Mangs-Hernandez, Kelly

Subject: RE: Daily Journal Article

From: Judith Chirlin <judgejudy@westernjustice.org>
Sent: Wednesday, August 24, 2016 7:57 PM
To: Resnik, Judith
Subject: FW: Daily Journal Article

I see that you are doing a panel on this subject at the NAWJ meeting in Seattle. You are probably familiar with this case, but I thought I'd sent this along. Earlier this month the Cal Supremes denied the application to take the case, with Justices Liu and Cuellar dissenting from the denial.

Interesting things happening with the changes in personnel at the Cal SC!

Judy

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From: david_houston@dailyjournal.com [mailto:david_houston@dailyjournal.com]
Sent: Wednesday, August 24, 2016 4:27 PM
To: Judith Chirlin
Subject: Daily Journal Article

Message from sender:

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Wednesday, June 22, 2016

State high court should weigh in on campus sexual assault decision
By Judith C. Chirlin

Colleges and universities are caught in the middle of a mounting public debate over the appropriate response to the serious problem of sexual assault on their campuses. In an effort to create a safe environment for all students — and because many of these cases never make their way to the criminal justice system — schools have taken great pains to craft policies that encourage victims of sexual assault to come forward, balance the interests of victims and the accused

perpetrators, and comply with federal guidelines and laws. But schools are now trapped in an untenable position as some critics complain that they have gotten that balance wrong and that their private student conduct procedures deny due process. Attorneys have taken the bait, filing lawsuits against universities in droves on behalf of students found to have violated school policy for engaging in sexual misconduct.

The California Supreme Court should put an end to these lawsuits, which only revictimize the victims of assault and ask courts to second-guess private administrative decisions. The schools themselves, not courts, are best equipped to strike the delicate balance of complying with federal law and protecting the rights and interests of all parties in a private disciplinary proceeding concerning a violation of school policy. Judges, who analyze disciplinary decisions from a distance and without the context of all the interests at stake, threaten to disrupt this balance. For this reason and others, courts have historically deferred to colleges' and universities' disciplinary decisions.

The California Court of Appeal's recent decision in *Doe v. University of Southern California*, 2016 DJDAR 3265 (April 5, 2016), turns that deference on its head, and provides a stark reminder of why courts should not substitute their own views about student discipline for those of private schools. In *Doe*, USC's trained Title IX investigator found that a male student — "John Doe" — violated USC's Student Code by "permitting" and "encouraging" two of his friends to sexually assault a fellow USC student. USC's Appeals Panel and the Los Angeles County Superior Court affirmed the decision. But the California Court of Appeal reversed, holding that USC was required to provide John Doe with even more procedural protections than he received under USC's disciplinary policies, and disagreeing with USC's conclusion that the victim's version of events was more credible than John Doe's. USC has filed a petition asking our Supreme Court to weigh in on the important issues raised by this troubling decision.

It bears emphasis that these types of proceedings are not criminal in nature — they are private disciplinary proceedings to determine whether a student has violated school policies. Treating them like criminal trials would put universities in the impossible position of trying to comply with the mandates of Title IX while also affording all the process that state law requires. Courts are not well-equipped to design and administer private disciplinary proceedings for *any* infraction of school policy, and especially ill-equipped to do so for sexual misconduct claims, which are regulated by Title IX and its accompanying federal guidance. The Court of Appeal's foray into these proceedings expands the role of courts in a new and troubling way and invites even more lawsuits.

For example, Title IX requires schools receiving federal funding to investigate all claims of sexual misconduct swiftly and effectively, and to administer fair punishments. The U.S. Department of Education's guidelines counsel that the factfinder and decisionmaker in a school's sexual misconduct investigation should have adequate training and knowledge regarding sexual violence. These guidelines have prompted schools to equip themselves with special resources to address sexual misconduct complaints.

Schools that rely on trained Title IX professionals in sexual assault cases are better positioned than judges to investigate and decide whether a student has violated school policy by committing sexual assault. Many campus sexual assault cases involve little or no forensic evidence, delays in reporting, alcohol use, and differing accounts of consent. Moreover, while Title IX investigators assess credibility in person through a series of interviews, judges conducting a review of a private administrative proceeding evaluate cases on a cold, written record. They are far removed from the facts and demeanor of the victims and witnesses, on which many of these cases hinge. For these reasons, it makes little sense for courts to upend Title IX investigators' credibility determinations and reweigh evidence analyzed by these experts.

Deferring to schools' investigative procedures is also consistent with federal guidelines, which make clear that schools retain discretion to address sexual misconduct in a way that accommodates their respective priorities, size, structure, resources, and cultures. Schools must have latitude to make their own judgments about the needs of their communities and to develop campus policies without fear of litigation. If a school's procedures are consistent with federal law and guidelines for handling sexual assault claims, judges should not allow or mandate do-overs in their courtrooms.

There is yet another reason to defer to schools' efforts to eradicate sexual assault on campus: Courts simply cannot handle an influx of cases that do not belong there. From 2013 to 2014, there were 835,215 civil filings statewide in

California, nearly triple the number of civil cases filed in all of the federal district courts combined during a comparable period. Courts do not have the time or resources to review every campus sexual assault case, much less every disciplinary decision that private organizations and schools make every day and that could be subject to scrutiny if the Court of Appeal's decision remains good law. The *Doe* decision will only worsen the already-serious congestion burdening our courts.

College and universities have the unenviable task of balancing the competing interests of all the parties involved in an incident of sexual assault, making their campuses safe for all students, and complying with a multiplicity of laws and guidelines on this subject. The Supreme Court should step in to stem the tide of lawsuits that will inundate our courts and impede school administrators in their efforts to maintain safe and equitable learning environments for all of their students should the Court of Appeal's decision in *Doe v. USC* remain good law.

Judith C. Chirlin *is a retired judge of the Los Angeles County Superior Court.*