No. B284707

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

Second Appellate Division, District Seven

JOHN DOE,
Petitioner-Appellant

v.

OCCIDENTAL COLLEGE,
Respondent-Appellee

ON APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE MARY H. STROBEL, CASE NO. BS147275

BRIEF *AMICUS CURIAE* OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PETITIONER-APPELLANT

Cynthia P. Garrett
3658 Warner Street
San Diego, CA 92106-3245
Telephone: (619) 220-6640
Email: cgarrett101@gmail.com
Counsel for Amicus Curiae

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Second **APPELLATE DISTRICT, DIVISION** Seven	Court of Appeal Case Number: B284707
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Cynthia P. Garrett (SBN 106218) 3658Warner Street San Diego, CA 92106 TELEPHONE NO.: 619.220.6640 FAX NO. *(Optional):* E-MAIL ADDRESS *(Optional):* cgarrett101@gmail.com ATTORNEY FOR *(Name):* Foundation for Individual Rights in Education	Superior Court Case Number: BS147275 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: John Doe RESPONDENT/REAL PARTY IN INTEREST: Occidental College	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Foundation for Individual Rights in Education

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: December 4, 2018

Cynthia P. Garrett, Esq.
(TYPE OR PRINT NAME)

▶ Cynthia P Garrett
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov

No. B284707

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

Second Appellate Division, District Seven

JOHN DOE,
Petitioner-Appellant

v.

OCCIDENTAL COLLEGE,
Respondent-Appellee

ON APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE MARY H. STROBEL, CASE NO. BS147275

BRIEF *AMICUS CURIAE* OF FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF PETITIONER-APPELLANT

Cynthia P. Garrett
3658 Warner Street
San Diego, CA 92106-3245
Telephone: (619) 220-6640
Email: cgarrett101@gmail.com
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES **5**

INTEREST OF AMICUS CURIAE **9**

ARGUMENT **10**

I. This Court's Decision Will Have a Nationwide Impact **10**

II. Due Process Is of Critical Importance in Campus Sexual Misconduct Proceedings **13**

A. A Finding of Responsibility for Sexual Misconduct, Even Within a Campus Court, Carries Life-Altering Consequences 13

B. *Due Process Is of Great Importance for Victims as Well as the Accused* 22

CONCLUSION **25**

CERTIFICATE OF COMPLIANCE **27**

DECLARATION OF SERVICE **28**

TABLE OF AUTHORITIES

Cases

Brief *Amici Curiae* of Cornell Law Professors at 3, *Doe v. Cornell Univ.* (No. 526013) (N.Y. App. Div. Mar. 25, 2018). 14

Browning v. Univ. of Findlay, No. 3:15-02689 (N.D. Ohio Dec. 23, 2015) 17, 18

Compl. at 3, *Mumphery v. Mich. St. Univ.*, No. 1:18-cv-00576 (W.D. Mich. May 22, 2018) 16, 17

Compl. at 5, *Doe v. Butler Univ.*, No. 1:16-cv-01266 (S.D. Ind. May 23, 2016). 18

Complaint, *Doe v. Univ. of Ky.*, No. 5:15-cv-00296 (E.D. Ky. Oct. 1, 2015). 23, 24

Complaint, *Z.J. v. Vanderbilt Univ.*, No. 3:17-cv-00936 (M.D. Tenn. June 12, 2017) 17

Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 573, 607 (D. Mass. 2016) 14

Doe v. Brown Univ., 166 F. Supp. 3d 177, 184 (D.R.I. 2016) 14

Doe v. Miami Univ., 882 F.3d 579, 600 (6th Cir. 2018) 14

Doe v. Occidental Coll., No. BS147275 (Cal. Super. Ct. May 25, 2017) 11

Doe v. Univ. of Ky., 2016 U.S. Dist. LEXIS 117606, *8 (E.D. Ky. Aug. 31, 2016) 24

Doe v. Univ. of Notre Dame, 2017 U.S. Dist. LEXIS 69645, **34-35 (N.D. Ind. May 8, 2017). 13

Goss v. Lopez, 419 U.S. 565, 574 (1975) 14

Statutes

House Bill 1203, Session of 2015, *available at* http://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2015&sessInd=0&billBody=H&billTyp=B&billNbr=1203&pn=1578..... 20

