No. _____ 10-1411 MAY 16 2011

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Due Process Clause prohibits school administrators from suspending students for violating a school's code of conduct "absent fundamentally fair procedures to determine if the misconduct occurred." *Goss v. Lopez,* 419 U.S. 565, 574 (1975). South Dakota statutes provide that a student facing a suspension of more than 10 days is entitled to appeal the suspension in a formal hearing before the school board. Under *Goss v. Lopez* and South Dakota statutes, the key question in determining whether a student is entitled to informal or formal due process procedures is whether the suspension extends beyond 10 school days.

The Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 U.S.C. §§1400 *et seq.*, gives school children with disabilities the right to receive educational services in an interim alternative educational setting whenever there is a change of educational placement as a result of a disciplinary suspension. This Court has held that a suspension of more than 10 school days is a change of placement under the IDEA. *Honig v. Doe*, 484 U.S. 305, 326, n.8 (1988).

In this case, the Eighth Circuit ruled that a South Dakota student with a disability who was suspended and then excluded from his high school for 38 school days was not entitled to the formal due process that was available to non-disabled students because his disciplinary suspension ended when it became a "change of placement" under the IDEA.

QUESTIONS PRESENTED – Continued

The questions presented are:

1. For purposes of determining whether formal process is due a student who seeks to appeal a disciplinary suspension, does a disciplinary suspension of a student with a disability end when it becomes a change of educational placement under the IDEA?

2. Do IDEA administrative procedures provide a suitable remedy for a disabled student's claim that school administrators violated his constitutional due process rights by suspending him from school without formal due process?

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PETITION FOR A WRIT OF CERTIORARI

The petitioner Jonathan Doe respectfully petitions for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

OPINIONS BELOW

The decision of the Eighth Circuit Court of Appeals (Loken, Bright and Gruender, JJ.) is reported at 625 F.3d 459 (8th Cir. 2010) and reprinted in the Appendix ("App.") at App. 1-13. The district court's decision granting summary judgment to the petitioner is reprinted at App. 14-33.

JURISDICTION

The Eighth Circuit Court of Appeals rendered its decision denying rehearing on February 15, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISION INVOLVED

In relevant part, United States Constitution, Amendment 14 states:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent federal and state statutory and regulatory provisions are set forth in the Appendix at App. 35-51.

STATEMENT OF THE CASE

In this case, the Eighth Circuit Court of Appeals ruled that South Dakota students without disabilities have state-created formal due process rights to appeal a long-term disciplinary suspension in a hearing before the local school board, but students with disabilities do not.

The Due Process Clause prohibits school personnel from suspending a student from a school for violating the school's code of conduct "absent fundamentally fair procedures to determine whether the misconduct has occurred." *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

In South Dakota, the constitutional principle of *Goss v. Lopez* is codified in SDCL §13-32-4 and §13-32-4.2. [App. 35-38.] Those statutes provide that if a school administrator orders that a student be

suspended for more than 10 consecutive school days, that student has the right to appeal the administrator's decision in a hearing before the local school board. If a timely request for a hearing has been made and no hearing has been held within 10 school days, absent exigent circumstances, school personnel must allow the student to return to school pending a hearing.

The Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 U.S.C. §§1400 *et seq.*, gives students with disabilities the right to receive a free appropriate public education (FAPE) in an interim alternative educational setting during a long term suspension or expulsion.[1] 20 U.S.C. §1412(a)(1)(A); §1415(k). Various provisions of Section 1415 of the IDEA establish procedural safeguards to ensure that disabled students who have been suspended or expelled continue to receive FAPE while they are excluded from the regular school setting.

The Administrative Rules of South Dakota [ARSD] provide that the "suspension of pupils in need of special education or special education services includes the general due process procedures used for

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[1] 20 U.S.C. §1401(3)(A) of 2004 IDEA [Pub. L. 108-446] defines the term "child with a disability" to mean a child "with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance . . . , orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and . . . who, by reason thereof needs special education and related services."

all pupils and the additional steps in the process" set forth in the rules that implement the procedural safeguards of Section 1415 of the IDEA. ARSD §24:05:26:01. [App. 39.]

The petitioner, Jonathan Doe, was a South Dakota high school student with a learning disability who was suspended from the Todd County High School for violating the school's code of conduct. Intending to impose a long-term suspension of more than 10 school days, the school's assistant principal suspended the petitioner for an indefinite period – "until a hearing with the School Board can be arranged." [App. 55.] However, when the petitioner's legal guardian requested the assistant principal to arrange a hearing with the school board to appeal his decision, the assistant principal refused her request for a hearing. He claimed that the petitioner was not entitled to appeal a suspension because he was receiving special education services in an alternative school and therefore, he was no longer on suspension from the high school.

