No. 10-1411

In The
Supreme Court of the United States

JONATHAN DOE, a minor, by and through DOROTHY DOE, his legal guardian and next friend,

Petitioner,

v.

TODD COUNTY SCHOOL DISTRICT; MICHAEL V. BERG, Assistant Principal of Todd County High School; VICTORIA SHERMAN, Principal of Todd County High School; and RICHARD BORDEAUX, Superintendent of Schools, in their individual and official capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a student receiving special education services who agrees to placement through an individualized education program (IEP) may assert a claim for violation of his civil rights under 42 U.S.C. § 1983 by alleging that the agreed upon IEP placement constituted a constructive long-term suspension requiring due process guarantees such as notice and hearing.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Blank Page

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 625 F.3d 459 (8th Cir. 2010). The district court's decision granting summary judgment to the Petitioner is unpublished but included in Petitioner's Appendix at App. 14-33.

JURISDICTION

The order by the court of appeals denying rehearing and rehearing en banc was entered on February 15, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case presents the question of whether a student with an acknowledged disability receiving special education services, who agrees to placement through an individualized education program (IEP) may assert a claim for violation of his civil rights under 42 U.S.C. § 1983 by alleging that the IEP placement results in a constructive long-term suspension requiring notice and hearing. The court of appeals held that Petitioner's right to procedural due process was limited to the procedures governing the IDEA decision-maker under 20 U.S.C. § 1415. The decision of Petitioner's IEP team to place him in an

individualized education program, to which Petitioner through his guardian agreed, negates any requirement that a due process hearing be held. Further, in reaching an agreement as to the amount of the judgment to be entered in this case Petitioner waived his right to file a petition for writ of certiorari. The petition should be denied.

PROCEDURAL HISTORY

As a result of a fight which occurred on Todd County High School grounds on September 8, 2005, and being found in possession of a pocket knife, Jonathan Doe (Doe) was suspended from Todd County High School by letter dated September 12. The letter made the suspension effective September 8. On September 13, Doe's IEP team met and created an addendum to his IEP plan which changed his placement. He was then advised that he was no longer suspended from school because his IEP placement had been changed. Doe's guardian participated in the decision to change his placement and agreed to it.

By summons and complaint dated June 20, 2007, Doe, through his next friend, commenced an action against Respondents seeking money damages under the remedy provisions of 42 U.S.C. § 1983 arising from the alleged deprivation of Doe's constitutionally protected right to a public education without due process of law.

After considerable time, effort and expense in the course of the litigation summary judgment on the issue of liability only was entered by the district court on November 24, 2008. Pet. App. 14. The district court's order granted summary judgment on liability in favor of Petitioner and denied a similar motion made by Respondents.

Thereafter, in an effort " . . . to avoid the time and expense of further litigation and in order to foster judicial economy . . . " the parties engaged in voluntary mediation with the United States Magistrate to determine the amount of damages to be inserted in a final judgment that would give rise to limited rights of appeal to the United States Court of Appeals for the Eighth Circuit. Stipulation for Entry of Judgment – App. 1-4.

The parties successfully reached an agreement as to the amount of a judgment which could be entered by the district court pursuant to stipulation. As a result the parties entered into a written stipulation which was reviewed on the record with the U.S. Magistrate. Stipulation – App. 1-4 and Mediation Settlement Transcript, App. 8-12.

The stipulation specifically gave Respondents (Defendants) the right to appeal the finding of liability to the United States Court of Appeals. App. 3, ¶ 4.

The stipulation likewise discussed the contingent outcomes of such an appeal. In paragraph 5 the stipulation provided as follows:

> "In the event Defendants or some of them choose to appeal the final judgment entered by the court pursuant to this stipulation, depending on the outcome of the appeal, the parties will have the following rights and obligations:
>
> i. If the Court of Appeals affirms the United States District Court on appeal the judgment will be paid by Defendants and/or the insurance carriers within thirty days of the issuance of a mandate by the Court of Appeals;
>
> ii. If the Court of Appeals reverses the United States District Court on the issue of liability and orders that a judgment in favor of Defendants be entered then the case shall be dismissed without any payment on the part of the Defendants or their insurers;
>
> iii. If the Court of Appeals remands the case for further consideration to the United States District Court the judgment entered pursuant to this stipulation shall become null and void with the exception of any portions of said judgment which are affirmed by the Court of Appeals. The parties are free to make such claims and raise such defenses as they could

otherwise have made without the execution of the stipulation.

iv. If for any reason the Court of Appeals refuses to rule on the merits of any such appeal then the judgment entered pursuant to this stipulation shall become null and void. The parties are free to make such claims and raise such defenses as they could otherwise have made without the execution of the stipulation." Stipulation for Entry of Judgment – App. 3, 4, ¶ 5.