N.Y. CLS Educ. § 6444 (2018) 19

Va. Code § 23-9.2:15 (2015) 19

Other Authorities

American Association of Collegiate Registrars and Admissions Officers, *Disciplinary Notations*, http://www.aacrao.org/resources/trending-topics/disciplinary-notations (last visited Apr. 24, 2018) 21

American Association of Collegiate Registrars and Admissions Officers, TRANSCRIPT DISCIPLINARY NOTATIONS: GUIDANCE TO AACRAO MEMBERS (June 2017), *available at* http://www.aacrao.org/docs/default-source/TrendTopic/Disciplinary-Notations/transcript-disciplinary-notations-guidance.pdf..... 21

Andrew Morse et al., *State Legislative Developments on Campus Sexual Violence: Issues in the Context of Safety* (Dec. 2015), https://www.naspa.org/images/uploads/main/ECS_NASPA_BRIEF_DOWNLOAD3.pdf. 20

Charge Evaluation Worksheet, LAPD-Northeast (Nov. 5, 2013), *available at* https://www.thefire.org/charge-evaluation-worksheet-from-los-angeles-district-attorney..... 12

Hillary Pettegrew, *New Guidance on Student Discipline Transcript Notations for Higher Education*, EDURISK (June 2017), https://www.edurisksolutions.org/blogs/?Id=3334. 21

Jake New, *Requiring a Red Flag*, INSIDE HIGHER ED (Jul. 10, 2015), https://www.insidehighered.com/news/2015/07/10/states-requiring-colleges-note-sexual-assault-responsibility-student-transcripts. 19

Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, 248 NAT. INST. JUST. J. 23, 30 (2001) 22

Legislation Would Require Transcript Notation for Students Who Commit Sexual Assault, SECURITY MAGAZINE (Dec. 13, 2016), https://www.securitymagazine.com/articles/87652-legislation-would-require-transcript-notation-for-students-who-commit-sexual-assault 20

Madelyn Edwards, *Texas House Higher Education Committee Leaves 10 Bills Pending*, SHORTHORN (Apr. 13, 2017), http://www.theshorthorn.com/news/texas-house-higher-education-committee-leaves-bills-pending/article_b06b3bc0-2061-11e7-8873-9b673f26a75d.html 20

Maryland Coalition Against Sexual Assault, *2015 Legislative Priorities - Final Report* 7, http://www.mcasa.org/_mcasaWeb/wp-content/uploads/2010/09/Legislative-Report-2015-Final.pdf. .. 20

Natalie Ellis, *State Legislation*, UNIVERSITY OF COLORADO GOVERNMENT RELATIONS NEWSLETTER (May 25, 2017), https://www.cu.edu/blog/government-relations/state-legislation-0 20

Patrick Witt, *A Sexual Harassment Policy That Nearly Ruined My Life*, BOSTON GLOBE, Nov. 13, 2014, https://www.bostonglobe.com/opinion/2014/11/03/sexual-harassment-policy-that-nearly-ruined-life/hY3XrZrOdXjvX2SSvuciPN/story.html. 15

Samantha Harris & KC Johnson, Lawsuits by Students Accused of Sexual Misconduct, 4/4/2011-11/28/2018, *available at*

https://docs.google.com/spreadsheets/d/e/2PACX-1vSxV2uAGdkKi41JcKsIny-v3EXdVncfTAZUDoDqSIGckswc7qXFDWb0XKFVU7Vy5NhWAa59b6LljsfL/pubhtml. 10

Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 105 OHIO ST. J. CRIM. L. 105, 108 (2005) 22

Vanessa McCray, *2 student-athletes expelled from University of Findlay after sexual assault investigation*, BLADE, Oct. 6, 2014, *available at* http://www.toledoblade.com/local/2014/10/06/2-student-athletes-expelled-from-University-of-Findlay-after-sexual-assault-investigation.html 17

INTEREST OF AMICUS CURIAE

The Foundation for Individual Rights in Education ("FIRE") is a nonpartisan, nonprofit organization dedicated to promoting and protecting civil liberties at our nation's institutions of higher education. Since 1999, FIRE has worked to protect student due process rights at campuses nationwide, and has filed numerous amicus briefs in cases concerning the due process rights of accused students in campus misconduct proceedings. FIRE believes that our perspective will assist the court in delineating the scope of due process rights in the context of on-campus adjudications.

