JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW

SELF-DETERMINATION

REVIEW OF DISABILITY-RELATED CASES INVOLVING JUDGE BRETT KAVANAUGH

The Bazelon Center for Mental Health Law strongly opposes the nomination of Judge Brett Kavanaugh to serve on the U.S. Supreme Court. The appointment of Judge Kavanaugh would threaten hard-won rights and protections for people with disabilities. Judge Kavanaugh's record demonstrates his great skepticism of the Affordable Care Act, his hostility to civil rights—including the rights of people with disabilities—and his narrow view of the authority of executive branch agencies to interpret and enforce the law. His confirmation could add a fifth vote for such regressive views. A summary of his record is provided below.

Self-Determination

Like all people, the decisions of people with disabilities, including their choices about the medical care they receive, should be respected to the maximum extent possible. Despite this basic principle, people with disabilities, and particularly people with intellectual and developmental disabilities, have experienced a long and shameful history of forced sterilization and other state-sanctioned intrusions into their physical autonomy.

Judge Kavanaugh demonstrated a disturbing lack of regard for the rights of individuals with disabilities in ***Doe ex rel. Tarlow v. D.C.***,[1] a challenge brought by a class of people with intellectual disabilities who lived in District of Columbia facilities and were subjected to elective surgeries based on the consent of District officials. The plaintiffs alleged that the District provided consent for elective surgeries (including unwanted abortions) on class members without attempting to ascertain their wishes, in violation of the Constitution and the District's own law; further, the plaintiffs alleged that District officials had signed off on *every* proposed elective surgery for class members for the past 30 years, indicating an unlawful rubber-stamp approach. The district court ruled in favor of the plaintiffs, noting that an individual who was legally incompetent to make medical decisions may nevertheless be capable of expressing a choice or preference regarding medical treatment and those wishes should be given weight under D.C. law, which requires that the District base medical decisions on the wishes of individuals who lack the capacity to make medical decisions unless those wishes cannot be ascertained.[2] The district court

[1] *Doe v. District of Columbia*, 489 F.3d 376 (D.C. Cir. 2007).

[2] *Does v. D.C.*, 374 F. Supp. 2d 107, 115 (D.D.C. 2005). Indeed, a District official had acknowledged in her testimony that at least one of the named plaintiffs was capable of making her wishes known. Brief of Appellees, 2006 WL 3532947, at *7.

permanently enjoined the District from consenting to elective surgeries before attempting to ascertain the known wishes of the patient.[3]

On appeal, Judge Kavanaugh vacated the injunction and directed judgment in favor of the District, writing that "accepting the wishes of patients who lack (and have always lacked) the mental capacity to make medical decisions does not make logical sense and would cause erroneous medical decisions—with harmful or even deadly consequences to intellectually disabled persons."[4] In addition, Judge Kavanaugh held that no substantive due process claims were implicated because "plaintiffs have not shown that consideration of the wishes of a never-competent patient is 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[5] This language raises serious concerns about Judge Kavanaugh's views on the rights and abilities of people with disabilities to determine the course of their own lives.[6] It is also inconsistent with the approach required by numerous states and used in many court decisions, which requires some consideration of the individual's wishes even if the individual is not legally competent to make the decision.

[3] *Does I through III v. D.C.*, 232 F.R.D. 18, 34 (D.D.C. 2005), rev'd in part, vacated in part sub nom. *Doe ex rel. Tarlow v. D.C.*, 489 F.3d 376 (D.C. Cir. 2007).

[4] *Doe ex rel. Tarlow v. D.C.*, 489 F.3d 376, 382 (D.C. Cir. 2007).

[5] *Id.* at 383. Notably, the case proceeded following Judge Kavanaugh's remand, and the District Court ultimately found that the District's consent for the unwanted abortions on two of the women was unconstitutional and constituted batteries. Doe v. D.C., 206 F. Supp. 3d 583 (D.D.C. 2016).

[6] Judge Kavanaugh expressed similar views in *Garza v. Hargan*, in which he dissented from an en banc decision that allowed an undocumented minor in government custody to access abortion care. Even though the minor had already obtained a judicial bypass order confirming that she was capable of deciding to have an abortion, Judge Kavanaugh believed that she should wait to make this "major life decision" until she was placed with a sponsor and "in a better place when deciding whether to have an abortion." Garza v. Hargan, 874 F.3d 735, 755 (D.C. Cir. 2017) (Kavanaugh, J., dissenting), *cert. granted, judgment vacated sub nom.* Azar v. Garza, 138 S. Ct. 1790 (2018). Like his opinion in *Doe*, Judge Kavanaugh's dissent in *Garza* demonstrates a troubling disregard for an individual's right to medical and physical autonomy.