No. 10-1411

AUG 1 - 2011

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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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF FOR PETITIONER

I.

INTRODUCTION

South Dakota law does not permit a school principal to suspend a student from a state school for more than 10 days. In this case, an assistant principal, intending to impose a suspension of more than 10 days, imposed a disciplinary suspension of indefinite duration on the Petitioner for possessing a pocket knife on school grounds. When the Petitioner's guardian requested a hearing before the school board to appeal her grandson's indefinite disciplinary suspension from the school, she was advised that her grandson had no right to a hearing because his suspension had become a change of placement under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq*.

The Eighth Circuit Court of Appeals agreed.

The Eighth Circuit's decision leaves children with disabilities without any opportunity to appeal an arbitrary, mistaken or even, as here, unlawful long-term disciplinary removal from school in a hearing before an impartial fact finder.

Jonathan Doe's petition presents two issues of law:

(1) For purposes of determining whether formal process is due a student facing a proposed indefinite disciplinary suspension, does the disciplinary suspension of a student with a disability end when it

becomes a change of placement under the Individuals with Disabilities Education Act (IDEA)?

(2) Do IDEA administrative procedures provide any relief for a child with a disability who complains that he was suspended from school for violating a school disciplinary code without fair procedures to determine if the misconduct occurred?

II.

THE PETITIONER HAS NEITHER EXPRESSLY NOR IMPLICITLY WAIVED HIS RIGHT TO PETITION THIS COURT.

After the district court granted Jonathan Doe summary judgment as to liability, to save the expense of a trial on damages, the parties entered into a written agreement whereby they "agreed to stipulate to the amount of damages to be entered by the Court in a final judgment which then may be subject to appeal." The agreement was expressly not intended to end the litigation of the case and it contained no express waiver by Petitioner Doe of his right to petition this Court for certiorari.

Nonetheless, the Respondents contend that in that agreement, the Petitioner implicitly waived his right to petition this Court by stipulating that if the Court of Appeals reversed the district court and ordered that judgment be entered in favor of the defendants, the defendants would not have to pay the Petitioner any money.

The Respondent's claim of waiver is frivolous.

For there to be a valid waiver, there must be evidence of a voluntary and knowing relinquishment of a known right. *Haghighi v. Russian-American Broadcasting Co.,* 173 F.3d 1086 (8th Cir. 1999). A waiver of a legal right will not be presumed in the absence of fairly explicit language setting forth the waiver. *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000).

There can be no valid waiver of a right to appeal without language in the agreement that expressly, clearly, and unambiguously establishes the party's intention to waive such right. *Montez v. Hickenlooper*, 640 F.3d 1126, 1131-32 (10th Cir. 2011).

Respondents do not claim the Petitioner expressly waived his right to petition this Court. Instead, the Respondents divine an implicit waiver of that legal right from these words:

> i. If the Court of Appeals affirms the United States District Court on appeal the judgment will be paid by the 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 the Defendants be entered then the case shall be dismissed without any payment on the part of the Defendants or their insurers.

There is nothing in the language of the agreement that can be construed to express a knowing and intentional waiver by Petitioner of his right to seek redress in this Court.

If the attorneys for Respondents truly believed that Petitioner intended to waive his legal right to appeal to this Court by stipulating that he would get no money if the Court of Appeals ordered that his case be dismissed, they should have and would have put that in the written agreement which they drafted. They did not.

Petitioner Jonathan Doe has not waived his right to petition this Court for a writ of certiorari.

III.

THE PETITION PRESENTS PURE QUESTIONS OF LAW THAT CAN AND SHOULD BE DECIDED BY THIS COURT.

The Eighth Circuit's dispositive legal ruling was that the Petitioner's removal from school was not a suspension; it was a change of educational placement under the IDEA to which the petitioner's grandmother consented.

Respondents seek to defend that ruling by repeatedly misrepresenting and denying the undisputed material facts in the record.

In their brief, Respondents represent to this Court (on page 8) that "it was the intent and understanding of all involved that Petitioner's suspension ended upon the IEP team's placement" of Jonathan Doe in the After-School program. They represent (on page 2) that at the IEP team meeting on September 13, after the IEP team decided that Jonathan would receive instruction in the After-School program, the Petitioner "was then advised that he was no longer suspended from school because his IEP placement had been changed." The Respondents represent (on page 10) that the IEP team "unanimously determined that there would be a change of placement, which would effectuate an end to his suspension . . . " The Respondents (on page 17) flatly declare: "It was discussed at the September 13, 2005 IEP team meeting that Petitioner would no longer be suspended."

Those assertions by the Respondents misrepresent undisputed material facts in the case.

In its order granting summary judgment to the Petitioner [paragraph 9], the district court found that there was no genuine dispute as to these material facts:

> At no point during the September 13 meeting were Dorothy or Jonathan informed that Jonathan would no longer be "on suspension" after his change of educational placement.

On appeal, the Respondents did not challenge the ruling by the district that there was no genuine dispute as to those material facts.