Prior to execution of the written stipulation a discussion was held in the presence of the U.S. Magistrate which included, in part, the following exchange:

> "Mr. Tieszen (counsel for Todd County School District): . . . if they affirm Judge Kornmann's decision, game over, and you would receive the amounts that are contemplated under this. If they affirm his decision, with or without a remand, it's over, and you would take those monies.
>
> If, on the other hand, they reverse, with or without a remand, game over would be in the other way, and the monies would not be paid out at all. . . ." Mediation Settlement Transcript – App. 10.

The stipulation was signed by representatives of all parties after agreement on the record that the parties had given their permission for counsel

to do so. Mediation Settlement Transcript, App. 11-12.

A judgment was then entered by the district court incorporating the $90,000 amount as agreed upon by the parties. The judgment by its terms makes it clear that it was entered pursuant to the stipulation for entry of judgment (Doc. 97). Judgment – App. 6.

Consistent with the stipulation, the judgment acknowledged that:

> "In the absence of this certification, the parties and the court would be forced into a trial with expert witnesses and much expense to determine the matter of damages. This is the very unusual case where the parties have agreed as to the amount of damages if liability exists. There would be hardships and needless expense in the absence of this certification. School districts and school administrators across South Dakota deserve a speedy answer to the questions of liability presented in this action." Judgment, App. 7.

After entry of judgment the contingency contemplated by paragraph 5 (ii) came to fruition when the United States Court of Appeals for the Eighth Circuit reversed the district court and ordered judgment be entered in favor of Defendants (Respondents). Stipulation for Entry of Judgment, App. 3, ¶ 5 (ii).

After the Eighth Circuit denied Petitioner's request for rehearing Petitioner filed his petition for writ of certiorari with this Court. Petitioner did not treat the game as being "over" as discussed at the conclusion of the mediation session and as required by the plain terms of the stipulation. Petitioner has clearly waived his right to seek redress from this Court and to permit him to do so would defeat the very purpose of the mediation and stipulation which was entered into by the parties at the district court level.

FACTUAL BACKGROUND

Petitioner's statement of facts omits a substantial portion of the relevant facts. An accurate understanding of those facts will assist this Court as it considers the petition.

Petitioner was a high school student at the Todd County School District. He was placed on an IEP because of a learning disability in reading. After school on September 8, 2005, he was involved in a fight on school grounds, and was brought the next day to the office of Assistant Principal, Mike Berg. At that time Petitioner possessed a knife he had brought to the school with him. Petitioner knew it was a violation of school policy to have a knife at school, and that it was a weapon with which he could seriously harm others. Petitioner admitted this to Berg. Berg told Petitioner he would be suspended

from school because of fighting and possessing a knife. Berg read to Petitioner the school policy and the Discipline Protocol from the student handbook including the short-term and long-term suspension sections and the weapons section. Berg called Petitioner's grandfather, with whom he lived, to come and get him from school. When he arrived, Berg told the grandfather about the fight and about the knife. Petitioner was suspended at that point in time.[1]

Because Petitioner was on an IEP, Berg called the school's Exceptional Education Director, Debera Lucas, immediately. Lucas and Berg discussed the incident with Petitioner and his grandfather. They further discussed the need to arrange a manifestation determination meeting to comply with the requirements of IDEA. Although there had not been a decision that Petitioner would be suspended for more than ten days, Lucas recognized the possibility of such a suspension and took a proactive approach. She scheduled a manifestation determination meeting for Petitioner immediately. The purpose was to examine his education plan and determine if changes were required.

Berg sent a letter dated September 12, 2005, to Petitioner's grandparents concerning Petitioner's suspension, and provided information regarding a hearing as well as the Discipline Protocol outlining

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[1] Petitioner's statement in his petition that Berg intended to impose a long-term suspension misrepresents the record.

Petitioner's due process rights. On September 13, 2005, a manifestation determination meeting was held with the IEP team, of which Petitioner and his grandmother were members. The team ultimately determined that Petitioner's behavior was not a manifestation of his disability. The IEP team discussed the need for placing Petitioner into a different setting to receive his education. The placement also addressed concerns Petitioner's guardian conveyed regarding safety in the general classroom and a desire to not expose Petitioner to further confrontation. Lucas Transcript – App. 17-18. Petitioner explained his view of the events. Lucas Transcript – App. 16-17. Although the IEP team discussed a mandated, or unilateral, removal of Petitioner by staff into an interim alternative educational setting for 45 days under the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq., they determined that the change of placement to the alternative high school would be a more appropriate option. During the September 13th IEP team meeting, Lucas asked the grandmother whether she was agreeable to Petitioner going to an after-school program as resolution of the situation. The grandmother agreed with that plan. Pet. App. 62, 64, 65, 68. Lucas and Petitioner's grandmother discussed that Petitioner's math, science, and geography would be provided at the alternative school, and that he would also receive specific one-on-one study. The change of placement, as it was referred to throughout the meeting, was noted on the manifestation determination documentation as a change of placement due to a weapon.

