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Senate Judiciary Committee  
224 Dirksen Senate Office Building  
Washington, DC 20510  
Via Electronic Mail

September 17, 2018

Dear Senators,

I write to supplement existing accounts of the disability community's concerns surrounding *Doe ex rel. Tarlow v. District of Columbia*.<sup>1</sup> Judge Kavanaugh's opinion in *Tarlow* was not only damaging to the rights of people with intellectual and developmental disabilities – as existing accounts suggest – but display a disregard for norms surrounding judicial factfinding at the appellate level. I have serious concerns that, if placed on the Supreme Court, Judge Kavanaugh would continue this pattern of playing fast and loose with the facts of the cases before him.

## Background

Three Jane Doe plaintiffs brought the underlying action in 2001. They challenged the DC government's policy of authorizing elective surgeries, including abortions, on people who were receiving developmental disability services (DD services), without first considering the patients' expressed wishes.<sup>2</sup> Two of the Jane Does had received abortions without their consent.<sup>3</sup> Another had undergone surgery to correct exotropia, a misalignment of the eyes that often causes only minor symptoms. Although all three plaintiffs had been deemed unable to independently provide informed consent to medical treatment, they could – and did – express clear desires regarding their care.<sup>4</sup>

The Jane Does sought a court order requiring the District to consult with similarly situated people receiving DD services, prior to authorizing surgery. In 2005, the federal district court granted the

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<sup>1</sup> See, e.g., Bazelon Center for Mental Health Law, "Review of Disability-Related Cases Involving Judge Brett Kavanaugh," <http://www.bazelon.org/wp-content/uploads/2018/07/Kavanaugh-Disability-Report-2018.pdf>; Robyn Powell, "Judge Kavanaugh's Supreme Court Nomination Could Put the Americans With Disabilities Act in Danger," *Rewire*, Jul. 26, 2018, <https://rewire.news/article/2018/07/26/judge-kavanaughs-supreme-court-nomination-could-put-the-americans-with-disabilities-act-in-danger/>; Amanda Marcotte, "Brett Kavanaugh's disturbing abortion history: He ruled against women who were forced to abort," *Salon.com*, Aug. 20, 2018, <https://www.salon.com/2018/08/20/brett-kavanaughs-disturbing-abortion-history-he-ruled-against-women-who-endured-forced-abortions/>; David Perry, "Disability Rights Groups Come Out Strong Against Kavanaugh's Scotus Nomination," *Pacific Standard*, Aug. 20, 2018, [https://psmag.com/amp/social-justice/disability-rights-groups-come-out-against-kavanaugh-scotus?twitter\\_impression=true](https://psmag.com/amp/social-justice/disability-rights-groups-come-out-against-kavanaugh-scotus?twitter_impression=true).

<sup>2</sup> *Doe v. District of Columbia*, 206 F.Supp.3d 583, 594-96, 599-600, 596-98 (D.D.C. 2016) (providing a detailed procedural history of the case since its initial filing).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 596 (Jane Doe I "testified that she did not request an abortion in 1984, that she had not wanted the abortion, and that she had wanted to have her baby"), 599 (records indicated Jane Doe III "was 'refusing to take contraceptive pills' and 'wished to become pregnant'"). Jane Doe II's ability to express her own wishes is not discussed in this opinion because her claims were focused on the District of Columbia's alleged failure to consult with her mother, who was her appointed health advocate. *Id.* at 596-598.

plaintiffs' request for a permanent injunction.<sup>5</sup> The district court specifically found that the District's "updated" policy on consent, which was issued in 2003, had not resulted in any meaningful changes to the District's practices. Instead, the district court noted that it was "undisputed" that the District "continues to provide consent without making any subjective inquiry into the patient's wishes or values, and without attempting to ascertain what the patient would do if competent."<sup>6</sup>

The judge ordered the District, when consenting to elective surgeries for people receiving DD services, to use the "substituted judgment" standard. This standard required the District to consider an individual's expressed wishes and preferences in order to determine what the individual would want if he or she had the capacity to consent to the procedure.<sup>7</sup> This standard does not, however, require the District to follow the individual's expressed wishes and preferences in all cases.

The District appealed the injunction.

### **Judge Kavanaugh's 2007 Opinion**

In a 2007 opinion, Judge Kavanaugh reversed the district court, holding that the District had no obligation to consider the expressed wishes or preferences of people receiving DD services prior to consenting to elective surgery. As disability attorney Robyn Powell explained in her article in *Rewire*, this holding by itself is outside of the mainstream.<sup>8</sup> It is so far outside the mainstream that it contradicts the recommendations of the National Conference of Commissioners on Uniform State Laws regarding *from 1998* with respect to decisions by guardians.<sup>9</sup>

However, a review of the record in this case shows that, in addition to his alarming disregard for the rights of people with intellectual and disabilities to have their wishes considered, Judge Kavanaugh also disregarded important parts of the record, engaged in inappropriate fact-finding at the appellate level, and dramatically mischaracterized the lower court record.