Pursuant to Rule 8.200(c)(3) of the California Rules of Court, counsel for amicus states that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

I. This Court's Decision Will Have a Nationwide Impact

This case concerns whether Occidental College afforded a student a fair process before finding him responsible for sexual assault. The implications of this court's decision, however, will reach far beyond Occidental and even the state of California. Around the country, lawsuits by students accused of sexual misconduct and disciplined by their colleges and universities are working their way through state and federal courts. More than 350 such suits have been filed since the Department of Education's Office for Civil Rights (OCR) issued its now-rescinded "Dear Colleague" letter on April 4, 2011.[1] At least 65 suits have been filed in 2018.[2]

Because this area of the law is evolving so rapidly, every decision is of critical importance to the many students nationwide effectively branded as sex offenders without being afforded a fair hearing. While universities often argue that campus sexual

---

[1] Samantha Harris & KC Johnson, Lawsuits by Students Accused of Sexual Misconduct, 4/4/2011-11/28/2018, *available at* https://docs.google.com/spreadsheets/d/e/2PACX-1vSxV2uAGdkKi41JcKsIny-v3EXdVncfTAZUDoDqSIGckswc7qXFDWb0XKFVU7Vy5NhWAa59b6LljsfL/pubhtml.

[2] *Id.*

misconduct proceedings are simply educational in nature, the reality is that students found responsible for such conduct face serious and lifelong consequences.

The hearing afforded to John Doe by Occidental suffered from serious, invalidating deficiencies. Doe's right of confrontation was significantly curtailed by the fact that the external adjudicator asked only 15 of the 42 questions submitted by Doe. Moreover, in finding that the accuser was incapacitated (and thus unable to consent) despite numerous text messages reflecting a conscious and knowing decision to engage in sexual activity, the external adjudicator deviated from Occidental's written definition of incapacitation, which requires that a party "lack[] conscious knowledge of the nature of the act (e.g., to understand the who, what, when, where, why or how of the sexual interaction)." *Doe v. Occidental Coll.*, No. BS147275 (Cal. Super. Ct. May 25, 2017).

The text messages the accuser sent the night of Doe's alleged offense indicate that she was aware that she was going to engage in sexual activity with Doe and indeed had the capacity to coordinate sneaking out of her room through these text messages, sent to him over a 24-minute period. The accuser's text message to her friend also reveals that she wanted to share the news that she planned to engage in sexual activity. Further, her question to Doe about whether he had a condom suggests that she was lucid

enough to be concerned about the possibility of pregnancy and/or contracting a sexually transmitted disease.

In light of these messages, a conclusive statement that such a person did not understand the potential consequences of sex or the "nature of the act" of sex is unfounded.[3] In fact, the weakened definition of incapacitation applied by the external adjudicator in this case is so faulty and unfair that, using the same applied definition and given the same evidence, Doe's accuser would be guilty of sexually assaulting him. (There appears to be no dispute that Doe himself was intoxicated and does not remember portions of the night in question). The fact that the applied definition of incapacitation would make *both* parties guilty of sexually assaulting one another brings into stark relief the fundamental unfairness and lack of substantive due process present in Occidental's actions against Doe.

Too many campus hearings nationwide suffer from a similar lack of due process. A decision by this court overturning

---

[3] In contrast with the findings of Occidental's external adjudicator, police investigators found that Doe and his accuser were "willing participants exercising bad judgment" and that "[i]t would be reasonable for [Doe] to conclude based on their communications and her actions that, even though she was intoxicated, she could still exercise reasonable judgment." Accordingly, police declined to bring charges. Charge Evaluation Worksheet, LAPD-Northeast (Nov. 5, 2013), *available at* https://www.thefire.org/charge-evaluation-worksheet-from-los-angeles-district-attorney.

the ruling of the Superior Court would have an impact on the due process rights of students around the country whose futures hang in the balance.

II. Due Process Is of Critical Importance in Campus Sexual Misconduct Proceedings

A. A Finding of Responsibility for Sexual Misconduct, Even Within a Campus Court, Carries Life-Altering Consequences

While many supporters of the current structure for campus sexual misconduct adjudication argue that additional protections are unnecessary because the process is merely "educational,"[4] this ignores the reality of the tremendous (and well-deserved, when someone is found responsible after a fair process) stigma of being labeled a sexual offender.