Petitioner was initially suspended on September 9, 2005. On September 13, 2005, his IEP team unanimously determined that there would be a change of placement, which would effectuate an end to his suspension and begin instead a new educational placement. Between September 14, 2005, and November 3, 2005, Petitioner, pursuant to the IEP team's determination, received access to the general curriculum and met the goals and objectives of his IEP. In mid-September 2005, Petitioner's grandmother demanded that Petitioner be returned to the classroom. Berg responded to the grandmother's demand, clarifying that Petitioner was not on suspension, and that although he was suspended on September 12th, it was the consensus of the IEP team at the IEP manifestation determination meeting on September 13th that he be placed in the After-School Program, and that the suspension given on September 12th was considered as having ended on the date Petitioner's placement was changed. Therefore, since the IEP team changed the status from a suspension to an IEP placement, there was no long-term suspension in effect so as to require a due process hearing before the school board.

At an IEP meeting held October 12, 2005, the IEP team reviewed what had transpired at the September 13th IEP meeting. Lucas thoroughly reviewed with the grandmother and the rest of the IEP team the parental rights handbook, the manifestation determination, and the alternative educational setting sections. Lucas went over the matter with the grandmother, who was accompanied by advocates

and was open about asking questions, and gave no indication she did not fully understand the discussion. The IEP team agreed that it would meet again in several weeks to discuss the behavior rating scales and develop an appropriate transition for Petitioner back into the Todd County High School. Upon the agreement of the IEP team, Petitioner was transitioned from the alternative school to the Todd County High School on November 3, 2005. In late November, he was suspended for ten days for fighting, and was subsequently removed from the Todd County High School by his family in early 2006.

ARGUMENT

During voluntary mediation engaged in by the parties at the district court level, Petitioner agreed to a stipulation for entry of judgment that effectively waived his right to file a petition for writ of certiorari in this Court. Therefore he has waived such right and the petition should be dismissed.

The decision below does not conflict with a decision of this Court or any court of appeals, nor does it implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried his burden of demonstrating any "compelling reasons" for the Petition to be granted. See Sup. Ct. R. 10.

I. Petitioner has waived his right to file a petition for writ of certiorari with this Court.

The parties agreed to entry of a money judgment in United States District Court in order to terminate the trial court phase of this litigation. As true in most such situations the agreement involved give and take by all parties. The district court plaintiff (Petitioner herein) obtained a money judgment without additional expense and risk. He further obtained the guarantee that if the district court judgment was affirmed by the court of appeals the specified amount would be paid and the litigation would be concluded. The district court defendants (Respondents herein) retained their right to appeal the finding of liability only to the court of appeals. In the event of either outright affirmance or reversal the parties expressed a clear agreement that the "game would be over" and the litigation would be concluded.

Paragraph 5(ii) of the stipulation clearly and unequivocally stated that in the event of reversal by the court of appeals " . . . the case shall be dismissed without any payment on the part of Defendants or their insurers." Stipulation for Entry of Judgment – App. 3, ¶ 5.

Consent to an execution of the stipulation constitutes a clear and unequivocal waiver of Petitioner's right to file a petition for writ of certiorari in this court.

In *Goodsell v. Shea*, 651 F.2d 765 (United States Court of Customs and Patent Appeals 1981), the court granted a motion to dismiss an appeal based on waiver. The court recognized:

> "It is common practice for parties in litigation to agree among themselves to be bound by the determination of a specific tribunal and not to prosecute an appeal." *Id.* at 651 F.2d 765, 767.

The Court in *Shea* went on to discuss the policy issues involved in enforcing such waivers:

> "In light of the public policy mandate that disputing parties should be encouraged to resolve their disputes through negotiation rather than litigation, and, furthermore, should have a right to control their own litigious destinies to the extent of deciding not to pursue appellate review by accepting the decision of a specified tribunal as final and therefore avoiding protracted litigation involved in an appeal, agreements not to appeal should not be simply ignored." *Id.* at 651 F.2d 765, 767.

