

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

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

Appellate Case No. 2017-002242

John Doe 2, Petitioner,

v.

The Citadel..... Respondent.

RESPONDENT'S REPLY TO AMICUS CURIAE BRIEF OF THE WOMEN'S AND
CHILDREN'S ADVOCACY PROJECT AT NEW ENGLAND LAW|BOSTON

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COUNTERSTATEMENT OF THE ISSUE

Amicus Curiae Women's and Children's Advocacy Project at New England Law|Boston ("WCAP") has included a "Statement of the Issue" in its Brief of *Amicus Curiae* in Support of Petition for Writ of Certiorari ("*Amicus* Brief"). Specifically, WCAP states that the issue is "[w]hether Title IX of the Education Amendments of 1972 applies to all 'persons'?"

Respectfully, Respondent The Citadel, the Military College of South Carolina ("The Citadel") notes that Title IX is only one minor issue in this case. Nonetheless, to the extent Title IX is an issue in this appeal, The Citadel responds that the more accurate statement of the issue is:

Did the Court of Appeals correctly determine that Title IX of the United States Education Amendments of 1972 does not apply where Plaintiff was never a student of The Citadel and never was denied any educational benefit by The Citadel?

ARGUMENTS

The crux of WCAP's *Amicus* Brief is that the South Carolina Court of Appeals erred in concluding that Title IX of the Educational Amendments of 1972 did not apply in this case. Specifically, the Court of Appeals stated that "Title IX intends to protect participants and students of educational programs." The Citadel respectfully posits that the Court of Appeals correctly construed and applied Title IX. WCAP's arguments misapprehend the Court of Appeals' holding with regard to Title IX.

WCAP's primary 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."). Specifically, WCAP posits that "[t]his broad directive does not limit the statute's protections to 'students' of the institution, but covers all 'persons' 'subject to discrimination' within a funding recipient's control, including nonstudents." (*See* WCAP's *Amicus* Br., at 2-3). WCAP contends that the Court of Appeals' ruling "runs counter to responsible public policy, and if endorsed by this Court, would mean that even where all elements of a Title IX claim are met, schools would be free to act with deliberate indifference to sexual harassment and sexual violence on their campuses by their students and employees, so long as the victims are volunteers, visiting athletes, family members of students, guests of the school " (*See* WCAP's *Amicus* Br., at 5).

However, WCAP's *Amicus* Brief misapplies Title IX to the facts of this case and misconstrues the Court of Appeals' opinion. Importantly, the Court of Appeals held that Title IX did not apply here because Plaintiff "is not a member of the class of persons the statute intends to protect. Title IX intends to protect participants and students of educational programs." *See Doe 2 v. The Citadel*, 421 S.C. 140, 152, 805 S.E.2d 578, 584 (Ct. App. 2017), *reh'g denied* (Sept. 27, 2017). The Court of Appeals further noted that "both parties agree that Doe never attended The Citadel or its summer camps." *See id.*, 421 S.C. at 152, 805 S.E.2d at 585. Importantly, the

Court of Appeals determination was not based on a conclusion that Plaintiff was not a "person." Rather, the Court of Appeals (correctly) concluded that, while Plaintiff is a "person" under Title IX, he was *not* a person who was "denied the benefits of, or [was] subject to discrimination under any education program or activity receiving Federal financial assistance." See 20 U.S.C.A. § 1681(a).

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 a student at The Citadel. He was not family member of a student. He was not denied access to any program or activity offered by The Citadel. He was not a member of any of the groups referenced in WCAP's *Amicus* Brief; he was not a volunteer, visiting athlete, family member of a student, or guest of The Citadel. (See *Amicus* Br., at 5). There is no evidence of *any* relationship between Plaintiff and The Citadel. To the contrary, 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 relies on *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.

WCAP also cites *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), in

its *Amicus* Brief. *Davis* does not support WCAP's contention, but rather confirms that the Court of Appeals correctly construed Title IX. In *Davis*, a parent sued school officials under Title IX for failure to remedy *classmate's* sexual harassment *of a student*. The Court noted that deliberate indifference liability under Title IX may exist "where the funding recipient has some control over the alleged harassment." *See id.* at 644. However, the Court did not suggest, in any way, that Title IX could apply under the facts of the instant case, where the Plaintiff had *no relationship whatsoever* with the educational program.

WCAP invites this Court to distort *Davis* and impose Title IX in circumstances where it plainly does not apply. In support of its contention that this Court should drastically expand Title IX to find that Plaintiff was within the class of protected individuals, WCAP 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.