---

[4] An administrator at the University of Notre Dame who made this argument in federal district court in Indiana recently was met with opprobrium by the judge: "When asked at the preliminary injunction hearing why an attorney is not allowed to participate in the hearing especially given what is at stake—potential dismissal from school and the forfeiture of large sums of tuition money—Mr. Willerton, the Director of the Office of Community Standards and a member of the Hearing Panel, told me it's because he views this as an 'educational' process for the student, not a punitive one. This testimony is not credible. Being thrown out of school, not being permitted to graduate and forfeiting a semester's worth of tuition is 'punishment' in any reasonable sense of that term." Doe v. Univ. of Notre Dame, 2017 U.S. Dist. LEXIS 69645, **34-35 (N.D. Ind. May 8, 2017).

Indeed, a group of 23 professors at Cornell Law School recently filed an *amicus* brief in a similar case brought against Cornell University, asking the court there "to continue to serve as an effective check on colleges and universities, which have been vested with authority to inflict life-altering punishment in this controversial area." Brief *Amici Curiae* of Cornell Law Professors at 3, *Doe v. Cornell Univ*. (No. 526013) (N.Y. App. Div. Mar. 25, 2018).

Similarly, the United States Court of Appeals for the Sixth Circuit recently wrote that a student found responsible for sexual misconduct "may face severe restrictions, similar to being put on a sex offender list, that curtail his ability to gain a higher education degree…. Thus, the effect of a finding of responsibility for sexual misconduct on 'a person's good name, reputation, honor, or integrity' is profound." *Doe v. Miami Univ*., 882 F.3d 579, 600 (6th Cir. 2018) (quoting *Goss v. Lopez*, 419 U.S. 565, 574 (1975)) (internal citations omitted). *See also Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 573, 607 (D. Mass. 2016) (observing that a sexual misconduct finding "may permanently scar [a student's] life and career," as he or she would be "marked for life as a sexual predator"); *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 184 (D.R.I. 2016) (noting that allegations of campus sexual misconduct are often also "accusations that constitute serious felonies under virtually every state's laws").

Yale University alumnus Patrick Witt wrote about these life-altering consequences in a *Boston Globe* editorial protesting Harvard University's adoption of a broad sexual harassment policy.[5] According to Witt, a fellow student accused him of sexual misconduct via an "informal complaint" mechanism available at Yale. Because the complaint was made informally, Witt was not entitled to the details of the accusations against him. The university undertook no formal investigation, despite Witt's request that the university do so in order to allow him to clear his name. As a result of the accusation, Witt wrote, he lost his Rhodes scholarship, an offer of employment, and the opportunity to play in the NFL:

> The complaint lodged against me caused me and my family immense grief, and as a simple Google search of my name reveals, its malignant effects have not abated. It cost me my reputation and credibility, the opportunity to become a Rhodes scholar, the full-time job offer I had worked so hard to attain, and the opportunity to achieve my childhood dream of playing in the NFL. I have had to address it with every prospective employer whom I've contacted, with every girl that I've dated since, and even with Harvard Law School during my admissions interview. It is a specter whose lingering presence is rooted in its

---

[5] Patrick Witt, *A Sexual Harassment Policy That Nearly Ruined My Life*, BOSTON GLOBE, Nov. 13, 2014, https://www.bostonglobe.com/opinion/2014/11/03/sexual-harassment-policy-that-nearly-ruined-life/hY3XrZrOdXjvX2SSvuciPN/story.html.

inexplicability.

If Witt committed sexual misconduct, it could be argued that these consequences were appropriate, even insufficient. But the impact of the allegation alone demonstrates the critical importance of ensuring a reliable process within campus conduct proceedings.

Witt is far from alone in having experienced serious consequences from an allegation of sexual misconduct on campus. Indeed, many of the legal complaints brought by accused students for alleged due process violations further illustrate the impact of a finding of responsibility for sexual misconduct, even "just" from a campus judiciary.