The Court acknowledged that agreements barring appellate review are enforced by the great weight of authority throughout state and federal jurisdictions. Citing *United States Consolidated Seeded Raisin Co. v. Chaddock & Co.*, 173 F. 577 (9th Cir. 1909).

The *Goodsell* court ultimately enforced the waiver made by the parties in the court below:

> "In light of the above, this court will not ignore an agreement not to appeal where a clear mutual intent not to appeal is shown and the agreement is made part of the record below."

In the present action the parties for mutually valid consideration, agreed to limit rights of appeal so as to only permit the defendants (Respondents herein) to appeal the district court's finding of liability to the court of appeals. In the event of either outright affirmance or reversal by the court of appeals, the litigation was to be concluded. That intent was made perfectly clear in both the stipulation for entry of judgment (App. 1-4) and on the record at the conclusion of the mediation session. Transcript – App. 8-12.

The Sixth Circuit Court of Appeals addressed a similar situation in *Lybarger v. Hauck*, 793 F.2d 136 (6th Cir. 1986). In *Lybarger* the parties had agreed that a district court's decision as to the recovery and payment of attorney's fees would be final and non-appealable. When one of the parties attempted to disavow the agreement the *Lybarger* court stated:

> "In this case, the parties entered into a settlement agreement which expressed a clear intent to end all litigation concerning this age discrimination action. The first page of the consent decree states: 'Whereas, *the parties, being desirous of settling these matters*

> *without further litigation*, have agreed to the following terms and conditions. . . .' (Emphasis added.)
>
> Accordingly, when the parties could not agree as to the amount of attorney's fees, they submitted the matter to the district court for a final and non-appealable determination. Consequently, we hold that Plaintiff waived her right to appeal any district court decision regarding the amount of attorney's fees regardless of whether the Plaintiff's counsel rendered the legal services in the underlying age discrimination action, in the preparation of the original application for attorney's fees, or in defense of that application." *Lybarger* at 138.

The present case is remarkably similar. The parties expressed their desire to end what had been time consuming and expensive litigation, agreed to the entry of a judgment and agreed to the eventual outcome of the litigation dependent on certain contingencies in the court of appeals. Petitioner now seeks to disavow that agreement.

Paragraph 5(ii) of the stipulation for entry of judgment clearly states that if the court of appeals reverses the United States District Court and orders that judgment in favor of defendants be entered then the case " . . . shall be dismissed without any payment on the part of the defendants or their insurers." Stipulation for Entry of Judgment, App. 3. The stipulation was simply an agreement to dismiss the action in the court below upon the occurrence of a

contingency. That contingency occurred. Petitioner has waived his right to file a petition in this Court for a writ of certiorari and the petition should be dismissed.

II. Petitioner, who agreed to placement through an individualized education program (IEP) is barred from asserting a claim for violation of his civil rights by alleging that the agreed upon IEP placement constituted a constructive long-term suspension.

A. Under the facts of this case, the actions of Petitioner's IEP team ended the short-term suspension imposed by the school principal.

Petitioner, in a convoluted argument, asserts the IEP team did not have the legal power to end Petitioner's suspension because his guardian did not consent to a long-term suspension, and then proceeds to assert that the IEP team ordered Petitioner's exclusion from the high school. Petitioner misrepresents the lower court's ruling, the facts in this case, and the law.

Petitioner attempts to convince this Court that Petitioner's guardian did not consent to the placement change by his IEP team. The record, however, reflects that Petitioner's guardian agreed, on several occasions, with the IEP team's plan for Petitioner's educational placement in the alternative setting. As a

result of that consent, the IEP team, and not the school board, became the decision-maker authorized to make any further changes to Petitioner's placement. 34 C.F.R. § 300.530(d)(5).

The record strongly supports that it was the intent and understanding of all involved that Petitioner's suspension ended upon the IEP team's placement. It was discussed at the September 13, 2005, IEP meeting that Petitioner would no longer be suspended. Petitioner testified that he understood he was under a change of placement, not a long-term suspension. Petitioner's guardian wrote absence notes to excuse Petitioner from attendance at the alternative school during that period of time. Further, the school's attendance record clearly reflects that it considered Petitioner's suspension concluded on September 13, 2005, and that on September 14, 2005 he was again attending school at the alternative high school pursuant to the IEP team's placement into the alternative setting.

The purpose of Petitioner's IEP plan was to keep him in school to work on issues that had been identified in a prior behavior plan. Petitioner had a history of disciplinary events, and had received numerous in-school and out-of-school suspensions, as recently as earlier in that same school year, and the IEP team felt placing him in the alternative school was necessary in order for him to receive an education. Lucas Transcript – App. 14-15. During the September 13th meeting, the IEP team determined that the best option for Petitioner was to enroll him in the alternative

school. Petitioner and his guardian were present, and participated in and understood the IEP team's decision. Lucas Transcript – App. 15-17.