In fact, WCAP's *Amicus* Brief does not cite any authority supporting its contention that Title IX applies in this case. It does not do so because no such authority exists. On the other hand, the Court of Appeals correctly relied upon compelling authority — which WCAP and Plaintiff have never refuted — requiring that there be *some* relationship between a "person" and an educational 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 of Appeals correctly determined that Title IX does not apply. WCAP's *Amicus* Brief does not support Plaintiff's request to re-write Title IX to apply where no court has ever applied it before.

Numerous other courts have concluded that Title IX only applies where there is a relationship (typically a student) between the plaintiff and the programs of an educational institution. *See Doe v. Brown Univ.*, 270 F. Supp. 3d 556, 562 (D.R.I. 2017) ("The total absence of a relationship between Ms. Doe's educational institution (Providence College) and the harassers' school (Brown University) is dispositive on the issue of whether Ms. Doe has a Title IX claim against Brown in this case."); *Seiwert v. Spencer–Owen Comm. Sch. Corp.*, 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007) ("Because there are no educational opportunities or activities that the parents are excluded from, they have no claim."); *Preyer v. Dartmouth Coll.*, 968 F. Supp. 20, 25 (D.N.H. 1997) ("It is apparent that DCDS, which provides food services to the university community, does not have an inherently educational goal. . . . In addition, . . . plaintiff has not alleged that she is a Dartmouth student."); *Burrow By & Through Burrow v. Postville Comm. Sch. Dist.*, 929 F. Supp. 1193, 1199 (N.D. Iowa 1996) ("Neither of Lisa's Parents were students at Postville Community High School nor were they personally excluded from, denied the benefits of or subjected to discrimination under an educational program or activity within the meaning of Title IX."); *R.L.R. v. Prague Pub. Sch. Dist. I-103*, 838 F. Supp.

1526, 1530 (W.D. Okla. 1993) ("Non-students have no claim under Title IX.").

Moreover, guidance on the construction of Title IX supports The Citadel's contention that such statute does not apply here. In its now-withdrawn April 4, 2011 "Dear Colleague Letter: Sexual Violence," the United States Department of Education stated that "Title IX protects students from sexual harassment *in a school's education programs and activities.*" (See <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (accessed February 13, 2018), at p.3 (emphasis added)). The Dear Colleague letter further states that Title IX only applies to non-students *in very limited circumstances*:

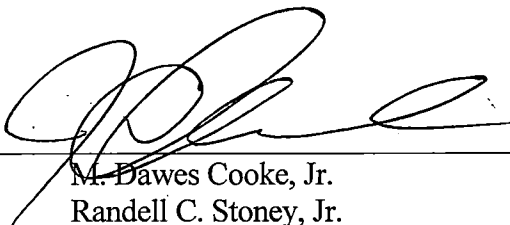
Title IX also protects third parties from sexual harassment or violence *in a school's education programs and activities.* For example, Title IX protects a high school student participating in a college's recruitment program, a visiting student athlete, and a visitor in a school's on-campus residence hall. Title IX also protects employees of a recipient from sexual harassment.

(See *id.*, at 4 n.11). It is beyond dispute that Plaintiff was not abused in the context of any "education program" or "activity" of The Citadel. To the contrary, he had no relationship whatsoever with The Citadel; as result, Title IX does not apply here. See *Administrative Closure Letter*, OCR Complaint No. 11-16-2231 (U.S. Dep't of Educ., Office for Civil Rights June 15, 2017) <https://www.documentcloud.org/documents/3521605-Liberty-University-11-16-2231.html> (accessed February 16, 2018) ("[T]he accused's employment alone, given that the Complainant was unaffiliated with the University and that the alleged sexual assault did not occur in connection with any University education program or activity, is insufficient to confer jurisdiction under Title IX such that OCR will continue its investigation.").

Respectfully, WCAP has cited no authority supporting its contention that Title IX applies to the facts of this case.

CONCLUSION

For the reasons set forth herein and in Respondent's Return to Petition for Writ of *Certiorari*, the Court should deny Plaintiff's Petition for Writ of *Certiorari* and decline to review this case.



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Dated: February 16, 2018
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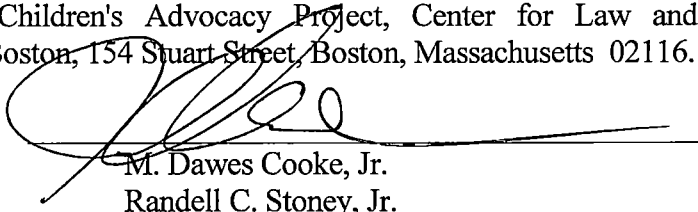
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PROOF OF SERVICE

I certify that I have served the RESPONDENT'S REPLY TO 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 February 19, 2018, addressed to the following 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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