The special education director, Ms. Lucas, admitted those facts in her deposition testimony. [Reply Appendix 1, Lucas deposition, 44:22-45:23.]

In a similar vein, in their opposition brief (page 8), the Respondents assert that "Petitioner's statement in his petition that Berg intended to impose a long-term suspension misrepresents the record."

Again, in the district court order granting summary judgment (paragraph 17), the court found that fact to be undisputed. Respondents admitted that when Berg suspended Jonathan, Berg intended his suspension to be a long-term suspension of more than 10 days in their Answer to the Plaintiff's Complaint.

In spite of Respondents' efforts to create factual disputes where none exist, all the material facts in this case are undisputed. This case can be decided solely on the law.

The principle issue presented for review is a pure question of law: for purposes of determining what process is due a student who was removed from school for violating school rules, does a disciplinary suspension of a student with a disability end when there is a change of placement under the IDEA, even though the student continues to be excluded from his regular school?

The answer to that legal question will decide the educational and constitutional rights of school children with disabilities throughout this country.

IV.

THE COURT OF APPEALS' RULING THAT I.D.E.A. ADMINISTRATIVE PROCEDURES COULD HAVE PROVIDED RELIEF FOR THE PETITIONER'S CLAIMED INJURIES WAS PLAIN ERROR.

The Respondents claim and the Eighth Circuit ruled that in his §1983 Complaint Jonathan Doe claimed there was a violation of his rights under the IDEA as a result of his placement in an alternative educational setting. The Eighth Circuit arrived at that legal conclusion in spite of the fact that Petitioner's Complaint makes no mention of the IDEA or of his placement in an alternative educational setting or the fact that he is a child with a disability. Based on that erroneous premise, the Court of Appeals ruled that Jonathan should have taken his complaint to an IDEA hearing officer.

Although that ruling served as the basis for its reversal of the district court, the Eighth Circuit's decision simply asserts, rather than demonstrates, that Jonathan Doe was claiming that he was denied IDEA rights. Nowhere in its decision does the Eighth Circuit point to any language in the Petitioner's Complaint that would support its ruling that Jonathan was really complaining about being placed in the After-School Program, not about being removed from the High School without due process.

Nor could that Court have done so. There is no such language in the Petitioner's Complaint.

In their brief, the Respondents finally identify specific language in the Petitioner's complaint in which they detect an implicit claim that his rights under the IDEA were violated: in his Complaint, the Petitioner, not once, but *twice*, alleged that his long-term suspension was a "deprivation of his right to education." That language, the Respondents claim, is "inescapably a challenge to the educational placement of Petitioner pursuant to the terms of the IDEA." (Page 29.) Respondents point to no other language in the Petitioner's Complaint to support their contention that Doe was implicitly complaining that his rights under IDEA were violated.

A pleading that claims that the defendants caused the plaintiff to suffer a "deprivation of his right to education" when they suspended him from school does not state a claim of an IDEA violation. It is simply a recognition of the holding in *Goss v. Lopez*, 419 U.S. 565 (1975): a suspension is a significant deprivation of a student's right to education that merits due process protection.

In the absence of any language in the Petitioner's Complaint that would lend any support to the Eighth Circuit's divination of an IDEA claim lurking beneath the surface of what the Petitioner actually pleaded, the Eighth Circuit's ruling is plain error.

It is an error with far reaching negative consequences for children with disabilities and their

families. The Eighth Circuit's ruling means that no student who alleges that school personnel unlawfully caused him to suffer a deprivation of his right to education by suspending or expelling him in violation of his constitutional rights can ever seek money damages in a civil action if the plaintiff happens to be a child with a disability. The result of the Eighth Circuit's decision is to strip children with disabilities and their parents of their constitutional right to access to the courts.

The Eighth Circuit's decision is based on legal error so plain and so egregious that it merits summary reversal.

V.

THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH *HONIG V. DOE* AND *GOSS V. LOPEZ.*

The Eighth Circuit's ruling that Jonathan was not entitled to a school board hearing because Dorothy Doe consented to his removal from the high school ignores the undisputed fact that Dorothy was told by Debera Lucas, the school district's special education director, that Dorothy had no choice in the matter.

In its summary judgment order (paragraph 9), the district court ruled that that there was no genuine dispute as to these facts:

> At [the September 13 IEP team] meeting, Lucas informed Dorothy that Doe could not

> return to regular classes due to his possession of a knife, and a change of placement based on Doe's possession of the knife, was necessary.

Those facts were admitted by Ms. Lucas in her deposition testimony, which was part of the record below.

> Q. All right. Specifically with regard to D.J. [Doe], you were there to discuss options, among other things, to discuss options about where he would receive educational services, correct?
>
> A. Yes.
>
> Q. One of those options was not regular classes in the Todd County High School, was it?
>
> A. That's correct.

[Lucas deposition, 56:10-17.]