Upon conclusion of the September 13th manifestation meeting, Lucas informed Berg that Petitioner was no longer suspended and that his educational placement had been changed. Petitioner was not subjected to a long-term suspension as he contends, and as a result he cannot meet the threshold requirement for his allegation that he was deprived of a due process hearing.

B. The court of appeals' ruling does not conflict with this Court's decision in *Honig v. Doe.*

Petitioner further fails to establish that the lower court's ruling conflicts in principle with the Court's holding in *Honig v. Doe*, 484 U.S. 305 (1988). This tangential policy argument by Petitioner misconstrues *Honig*. Petitioner cites directly to footnote 8 in *Honig*, and represents to this Court that *Honig* held that when a disabled student is suspended for more than ten school days, the suspension constitutes a change of placement under federal special education law. Petitioner's argument is mistaken on a number of levels, and when *Honig* is correctly analyzed, it is apparent that the court of appeals' decision in this case does not conflict in any respect with *Honig*.

Petitioner attempts to take language from *Honig* outside of the limited context of the exigency argument that was then before this Court. In *Honig*, this Court considered whether a dangerousness or exigency exception existed to the stay-put provisions of 20 U.S.C. § 1415(e)(3).[2] The Court ruled that even where a disabled student presented a danger to other students, the plain language of the section prevented a school from removing a child from the school without the permission of the parent or until resolution by a hearing officer. *Honig*, 484 U.S. at 323. The *Honig* Court determined Congress intended to strip schools of the ***unilateral*** authority they had traditionally employed to exclude disabled students from school. *Id. Honig* simply does not stand for the proposition that when a student with a disability is placed into an alternative educational setting by that student's IEP team, and with the consent and agreement of that child's parent or guardian, that a due process hearing before the school board is implicated for the "change of placement." Petitioner is incorrect in his imprecise assertion that because the Court in *Honig* states in footnote 8 that "a suspension in excess of 10 days does constitute a prohibited 'change in placement,'" a change in placement for more than ten days constitutes a "suspension." *Honig* simply does not stand for that proposition.

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[2] The stay-put provision assessed in *Honig* is now codified as 20 U.S.C. § 1415(j).

Honig addressed a ***unilateral*** action by the school, i.e., one taken without the agreement of the student's parent. In contrast, Petitioner's guardian actively participated in and consented to the determination of his placement in the Todd County School District's After-School Program as the most appropriate location for him to receive his education. Petitioner strains to transform the narrow ruling of *Honig* (that Congress did not intend a dangerousness exception to the stay-put provisions of the IDEA) into one that an IEP team, with the consent of the student's parent, may not place that student into the educational setting the IEP team determines best for the student. The lower court's ruling in this matter does not conflict with the ruling in *Honig*.

III. The Eighth Circuit's ruling does not abrogate the IDEA, does not conflict with state due process laws, and does not deprive a class of individuals of equal protection or due process.

A. IDEA.

Petitioner's argument that the lower court's ruling somehow abrogates IDEA is dependent upon an erroneous interpretation of 20 U.S.C. § 1415(k)(1)(C). Petitioner insists that because there was a "no manifestation" finding by the IEP team, the school board was granted authority over the situation. Petitioner's argument mistakenly interposes into the statute the concept of a mandate where discretionary authority is set out.

The subject language states that where behavior is determined not to be a manifestation of the child's disability, "the relevant disciplinary procedures applicable to children without disabilities ***may*** be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities." 20 U.S.C. § 1415(k)(1)(C) (emphasis added). A clear reading of the section – "may be applied" – is that it allows the application of the same disciplinary procedures applicable to children without disabilities to discipline a disabled child. The plain language of the section simply does not mandate that course, however. As this Court has recognized, "[t]he word 'may' customarily connotes discretion." *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 346 (2005) (citing *Haig v. Agee*, 453 U.S. 280, 294, n.26 (1981)); see also *Ashland School Dist. v. Parents of Student E.H.*, 583 F.Supp.2d 1220, 1226 (D.Or. 2008) (noting use of word "may" rather than "shall" denotes denial of reimbursement in IDEA is discretionary). Such discretion by the student's IEP team is consistent with the balance of IDEA; certainly if Congress had intended a mandatory imposition of disciplinary procedures in the same manner as for children without disabilities, it would have used the word "shall" as it did in numerous other portions of the IDEA. Petitioner's argument that disciplinary procedures applicable to children without disabilities "shall" be applied must fail.