Keith Mumphery, a former Michigan State University football player who sued MSU for numerous alleged due process violations in his campus sexual misconduct hearing, alleges that he was drafted by the Houston Texans NFL franchise, but was cut from the team "the day after a newspaper report in Houston questioned how the Texans could have hired a player who had been expelled from college for sexual assault."[6] Since being cut from the Texans, Mumphery alleges, he "has been unable to find a job in his chosen profession," and has also been "permanently

[6] Complaint at 3, *Mumphery v. Mich. St. Univ.*, No. 1:18-cv-00576 (W.D. Mich. May 22, 2018).

prevent[ed] ... from completing a graduate degree in communications."[7]

In his complaint against Vanderbilt University, plaintiff Z.J.—who was attending Vanderbilt on an ROTC scholarship—explained how he was expelled three days before graduation, was not commissioned as an army officer, and retroactively lost his ROTC scholarship such that he now owes Vanderbilt $218,000 in tuition.[8]

After the University of Findlay found students Alphonso Baity and Justin Browning responsible for sexual assault—through a process in which, Baity and Browning allege, the university held no hearing and did not even interview the complainant[9]—the university released their names to the media, stating that they had been expelled for sexual assault.[10] A Google search of either student's name prominently reveals the sexual assault finding against them, despite the fact that neither student was ever arrested for or charged with any crime. It is

---

[7] *Id.*

[8] Complaint, *Z.J. v. Vanderbilt Univ.*, No. 3:17-cv-00936 (M.D. Tenn. June 12, 2017).

[9] Complaint at 23, *Browning v. Univ. of Findlay*, No. 3:15-02689 (N.D. Ohio Dec. 23, 2015).

[10] Vanessa McCray, *2 student-athletes expelled from University of Findlay after sexual assault investigation*, BLADE, Oct. 6, 2014, *available at* http://www.toledoblade.com/local/2014/10/06/2-student-athletes-expelled-from-University-of-Findlay-after-sexual-assault-investigation.html.

easy to imagine the impact that information will have on these students' future academic and career prospects. Indeed, their complaint against the university alleges:

> As a mere example of the damage done by Defendants, Browning has thus far been denied entrance to at least two universities – University of Mount Union in Alliance, Ohio, and Ohio Northern University in Ada, Ohio – as a direct and proximate result of the Defendants' misconduct. Baity, who was being recruited by a prominent Division I basketball program, was denied entrance to school as a direct and proximate result of the Defendants' misconduct.[11]

Similarly, in a federal complaint against Butler College in Indiana, a student found responsible for sexual misconduct alleges that in the aftermath, "he applied to seven (7) colleges, and [has] been rejected by all seven—and in each and every case, the reason he was not accepted was the evidence of his expulsion from BUTLER, and the reason therefor."[12]

As illustrated by the foregoing examples, the stakes are high for students accused of sexual misconduct and tried before campus tribunals. And these life-altering consequences are likely to become even more severe due to growing support, among

---

[11] Complaint at 31, *Browning v. Univ. of Findlay*, No. 3:15-02689 (N.D. Ohio Dec. 23, 2015).
[12] Complaint at 5, *Doe v. Butler Univ.*, No. 1:16-cv-01266 (S.D. Ind. May 23, 2016).

various states and associations, for special notations on the transcripts of students found responsible for sexual assault and other forms of serious wrongdoing.[13] Virginia and New York already have such laws. In Virginia, for example, universities are required to include a "prominent notation" on the transcript of any student who is found responsible for sexual assault (or who withdraws during the course of a sexual assault investigation) "stating that such student was suspended for, was permanently dismissed for, or withdrew from the institution while under investigation for an offense involving sexual violence under the institution's code, rules, or set of standards."[14] In New York, "[f]or crimes of violence, including but not limited to sexual violence... institutions shall make a notation on the transcript of students found responsible after a conduct process that they were 'suspended after a finding of responsibility for a code of conduct violation' or 'expelled after a finding of responsibility for a code of conduct violation.'"[15]

---

[13] Jake New, *Requiring a Red Flag*, INSIDE HIGHER ED (Jul. 10, 2015), https://www.insidehighered.com/news/2015/07/10/states-requiring-colleges-note-sexual-assault-responsibility-student-transcripts.
[14] Va. Code § 23-9.2:15 (2015).
[15] N.Y. CLS Educ. § 6444 (2018).

Similar legislation has been proposed, at various times, in California, [16] Colorado,[17] Maryland, [18] Pennsylvania,[19] and Texas,[20] and at the federal level.[21]

In June 2017, the American Association of Collegiate Registrars and Admissions Officers (AACRAO), whose membership includes representatives from more than 2,500

---

[16] Andrew Morse et al., *State Legislative Developments on Campus Sexual Violence: Issues in the Context of Safety* (Dec. 2015), https://www.naspa.org/images/uploads/main/ECS_NASPA_BRIEF_DOWNLOAD3.pdf.