The petitioner was excluded from the high school for 38 school days without being given an opportunity to contest the factual and legal basis for that exclusion in a formal hearing.

The petitioner brought suit against the school district, its superintendent of schools, the high school principal and the assistant principal under 42 U.S.C. §1983, claiming that they had deprived him of state-created property rights – his statutory right to attend

classes at the high school and his statutory due process rights to appeal a long-term suspension – without due process of law. The district court granted summary judgment to the petitioner. The Eighth Circuit Court of Appeals reversed and dismissed the petitioner's complaint.

The Eighth Circuit held that the petitioner was not entitled to the protection of state laws giving students formal due process rights to appeal a disciplinary suspension because the petitioner was a child with a disability who received special education services and "Doe's right to procedural due process was limited to the procedures governing the IDEA decision-maker under 20 U.S.C. §1415."

FACTUAL BACKGROUND

In September 2005, Jonathan "DJ" Doe ("Jonathan") was a freshman student attending regular classes at the Todd County High School in Mission, South Dakota on the Rosebud Sioux Indian Reservation. He was a student with a learning disability who received special education services through an individualized education program (IEP).

Jonathan's exclusion from the high school began on September 9, 2005, when the respondent Michael V. Berg, assistant principal of the school, summarily suspended him from all classes at the school for fighting and possessing a pocket knife. In the assistant principal's view, Jonathan's pocket knife was a

"dangerous weapon," the possession of which called for a long-term suspension of more than 10 days under the school's disciplinary code.[2]

It is undisputed that when assistant principal Michael V. Berg suspended Jonathan, it was his intention to impose a long-term suspension of more than 10 days. SDCL §13-32-4.2 gives a school principal authority to impose a short-term suspension of up to 10 school days. State statutes do not authorize a school principal to suspend a student for more than 10 days or to impose a suspension of indefinite duration.

When the assistant principal suspended Jonathan from the high school, Debera Lucas, the school's special education director, knew that the IDEA required school personnel to convene an IEP meeting, before Jonathan was suspended for more than 10 days, to determine whether the behavior prompting Jonathan's disciplinary suspension was a manifestation of his disability. Ms. Lucas sent Jonathan's grandmother ("Dorothy") written notice on September 9 that there would be a meeting on September 13 to make a "Manifestation Determination." [App. 52-54.]

On September 12, 2005, the fourth day of Jonathan's exclusion from the high school, the assistant

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[2] ARSD §24:07:01:01(2) of the South Dakota Administrative Rules defines the term "long-term suspension" as "the exclusion of a pupil by the superintendent or the school board from a class or classes or from school for more than 10 but not more than 90 school days."

principal sent a letter to Jonathan's grandparents, Calvin and Dorothy, notifying them that he had suspended Jonathan from all classes at the Todd County High School for fighting and possessing a dangerous weapon. [App. 55-56.] The letter made no mention of the rights provided by state statutes that gave students due process rights to appeal a suspension. Instead, the letter advised Jonathan's grandparents that "the School Board reserves the right to hold a hearing on this matter" and that such hearing "might also result in a long-term suspension or a recommendation for expulsion." Jonathan was suspended for an indefinite period of time: "The length of this suspension shall be for [*sic*] September 8, 2005 and until a hearing with the School Board can be arranged. You will be notified of the date and time of this hearing."

On the fifth day of Jonathan's exclusion from the high school, on September 13, an individualized education program (IEP) team met to determine whether Jonathan's possession of a pocket knife was a manifestation of his learning disability.[3] The IEP team consisted of: Ms. Lucas, the special education director; Ms. Sherman, the high school principal; other school personnel; and Jonathan's grandmother, Dorothy.

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[3] An individualized education program team or "IEP team" is "responsible for developing, reviewing, or revising an IEP for a child with a disability." 34 C.F.R. §300.23; 20 U.S.C. §1414(d)(1)(B).

The IEP team determined that Jonathan's possession of a pocket knife was not a manifestation of his disability. [App. 57-64.][4] That determination gave school administrators the legal authority to apply the school system's generally applicable disciplinary rules and procedures to discipline Jonathan Doe, so that they could, if they chose to do so, suspend him from the high school for more than 10 school days. 20 U.S.C. §1415(k)(1)(C).

The IDEA requires schools to provide a free appropriate public education in an alternative school setting to students with disabilities who have been suspended from their regular educational setting for more than 10 school days [20 U.S.C. §1412(a)(1)(A); §1415(k)(1)(C) and (D); §1415(k)(2)]; therefore, the IEP team then had to determine an interim alternative educational setting in which Jonathan would receive educational services if school authorities proceeded with their intention to suspend him from the high school for more than 10 school days. 20 U.S.C. §1415(k)(1)(C); §1415(k)(2). The IEP team revised Jonathan's IEP to provide him with 8 hours of educational instruction a week in a temporary interim alternative school setting during the suspension period, beginning on the 11th day after Jonathan was suspended from the high school. [App. 65-68.]