The lower court was correct when it observed that under IDEA the IEP team "*could have* let school officials apply generally applicable disciplinary procedures and suspend [Petitioner] 'in the same manner and for the same duration in which the procedures would be applied to children without disabilities,'" thus recognizing the discretionary language of 20 U.S.C. § 1415(k)(1)(C). Further, any unique circumstances may be considered on a case-by-case basis when determining whether to order a change in placement; here, the IEP team's decision took into consideration Petitioner's 2004 Behavioral Intervention Plan and determined a change of placement, not a suspension from school, was in his best interest. 20 U.S.C. § 1415(k)(1)(A). The clear language of IDEA does indeed allow the IEP team to address Petitioner's situation in the manner in which it did, which the lower court correctly recognized. The IDEA left "[t]he primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs . . . to state and local educational agencies in cooperation with the parents or guardian of the child." *Bd. of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982). Thus Petitioner fails to establish a reason whatsoever that his petition should be granted.

B. State due process laws.

In a similarly mistaken argument, Petitioner asserts that the lower court abrogated and nullified statutory powers of a school board when ruling that

the IEP team, and not the school board, had control over the situation, and that in doing so the lower court committed plain error. Petitioner's argument is again wholly dependent upon his misinterpretation of § 1415(k)(1)(C). Relying upon SDCL §§ 13-32-4 and 13-32-4.2, Petitioner claims the court of appeals abrogated and nullified state law that sets out authority of school superintendents regarding disciplinary matters and authorizes school boards to hear a student's appeal of a long-term suspension or expulsion. Once again, Petitioner fails to establish any basis for filing his petition.

The crux of Petitioner's argument is, in essence, that SDCL §§ 13-32-4 and 13-32-4.2 trump the IDEA. Rather, the court below recognized that when a student is on an IEP, pursuant to the IDEA, a separate set of procedural processes are called into play. *Honig*, 484 U.S. at 311 (noting procedural safeguards under IDEA that guarantee an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decision they think inappropriate).

The South Dakota state laws Petitioner references remain effective to authorize superintendents and school boards regarding procedures on student suspensions. However, those statutes do not address the matters implicated by the more specific language of IDEA as to matters of a student on an IEP, and which grant authority to the IEP team regarding placement and educational decisions of a student on

an IEP. The lower court properly applied the IDEA in this matter.

Petitioner's attempt to alarm this Court by his unfounded accusation that the lower court's decision amounts to blatant federal court nullification of state law should be flatly rejected, as Petitioner was not stripped of any right, and instead was provided the additional procedural safeguards under IDEA. This is also not a situation where the lower federal court expressly ruled state statutes unenforceable, as was the situation before this Court in *Leavitt v. Jane L.*, 518 U.S. 137 (1996). Here, a school board's authority to act pursuant to those South Dakota statutes remains soundly in effect.

Petitioner's argument further ignores Petitioner's guardian's active participation in his IEP team and agreement to the placement and handling of Petitioner's matter. The administrative procedures under IDEA provide the process intended for such a matter.[3] There is no conflict with or nullification of state law to support granting the petition for writ of certiorari.

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[3] The record establishes that in 2004, Petitioner and his guardian availed themselves to the IDEA hearing process, appealing a decision to an IDEA mediation proceeding; thus, Petitioner and his guardian were well aware of the process.

C. The court of appeals' decision does not result in a deprivation of equal protection or due process for disabled students.

Petitioner contends that the lower court's ruling somehow deprives all students with disabilities of due process rights. Petitioner's argument is founded on the false premise that he was subjected to a long-term suspension. Because that premise is false, his entire argument fails. Without a constitutional right to a hearing, there can be no deprivation of a right when such a hearing is not provided. The IDEA "establishes various safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." *Honig*, 484 U.S. at 311. Petitioner and his guardian agreed with and consented to the change of placement to an alternative educational setting; that change was not unilateral, as was the issue addressed in *Honig*, and did not affect or continue a period of suspension.

Petitioner was not deprived of constitutionally sufficient notice and due process hearing before the school board. Threshold to that issue is whether a constitutional deprivation occurred; there must first be an unconstitutional act. *Baker v. McCollan*, 443 U.S. 137, 140 (1979). Where there is no violation of a plaintiff's rights under the Constitution, there can be no liability under 42 U.S.C. § 1983. In this matter, as set out above, Petitioner was not subjected to a

long-term suspension, and thus was not deprived of his constitutional right to a public education without due process of law.