[17] Natalie Ellis, *State Legislation*, UNIVERSITY OF COLORADO GOVERNMENT RELATIONS NEWSLETTER (May 25, 2017), https://www.cu.edu/blog/government-relations/state-legislation-0.

[18] Maryland Coalition Against Sexual Assault, *2015 Legislative Priorities - Final Report* 7, http://www.mcasa.org/_mcasaWeb/wp-content/uploads/2010/09/Legislative-Report-2015-Final.pdf.

[19] Pennsylvania House Bill 1203, Session of 2015, *available at* http://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2015&sessInd=0&billBody=H&billTyp=B&billNbr=1203&pn=1578.

[20] Madelyn Edwards, *Texas House Higher Education Committee Leaves 10 Bills Pending*, SHORTHORN (Apr. 13, 2017), http://www.theshorthorn.com/news/texas-house-higher-education-committee-leaves-bills-pending/article_b06b3bc0-2061-11e7-8873-9b673f26a75d.html.

[21] *Legislation Would Require Transcript Notation for Students Who Commit Sexual Assault*, SECURITY MAGAZINE (Dec. 13, 2016), https://www.securitymagazine.com/articles/87652-legislation-would-require-transcript-notation-for-students-who-commit-sexual-assault.

colleges and universities,[22] issued guidance stating its belief that institutions "have a responsibility to notify other institutions of potential threats to their communities from students they have suspended/expelled for serious misconduct," and recommending notation either on a student's academic transcript or by some other means, such as a disciplinary transcript.[23] This is a reversal of the organization's previous recommendation that recording disciplinary actions on a student's transcript was not "a recommended best practice."[24]

Amicus FIRE takes no position on the wisdom of disciplinary notations on transcripts *per se*. But if a *de facto* sex offender registry for college students is to be constructed, it is all the more critical that meaningful procedural protections be in place to ensure trustworthy results. Any student who has actually committed a sexual assault on campus should, without a

---

[22] Hillary Pettegrew, *New Guidance on Student Discipline Transcript Notations for Higher Education*, EDURISK (June 2017), https://www.edurisksolutions.org/blogs/?Id=3334.

[23] American Association of Collegiate Registrars and Admissions Officers, TRANSCRIPT DISCIPLINARY NOTATIONS: GUIDANCE TO AACRAO MEMBERS (June 2017), *available at* http://www.aacrao.org/docs/default-source/TrendTopic/Disciplinary-Notations/transcript-disciplinary-notations-guidance.pdf.

[24] American Association of Collegiate Registrars and Admissions Officers, *Disciplinary Notations*, http://www.aacrao.org/resources/trending-topics/disciplinary-notations (last visited Apr. 24, 2018).

doubt, face severe consequences. But those consequences underscore the crucial importance to all parties of a fair and reliable process for determining guilt or innocence.

B. *Due Process Is of Great Importance for Victims as Well as the Accused*

Though procedural protections are generally described as inuring to the benefit of the accused, they are in fact vital for victims and the entire campus community. Without the fairness and reliability that the procedural protections of due process safeguard, public confidence and trust in the adjudicatory system erode, leaving all students less likely to participate in it, among other ill effects.[25]

---

[25] *See* Tracey L. Meares, *Everything Old Is New Again: Fundamental Fairness and the Legitimacy of Criminal Justice*, 105 OHIO ST. J. CRIM. L. 105, 108 (2005) ("The public is much more likely to support and participate in the criminal justice process and support those officials who run it when the public believes that the process is run fairly. If the American public does not perceive its criminal justice system to be fair, negative consequences can result. Diminished public support for the criminal justice system, taken to the extreme, can lead to diminished respect for the law and, thereby, less compliance with the law."); Lawrence W. Sherman, *Trust and Confidence in Criminal Justice*, 248 NAT. INST. JUST. J. 23, 30 (2001) ("[D]ata suggest that fairness builds trust in the criminal justice system and that trust builds compliance with the law. Thus, what is more fair is more effective, and to be effective it is necessary to be fair.").

When procedurally flawed processes are used to adjudicate campus sexual assault allegations, students found responsible can and will avail themselves of legal remedies to set aside those findings. In cases where those students are in fact responsible, victims of sexual assault are betrayed and re-victimized, and a potential predator is left free to roam campus.

