competent counsel, who have filed comprehensive briefs addressing all of the issues in this case. Plaintiff has not asserted a claim under Title IX. Rather, Title IX is a secondary argument for Plaintiff's contention that a duty of care existed in this case. The Citadel states that WCAP's Proposed Brief, while well-written, would not substantially aid the Court in deciding any issue in this case. For this reason, the Court should deny WCAP's Motion for Leave.

**B. The Arguments Raised in the Proposed Brief Are Without Merit**

The crux of WCAP's Proposed Brief is that the Court of Appeals' Opinion on this matter erred in concluding that Title IX of the Educational Amendments of 1972 did not apply in this case. Specifically, the Court stated that "Title IX intends to protect participants and students of educational programs." The Citadel respectfully posits that the Court should deny leave to file the Proposed Brief, insofar as the Court of Appeals' Opinion was plainly correct in its determination as to Title IX. WCAP's arguments misapprehend the Court of Appeals' holding in this respect.

WCAP's contention is that Title IX applies to anyone who falls within the broad definition of a "person" (*i.e.*, any human being). *See* 20 U.S.C.A. § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance."). In its Motion for Leave, WCAP contends that the Court of Appeals' "ruling necessarily excludes people such as family members of students, guests, prospective students, and even visiting athletes from other institutions, who are frequently present on college campuses, and/or are exposed to civil rights harms in connection with campus activities." (*See* WCAP's Mot. for Leave, at 3).

WCAP misapprehends that the Court of Appeals' ruling regarding Title IX was not based on a conclusion that Plaintiff was not a "person." Rather, the Court of Appeals (correctly) concluded that he was not a person "denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance." *See* 20 U.S.C.A. § 1681(a). Simply put, it is indisputable that Plaintiff had no relationship with any education program or activity of The Citadel. Plaintiff did not attend The Citadel's summer camp. He was not denied access to any program or activity offered by The Citadel. He is not a member of one of the groups referenced in WCAP's Motion for Leave; he is not a family member of a student, a guest, a prospective student, or even a visiting athlete. Plaintiff and The Citadel were complete strangers to each other. There is absolutely no authority supporting the application of Title IX in such circumstances.

WCAP cites *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512 (1982), for its contention that Title IX should apply to Plaintiff. In *Bell*, school boards challenged the propriety of certain Department of Education regulations dealing with *employment* practices in the context of education, ranging from job classifications to pregnancy leave. The Court concluded that Title IX could apply to protect employees employed *in connection with education programs*. *See Bell*, 456 U.S. at 520 ("Employees who directly participate in federal programs or who directly benefit from federal grants, loans, or contracts clearly fall within the first two protective categories described in § 901(a)."). An employee, while not a student, certainly receives benefits (*i.e.*, a job) from education programs or activities and is entitled to protection from discrimination relating to those benefits. Nothing in *Bell* suggests that Title IX can or should extend to individuals having *no* relationship with an education program or, as in this case, having not relationship whatsoever with an educational institution.

In support of its contention that Plaintiff was within the class of individuals protected by Title IX, WCAP also cites *Kauhako v. State of Hawai'i Bd. of Educ.*, No. 1300567, 2015 WL 470230 (D. Hawai'i Feb. 3, 2015), *Simpson v. University of Col. Boulder*, 500 F.3d 1170 (10th Cir. 2007), and *Crandell v. New York Coll. of Osteopathic Med*, 87 F. Supp. 2d 304 (S.D.N.Y.

2000). However, in all of these cases, the persons protected by Title IX were, in fact, students. *See Kauhako*, 2015 WL 470230, at \*1 ("Kauhako alleges that Ruston Tom, an adult male special needs student, repeatedly sexually assaulted her minor daughter, Mariana Doe, also a special needs student, while under the care and supervision of the DOE at Waianae High School."); *Simpson*, 500 F.3d at 1175 ("Plaintiffs sought relief under Title IX, 20 U.S.C. § 1681(a), claiming that CU knew of the risk of sexual harassment *of female CU students* in connection with the CU football recruiting program.") (emphasis added); *Crandell*, 87 F. Supp. 2d at 306 ("[P]laintiff in this case alleges that she was subjected to sexual harassment *through much of her training* as an osteopathic physician at the New York College of Osteopathic Medicine.") (emphasis added). In fact, the *Simpson* court noted that there had been a prior sexual assault situation involving the college football team where "the victim was not a CU student protected by Title IX." *See Simpson*, 500 F.3d at 1181. These cases do *not* support WCAP's contention that Title IX is intended to protect those who have *no relationship* with The Citadel and were not deprived of access to any "education program or activity" there.