"The 'free appropriate public education' required by [IDEA] is tailored to the unique needs of the handicapped child by means of an 'individualized education program' (IEP)." *Rowley*, 458 U.S. at 181. The IEP is a specialized course of instruction that "must be developed for each disabled student, taking into account that child's capabilities." *Gill v. Columbia 93 Sch. Dist.*, 217 F.3d 1027, 1034 (8th Cir. 2000) (citing 20 U.S.C. § 1414(d)(1)(A)). South Dakota law also mandates evaluation and placement procedures, which includes an IEP team. See ARSD 24:05:25:04.03 (stating that upon completing required evaluation of student, "the individual education program team and other qualified individuals required by 24:05:25:04.02 shall determine whether the student is a student with a disability, and shall determine the educational needs of the child. . . ."). The IEP is the governing document for all educational decisions regarding the disabled student. *Rodiriecus L. and Betty H. v. Waukegan Sch. Dist. No. 60*, 90 F.3d 249, 252 (7th Cir. 1996) (citing *Honig,* 484 U.S. at 311). The ruling by the court below is consistent with that dictate; it is the IEP team, not the school board, that is responsible for and has authority over the educational decisions of a student on an IEP. See 20 U.S.C. § 1415(k)(2) (interim alternative educational setting to be determined by student's IEP team). Petitioner's assertion that the school board

has the authority to overturn determinations of a student's IEP team is inconsistent with the intent and purpose of IDEA.

Further supporting that there are no compelling reasons for granting Petitioner's petition for a writ of certiorari is the fact that Petitioner admitted to the acts that would have formed the basis for a long-term suspension, had Petitioner in fact been subjected to one. In order to establish a denial of procedural due process, Petitioner must show he suffered substantial prejudice. *Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 1242 (10th Cir. 2001); *Keough v. Tate County Bd. of Educ.*, 748 F.2d 1077, 1083 (5th Cir. 1984). When a plaintiff has admitted unequivocally to the allegations, no substantial prejudice can be shown and no claim of due process violation may be made. See, e.g., *Boster v. Philpot*, 645 F.Supp. 798, 804 (D. Kan. 1986) (citing *Black Coalition v. Portland Sch. Dist. No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973) (recognizing that by admitting underlying facts, the plaintiffs waived the right to a due process hearing)). Here, the record reflects that at the time of the events at issue, Petitioner admitted to fighting on school property and to having a knife at school that was "dangerous" and could have hurt or killed someone. He further admitted that he knew, as of September 8, 2005, that it was a violation of school policy to fight and to bring a weapon onto school premises.[4]

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[4] District's disciplinary protocol identifies a number of acts as conduct which may result in short-term suspension, long-term

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Accordingly, Petitioner unequivocally admitted to the actions and cannot establish substantial prejudice, and his procedural due process claim must fail.

In addition, the lower court also does not rule that all "long-term" suspensions end upon a change of placement, as Petitioner alludes. Instead, in this situation and upon the particular facts in this matter, including the consent of Petitioner and his guardian to the educational placement, Petitioner's suspension ended upon his transfer by the IEP team into the alternative school. The lower court's ruling does not create a new exception or in any respect conflict with IDEA. Petitioner does not establish a compelling reason for grant of his petition for writ of certiorari.

IV. Petitioner's claimed injuries could have been remedied by an IDEA hearing.

Petitioner argues that he was not required to exhaust administrative remedies pursuant to 20 U.S.C. § 1415(l) because an administrative hearing under IDEA could not address his allegation of deprivation of a due process hearing, and that resort to those remedies would have been futile. He contends

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suspension, or expulsion, and includes possession or use of a dangerous weapon on school grounds. "Weapon" includes in its meaning a "device designed as a weapon that through its use is capable of threatening or producing great bodily harm or death"; for example, a knife. That the knife may not have met the definition of a "dangerous weapon" under 20 U.S.C. § 1415(k)(1)(G) is of no relevance.

now that his "chief complaint" was denial of a school board hearing and that refusal of a school board hearing caused him actual injury. Of note, Petitioner *fails to also acknowledge that in his Complaint* he twice alleged deprivation of his right to education. Pet. App. 80, 83. Despite Petitioner's arguments that his case is about failure to receive a hearing to challenge a long-term suspension, it is instead inescapably a challenge to the educational placement of Petitioner pursuant to the terms of IDEA. This assertion raises no "compelling reason" for the Petition to be granted.