### **Judge Kavanaugh inappropriately found that the District used the "best interest" standard for decisions.**

Judge Kavanaugh's 2007 decision includes repeated statements that the District used the "best interests" standard for its medical decisions on behalf of class members.<sup>10</sup> However, the parties did not actually

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<sup>5</sup> *Does v. District of Columbia*, 232 F.R.D. 18, 34 (D.D.C. 2005); *see also Does v. District of Columbia*, 374 F. Supp. 2d 107 (D.D.C. 2005) (discussing the court's prior grant of a preliminary injunction).

<sup>6</sup> *Does*, 374 F. Supp. 2d at 116.

<sup>7</sup> *Id.* at 113.

<sup>8</sup> Robyn Powell, "Judge Kavanaugh's Supreme Court Nomination Could Put the Americans With Disabilities Act in Danger," *Rewire*, Jul. 26, 2018, <https://rewire.news/article/2018/07/26/judge-kavanaughs-supreme-court-nomination-could-put-the-americans-with-disabilities-act-in-danger/>.

<sup>9</sup> National Conference of Commissioners On Uniform State Laws, Uniform Guardianship And Protective Proceedings Act (1997/1998) ("When dealing with an adult, the personal values and current and past expressed desires of the ward or protected person should be considered. To the extent that these personal values and expressed desires are unknown, the guardian or conservator should make an effort to learn the ward's or protected person's values and ask about the ward's or protected person's desires. Considering the personal values and expressed desires of the ward or protected person is also a priority consideration under this Act for decision making by guardians and conservators in general. See Sections 314(a), 411(c), and 418(b).").

<sup>10</sup> *Doe*, 489 F.3d at 379-384.

agree that the District was following the “best interests” standard.<sup>11</sup> Instead, plaintiffs argued that the District’s admitted failure<sup>12</sup> to consider the wishes of class members failed to live up to *either* the “best interests” or “substituted judgment” standard. Typically, even the application of the “best interests” standard requires some inquiry into an individual’s known wishes, feelings, and desires.<sup>13</sup> For example, it is impossible to determine whether it is in the “best interest” of a patient to receive surgery to correct eye alignment, without knowing whether the symptoms of the underlying condition are actually bothering the individual.

It was undisputed that District employees made no independent attempt to ascertain the wishes of class members prior to consenting to elective procedures.<sup>14</sup> Moreover, although the District claimed that class members’ wishes were considered by the doctors who recommended the procedure, this claim was also disputed.<sup>15</sup> Yet in his decision, Kavanaugh claimed that MRDDA had a policy of discussing proposed treatment with the class members.<sup>16</sup>

Judge Kavanaugh’s statements that the District’s policy and practice actually followed the “best interests” standard, and that all medical procedures were discussed with class members, are inappropriate. “Fact-finding” by an appellate judge is not normal; such findings are usually left to the district court. Strong judicial principles prevent appellate judges - who do not have the benefit of juries or other means of weighing competing evidence - from issuing findings on disputed facts outside of exceptional situations (such as situations in which the evidence is so overwhelming that no reasonable person would disagree).

This was not one of those situations. In fact, the parties had not even finished collecting evidence on this issue before Kavanaugh imposed his own take on the case.

The consequences of Judge Kavanaugh’s inappropriate fact-finding were significant. On remand, the district court was unable to consider plaintiffs’ evidence that the District was failing to meet the “best interests” standard, an issue that had not previously been considered relevant to the case.<sup>17</sup> All further attempts to seek injunctive relief against the District were therefore foreclosed.<sup>18</sup>

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<sup>11</sup> *Doe ex rel. Tarlow v. DC*, Oral Argument Tr. 30:17-21; 35:1-7, Feb. 6, 2007.

<sup>12</sup> *Does*, 374 F. Supp. at 116 (“It is undisputed that under its current policy (the 2003 Policy), MRDDA continues to provide consent without making any subjective inquiry into the patient’s wishes or values, and without attempting to ascertain what the patient would do if competent”).

<sup>13</sup> See National Conference of Commissioners On Uniform State Laws, Uniform Guardianship And Protective Proceedings Act (1997/1998), [http://www.uniformlaws.org/shared/docs/guardianship%20and%20protective%20proceedings/UGPPA\\_2011\\_Final%20Act\\_2014sep9.pdf](http://www.uniformlaws.org/shared/docs/guardianship%20and%20protective%20proceedings/UGPPA_2011_Final%20Act_2014sep9.pdf) (“The use of a best interest of the ward or protected person standard may be differentiated for adults and minors. When dealing with an adult, the personal values and current and past expressed desires of the ward or protected person should be considered. To the extent that these personal values and expressed desires are unknown, the guardian or conservator should make an effort to learn the ward’s or protected person’s values and ask about the ward’s or protected person’s desires. Considering the personal values and expressed desires of the ward or protected person is also a priority consideration under this Act for decision making by guardians and conservators in general. See Sections 314(a), 411(c), and 418(b).”).