* * *

> Q. Your testimony is that because of a weapon, return to the mainstream high school setting was not an option, correct?
>
> A. At the time, right.
>
> Q. And that was communicated to Dorothy [Doe] in that meeting, wasn't it, that was not an option?
>
> A. That the option was that he was going to be at the after-school program.

> Q. My question is, it was communicated to her that return to the original classroom setting was not an option. She was told that, wasn't she?
>
> A. * * * I'm sure that was her understanding.
>
> * * *
>
> Q. Was your understanding [that Dorothy understood that returning Jonathan to the High School was not an option] based on the fact that at some time in that meeting somebody communicated to her that return to the High School was not an option?
>
> A. For example, on the September 14th?
>
> Q. Yes.
>
> A. Yes.

[Lucas deposition, 91:22-93:1.]

Thus, the Eighth Circuit ruled that his guardian consented to Jonathan's continued exclusion from the school, even though it was undisputed that she had been told by school personnel that she had no choice in the matter. Without choice, there can be no consent. The undisputed fact is that Dorothy Doe was told she had no choice. Therefore, as a matter of law, she did not consent.

If Dorothy Doe did not consent to her grandson's exclusion from the High School, then Jonathan's long-term removal from the High School was a unilateral removal of a child with a disability which this Court

prohibited in *Honig v. Doe*, 484 U.S. 305 (1988). Since she was denied the opportunity to contest that removal in a hearing, it also violated Jonathan's due process rights under *Goss v. Lopez*.

This Court should grant certiorari because the Eighth Circuit's decision conflicts with the holdings of this Court in two important cases protecting the educational rights of children.

VI.

THIS CASE PRESENTS IMPORTANT QUESTIONS OF LAW THAT AFFECT THE EDUCATIONAL AND CONSTITUTIONAL RIGHTS OF STUDENTS WITH DISABILITIES THROUGHOUT THE NATION.

The questions of law presented in this case affect the rights of literally millions of disabled students and their families throughout the United States. It is an undeniable fact that long-term suspensions and expulsions are now commonplace in the public schools of our nation.

As the National Juvenile Defender Center, the Took Crowell Institute for At-Risk Youth, and the South Dakota Advocacy Services discuss in their amicus brief, since this Court decided *Goss v. Lopez*, the number of students who are suspended or expelled from public schools each year has doubled.

A recently released study provides empirical evidence of this national phenomenon and of the disproportionate degree to which punitive suspensions and expulsions affect students with disabilities.

The study, entitled "Breaking Schools' Rules: A Statewide Study of How School Discipline Relates to Students' Success and Juvenile Justice Involvement"[1] was prepared by the non-partisan Council of State Governments Justice Center. The study tracked the educational records of every student enrolled in grades 7 through 12 in the state schools of Texas, a state whose school system has 1 out of 10 of the public school students in the United States. The study tracked 928,940 students, of which nearly 13.2% (122,250) were students with disabilities who received special education services pursuant to the IDEA.

The study found that almost one-third (31%) of the public school students in Texas had been punished with out-of-school suspensions or expulsions at least once between their 7th and 12th grade school years. For those students, the average number of out-of-school suspensions was 8. Of the nearly 1 million students studied, about 15% were placed in disciplinary alternative educational settings; and 8% were placed in juvenile justice alternative education programs.

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[1] http://knowledgecenter.csg.org/drupal/system/files/Breaking_School_Rules.pdf.

Nearly 3 out of every 4 students with disabilities in the public schools of Texas who received special education services under the IDEA – 74.6% – were suspended or expelled at least once between the 7th and 12th grades.

Breaking this down further, of those 122,250 students who received special education services, 90.2% of all students with a serious emotional disability, 76.2% of all students with a learning disability, and 62.9% of the students with a physical disability were disciplined with out of school suspension or expulsion at least once between their 7th and 12th grades.

As the study points out, the commonplace and widespread practice of using suspensions and expulsions to discipline school children is not unique to Texas. School discipline rates in Texas are similar to or less than suspension and expulsion rates in other large states. In 2010, 5.7% of all the public school students in Texas from kindergarten to the 12th grade were punished with out of school suspensions or expulsions; in California, 12.7% of all students in grades K-12 were given at least 1 out of school suspension or expulsion; 8.7% of the public school students in Florida were suspended or expelled; and 5.2% of all students enrolled in the public schools of New York State were suspended out of school at least once (not including those who were expelled).

Those figures prove that the issues of federal law raised by Jonathan Doe's case are not isolated issues

affecting only the rights of disabled students in a small rural school on the Rosebud Sioux Indian Reservation in South Dakota. They have serious and far-reaching implications for the millions of students throughout this country who struggle with learning disabilities, emotional disturbances and physical handicaps and who will be suspended or expelled from state public schools at some time in their middle or high school years.

Whether the millions of students with disabilities in our public schools are entitled to the same due process rights that are available to students who have no disabilities or whether a federal act intended to prevent discrimination against children with disabilities should be interpreted to strip them of those rights is a question of vital national importance.

CONCLUSION

These are compelling reasons why this Court should grant the petition for a writ of certiorari in this case.

Respectfully submitted,

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