The correct inquiry is whether Petitioner's grievance can be addressed ***in any degree*** by the administrative process; if the answer is yes, or even questionable, administrative remedies must be exhausted. See *Robb v. Bethell School District #403*, 308 F.3d 1047, 1050 (9th Cir. 2002) (holding that "when a plaintiff has alleged injuries that could be redressed to any degree by the IDEA's administrative procedures and remedies, exhaustion of those remedies is required."); *Payne v. Peninsula Sch. Dist.*, 598 F.3d 1123, 1127 (9th Cir. 2010) (noting that if the question of whether plaintiff's injuries could be redressed ***to any degree*** by the IDEA's administrative procedures is either yes or unclear, exhaustion is required.). The *Robb* court noted that its holding is strongly supported by this Court's decision in *Booth v. Churner*, 532 U.S. 731 (2001) where that plaintiff argued exhaustion of administrative remedies would be futile because he sought money damages, which were not

available under the administrative grievance scheme. *Robb*, 308 F.3d at 1050-51 (citing *Booth*, 532 U.S. at 734). But regardless of the exact statutory context, mandatory administrative processes must be exhausted, even if the precise relief sought is not available in the administrative venue. *Robb*, 308 F.3d at 1051. The *Robb* court rejected the plaintiff's assertion that the administrative processes under IDEA did not grant the relief sought. *Id.* If a plaintiff's alleged injuries can be redressed to some degree by the administrative procedures and remedies of IDEA, then exhaustion of administrative remedies is required. *Id.* at 1054. Otherwise, plaintiffs could circumvent administrative procedures merely by asking for relief that an administrative authority cannot grant. *Polera v. Bd. of Educ. of the Newburgh Enlarged City School Dist.*, 288 F.3d 478, 487 (2nd Cir. 2002); see also *Hope v. Cortines*, 872 F.Supp. 14, 17 (E.D.N.Y. 1995) (a plaintiff "cannot escape IDEA's exhaustion requirement by drafting a complaint artfully avoiding an IDEA claim where IDEA offers plaintiffs the very relief they seek"), *aff'd*, 69 F.3d 687 (2nd Cir. 1995). "Under the IDEA, educational professionals are supposed to have at least the first crack at formulating a plan to overcome the consequences of educational shortfalls." *Polera*, 288 F.3d at 488.

Petitioner's grievance centers around an alleged failure to provide him with appropriate educational services, and those very assertions were argued to the lower court; indeed, the district court's decision was dependent upon an alleged failure to provide

adequate education, which it deemed to amount to a "constructive" suspension. Pet. App. 27-28. Those grievances could at a minimum be addressed "to some degree" under IDEA. 20 U.S.C. § 1415(b)(6); 20 U.S.C. § 1415(k)(3)(A). Accordingly, Petitioner here cannot escape the requirement of exhaustion of administrative remedies or "opt out" of that requirement by creative pleading.

V. Amici curiae's motion for leave to file and brief should be denied.

A motion for leave to file and brief as amici curiae in support of Petitioner has been submitted to this Court as well. That motion should not be granted because 1) the petition for writ of certiorari itself should not be allowed because Petitioner waived his right to appeal; 2) amici bring nothing to the attention of this Court that Petitioner has not already brought forward; and 3) because amici rely on significant misrepresentation or misapprehension of the facts of this matter, it is of no assistance to this Court and would only burden the Court.

It is evidence of the duplicity of amici's submission that their assertions have been addressed in this Opposition. In summary, amici's arguments are all dependant on the erroneous assumption that a suspension of more than ten days occurred; amici's arguments surmise incorrectly that Petitioner was subject to a unilateral change of placement, when in fact Petitioner and his guardian participated in and

agreed with that decision of his IEP team; and because of those two errors, amici's assertions as to the lower court's ruling conflicting with *Goss v. Lopez*[5] and *Honig v. Doe* fail. Amici grossly misstate the record, as the actions of the IEP team were founded upon the best educational setting for Petitioner, not "purely a punitive discipline action" as amici preposterously accuses. Amici's tale of possible misapplication by future courts of the Eighth Circuit's decision below could be argued about any lower court decision. Here, the lower court ruled soundly that the Petitioner failed to avail himself of the proper procedures and failed to exhaust his administrative remedies. Amici provide no authority to this Court, nor could they, for their position that the school board would have authority to override the decision of the IEP team as to Petitioner's educational placement. Amici simply parrot the Petitioner and add nothing to this Court's review; instead, amici are redundant and burdensome. As no basis has been raised to justify this Court's review, amici's motion should be denied.

CONCLUSION

Petitioner waived his right to appeal the decision of the Eighth Circuit Court of Appeals, and the petition for writ of certiorari may properly be dismissed on that basis alone. In addition, the decision below

[5] 419 U.S. 565 (1975).

does not conflict with a decision of this Court or any court of appeals, nor does it implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not carried his burden of demondemonstrating any "compelling reasons" for the Petition to be granted. The motion for leave of amici to file and brief and the petition for a writ of certiorari should be denied.

Respectfully submitted,

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