<sup>14</sup> *Does*, 374 F. Supp. at 116.

<sup>15</sup> Oral Argument Tr. at 35:8-13.

<sup>16</sup> *Doe*, 489 F.3d at 377.

<sup>17</sup> *Does v. District of Columbia*, 593 F. Supp. 2d 115, 124 n.5 (D.D.C. 2009).

<sup>18</sup> *Doe*, 206 F.Supp.3d at 602 (noting the plaintiffs later amended their complaint to seek damages but not injunctive relief).

## **Kavanaugh repeatedly mischaracterized the district court’s order**

As noted above, the district court had ordered the District to use a “substituted judgment” standard when consenting to medical treatment on behalf of class members. This standard requires the District to consider – but not necessarily adopt – the known wishes of the patient. Moreover, the district court’s order was limited to elective surgeries and did not cover decisions about urgent, life-saving treatment.<sup>19</sup>

Nevertheless, at oral argument, Judge Kavanaugh repeatedly insisted that the District was being required to follow the wishes of class members.<sup>20</sup> This assumption contradicted not only the district court’s order but also the statements of the District’s own counsel.<sup>21</sup>

Judge Kavanaugh also repeatedly suggested, both at oral argument and in his opinion, that the district court’s order would affect decisions on life-saving, urgent care. At oral argument, Judge Kavanaugh posed hypotheticals involving surgeries that were urgent and life-saving, prompting plaintiff’s counsel to clarify that those decisions were not relevant to the case.<sup>22</sup>

Despite these clarifications, Judge Kavanaugh’s written opinion continued numerous misstatements about the lower court’s order. He repeatedly stated that the lower court would require the District to follow a “known wishes” standard<sup>23</sup> – even though this standard is dramatically different from the “substituted judgment” standard. He further opined that such “[c]onsideration of the wishes of a patient who lacks mental capacity to make healthcare decisions could lead to denial of essential medical care to a patient who purportedly did not want it.”<sup>24</sup>

## **Conclusion**

Instead of carefully evaluating the plaintiffs’ arguments and the record, Judge Kavanaugh went into the oral arguments in this case with a predetermined assumption that greater self-determination rights for people with intellectual and developmental disabilities were unreasonable and dangerous. He was unable to adjust those assumptions in light of plaintiffs’ counsel’s arguments at oral argument or careful review of the record and procedural history of the case. Instead, he substituted a careful understanding of the record with inappropriate findings of fact and significant mischaracterizations of the lower court record. This careless approach to the record is extremely disturbing and is likely to manifest in his future decisions, including other high-stakes decisions about the civil rights of people with disabilities.

Our substantive concerns about Judge Kavanaugh’s decisions – as discussed in further detail in the articles cited at the introduction and in ASAN’s statement on Judge Kavanaugh’s nomination<sup>25</sup> – remain vital and principal in our objection to Judge Kavanaugh’s nomination. However, his careless approach to

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<sup>19</sup> *Does*, 232 F.R.D. at 34.

<sup>20</sup> Oral Argument Tr. at 22:1-3, 23:10-14;

<sup>21</sup> Oral Argument Tr. At 14:3-4.

<sup>22</sup> Oral Argument Tr. at 23:24-24-11.

<sup>23</sup> *Doe*, 489 F.3d at 380

<sup>24</sup> *Tarlow*, 489 F.3d at 379-380. Paradoxically, at oral argument, Judge Kavanaugh had stated that an “incompetent person” “obviously, cannot express his or her wishes in any meaningful way.” Oral Argument tr. at 11:2-3. This, again, is false and contradicts the record in this case. *Doe*, 206 F. Supp. 3d at 595-600.

<sup>25</sup> Autistic Self Advocacy Network, ASAN Opposes Supreme Court Nominee Brett Kavanaugh, Aug. 13, 2018, <http://autisticadvocacy.org/2018/08/asan-opposes-supreme-court-nominee-brett-kavanaugh/>.

appellate jurisprudence also poses a significant concern, which has the potential to affect cases outside the realm of disability rights as well.

Thank you for your consideration,

A handwritten signature in black ink, appearing to read 'Samantha Crane', written in a cursive style.

Samantha Crane, J.D.  
Legal Director, Director of Public Policy  
Autistic Self Advocacy Network