WCAP's Proposed Brief does not cite to any authority supporting the application of Title IX under the facts of this case. The Opinion correctly relied upon authority — which WCAP has not refuted — requiring that there be *some* relationship between a person and an education program for Title IX to apply. *See, e.g., Dipippa v. Union Sch. Dist.*, 819 F. Supp. 2d 435, 446 (W.D. Pa. 2011) ("On its face, the statutory language of Title IX, 20 U.S.C. § 1681 *et seq.*, applies only to students and participants in educational programs."); *Doe v. Oyster River Coop. Sch. Dist.*, 992 F. Supp. 467, 481 (D.N.H. 1997) ("Ordinarily, only participants of federally funded programs . . . have standing to bring claims under Title IX."). Therefore, The Citadel respectfully submits that the Court should deny WCAP's request for leave to file its Proposed Brief.

**CONCLUSION**

For the foregoing reasons, the Court should deny the Motion for Leave to File Brief as *Amicus Curiae* Brief of the Women's and Children's Advocacy Project at New England Law|Boston.



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Dated: September 1, 2017  
Charleston, South Carolina

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In The Court of Appeals

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Appellate Case No. 2015-001505

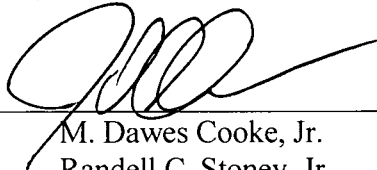
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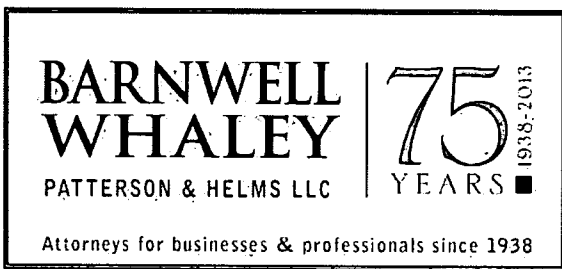
The Citadel..... Respondent.

PROOF OF SERVICE

I certify that I have served the Respondent's Return to Motion for Leave to File Brief as *Amicus Curiae* Brief of the Women's and Children's Advocacy Project at New England Law|Boston by depositing a copy of it in the United States Mail, postage prepaid, on September 1, 2017, addressed to their attorneys of record, W. Mullins McLeod, Jr. and Jacqueline LaPan Edgerton, McLeod Law Group, LLC, P.O. Box 21624, Charleston, South Carolina 29413, as well as to counsel for the Women's and Children's Advocacy Project at New England Law|Boston, Wendy Murphy, Women's and Children's Advocacy Project, Center for Law and Social Responsibility, New England Law|Boston, 154 Stuart Street, Boston, Massachusetts 02116.



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John W. Fletcher, Esquire  
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September 1, 2017

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
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SC Court of Appeals

RE: John Doe 2 v. The Citadel  
Appellate Case No. 2015-001505  
Our File No.: 1.537

Dear Ms. Kitchings,

Enclosed for filing please find the original and one (1) copy of Respondent The Citadel's Return to Motion for Leave to File Brief as *Amicus Curiae* Brief of the Women's and Children's Advocacy Project at New England Law/Boston in the above-referenced matter. We would appreciate if you would file the original and return the filed, stamped copy to us in the self-addressed, stamped envelope provided.

By copy of this letter, we are serving a copy of the return to Petition for Rehearing upon counsel of record.

Sincerely,

A handwritten signature in black ink, appearing to be "JWF", is written over a horizontal line. Below the signature, the name "John W. Fletcher" is printed in a standard font.

JWF/jgc  
Enclosures

cc: W. Mullins McLeod, Esquire  
Jacqueline LaPan Edgerton, Esquire  
Wendy Murphy, Esquire

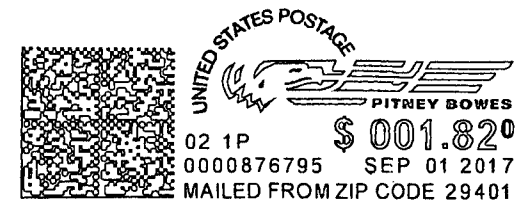
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REPRESENTING CLIENTS IN ALL COURTS IN SOUTH CAROLINA AND NORTH CAROLINA AND IN THE UNITED STATES PATENT AND TRADEMARK OFFICE



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1.537  
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