In 2015, a female student proceeding under the pseudonym Jane Doe filed a federal lawsuit against the University of Kentucky. Jane first reported a rape to the university and to police as a freshman in the fall of 2014. According to Jane, she was violently raped by a University of Kentucky football player who held his hand over her mouth and forcibly removed her clothing. The university held a hearing, but the accused student could not attend because of a criminal court date arising from the same conduct. The university found him responsible in absentia.[26]

A university appeals board overturned that decision. The accused student's due process rights had been violated, they said, because he was not able to attend the hearing. A second hearing was scheduled. This time, Jane did not attend, on advice from staff at the university's counseling center. The accused student was found responsible for a second time. And for a second time,

[26] Complaint, *Doe v. Univ. of Ky.*, No. 5:15-cv-00296 (E.D. Ky. Oct. 1, 2015).

the appeals board overturned it on due process grounds—this time because Jane's absence had denied the accused student the right to confront his accuser.[27]

The university scheduled a third hearing. Jane reported that the notice of the third hearing "caused her mental health to deteriorate" and that she withdrew from classes. At his third hearing, the accused student was found responsible again, and the appeals board again overturned it on due process grounds.[28]

In denying the university's motion to dismiss Jane Doe's complaint, the United States District Court for the Eastern District of Kentucky wrote:

> [T]he University bungled the disciplinary hearings so badly, so inexcusably, that it necessitated three appeals and reversals in an attempt to remedy the due process deficiencies. The disciplinary hearings were plagued with clear errors, such as conducting a hearing without [the accused] Student B's presence, and refusing to allow Student B to whisper to an advisor during the proceeding (as only two examples of several obvious errors), that resulted in multiple appeals spanning months, profoundly affected Plaintiff's ability to obtain an education at the University of Kentucky (the Court suspects this lengthy process profoundly affected Student B as well).[29]

---

[27] *Id.*
[28] *Id.*
[29] *Doe v. Univ. of Ky.*, 2016 U.S. Dist. LEXIS 117606, *8 (E.D. Ky. Aug. 31, 2016).

Properly conceived, due process protects both the accused's interest in not being wrongly found responsible for an act he or she did not commit, as well as the community's interest in ensuring trustworthy decisions that can be relied upon to protect its wellbeing. The severity of sexual misconduct and the importance of reducing its prevalence on the campuses of our nation's colleges and universities leave no room for faulty procedures, such as the ones used in the instant case, that taint the entire system's reliability and integrity.

CONCLUSION

This is a rapidly emerging area of the law. Since 2011, more than 350 accused students have filed lawsuits alleging deprivations of due process in campus sexual misconduct proceedings. Many of these lawsuits are still pending, with new suits being filed frequently. As a result, each decision issued in one of these cases is of critical importance and has a direct impact on the rights of students around the country.

More guidance from the courts is desperately needed. To help ensure fair, reliable hearings and just outcomes for all students, including those involved in the instant case, FIRE urges this court to overturn the decision of the Superior Court.

DATED: December 4, 2018

Respectfully submitted,

/s/Cynthia P. Garrett

Cynthia P. Garrett
Attorney for Amicus Curiae
FOUNDATION FOR INDIVIDUAL
RIGHTS IN EDUCATION

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the forgoing Amicus Curiae Brief of Foundation for Individual Rights in Education in Support of Plaintiff and Appellant is proportionately spaced, has a typeface of 13 points or more, and contains 4446 words.

DATED: December 4, 2018

/s/Cynthia P. Garrett

Cynthia P. Garrett
Attorney for Amicus Curiae
FOUNDATION FOR INDIVIDUAL
RIGHTS IN EDUCATION

DECLARATION OF SERVICE

I, Christopher W. Garrett, declare as follows:

I am a resident of the State of California, residing or employed in San Diego, California. I am over the age of 18 years and am not a party to the above-entitled action. My address is 3658 Warner Street, San Diego, CA 92106-3245.

On December 4, 2018, a true copy of Application to File *Amicus Curiae* Brief of Foundation for Individual Rights in Education in Support of Petitioner-Appellant and *Amicus Curiae* Brief of Foundation for Individual Rights in Education in Support of Petitioner-Appellant were electronically filed with the Court through truefiling.com. Notice and courtesy copies of this filing will be sent to the parties in the above-entitled action via U.S. Mail and electronic mail.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 4th day of December, 2018, at San Diego, California.

/s/Christopher W. Garrett

CHRISTOPHER W. GARRETT