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[4] On the Manifestation Determination report, Ms. Lucas checked the box which stated that "the conduct WAS a manifestation of the student's disability." [App. 61.] The parties agree that Ms. Lucas mistakenly checked the wrong box on the report.

None of the school personnel at the meeting said anything to indicate to Jonathan's grandmother Dorothy that Jonathan would no longer be "on suspension" from the high school while he was in the alternative school. Nothing in either the Manifestation Determination report or the revised IEP indicates that Jonathan's suspension had ended. [App. 57-68.] To the contrary, the IEP team's Addendum expressly states that Jonathan would receive educational services in the alternative school *during the suspension period*:

> DJ has been suspended on 9-8-05 for possession of a weapon . . . After-School program at Alternative High School from 3:30-5:30 M-R recommended for DJ during the suspension period, starting 9-19-05.

[App. 67.]

On September 21, Jonathan had been excluded from the Todd County High School for 10 school days. Although the assistant principal's letter of September 12 had advised Jonathan's grandparents that they would receive notice of the time and date of a school board hearing, school administrators had made no attempt to schedule a hearing. On that date, Dorothy hand-delivered a letter to the assistant principal. In the letter, which cited the applicable state statutes, Dorothy requested a hearing before the school board and further requested that Jonathan be reinstated in the high school until a hearing was held. [App. 69-70.]

In a letter dated September 29, the assistant principal denied Dorothy's request for a school board hearing and further denied her request that Jonathan be reinstated in the high school pending a hearing. [App. 71-72.] His letter stated that Jonathan was not entitled to a school board hearing because "I considered the suspension which I had given on September 8 as having ended on the date when the IEP Addendum changed his placement to the After-School Program." [App. 71.] According to the assistant principal, although Jonathan could not return to the high school, "there is no long-term suspension presently in effect which could result in an appeal to the school board and hearing before the school board." [App. 72.]

After he was suspended by the assistant principal on September 9, Jonathan was excluded from the Todd County High School for 38 consecutive school days without ever having been given an opportunity for a formal hearing "to determine whether the misconduct has occurred" (*Goss v. Lopez*, 419 U.S. 565, 574 (1975)) or whether the indefinite long-term suspension ordered by the assistant principal violated state law.

Jonathan, through his grandmother, filed a civil action for damages under 42 U.S.C. §1983 in which he claimed that the assistant principal, the principal, the superintendent of schools and the school district had deprived him of state-created 14th Amendment property rights – his statutory rights to education and his statutory rights to appeal a long-term suspension – without due process of law.

The petitioner's §1983 complaint did not claim any violation of his federal statutory rights under the IDEA.

FEDERAL STATUTORY AND REGULATORY BACKGROUND

The Individuals With Disabilities Education Improvement Act Of 2004

Before Congress enacted the Education of the Handicapped Act (EHA) in 1975, school personnel had excluded one out of every eight disabled children in the United States from their schools. *Honig v. Doe*, 484 U.S. 305, 324 (1988). Prior to the enactment of the EHA, thousands of students with disabilities were indefinitely suspended or expelled from their schools without receiving any educational services at all. Today, the EHA, in its amended form, is titled the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 U.S.C. §§1400 *et seq.*, and it expressly provides that states which receive federal funding under the Act must provide a free appropriate public education (FAPE) to all children with disabilities, "including children with disabilities who have been suspended or expelled from school." 20 U.S.C. §1412(a)(1)(A).

Under the IDEA, certain procedural safeguards are mandatory whenever school personnel propose a change of educational placement for a child with a disability. School personnel can propose a change of

educational placement either for disciplinary or for purely educational reasons. The procedures that must be provided in cases involving disciplinary changes of placement are set forth in Section 1415 of the IDEA and 34 C.F.R. §§300.530-300.537.

A suspension of less than 11 consecutive school days does not constitute a change of placement under IDEA. 20 U.S.C. §1415(k)(1)(A)(i); 34 C.F.R. §300.530(b)(1). School authorities can unilaterally suspend a child with a disability for up to 10 consecutive school days for disciplinary misconduct without providing the child with any educational services and without providing the child with a manifestation determination meeting or any of the procedural safeguards of Section 1415.

However, a suspension of more than 10 consecutive school days would constitute a change of placement under the IDEA and therefore, if school authorities propose to suspend a child with a disability for more than 10 days, they are proposing a change of placement that requires them to comply with the Section 1415 discipline procedures. 34 C.F.R. §300.536(a)(1); *Honig v. Doe*, 484 U.S. 305, 326, n. 8 (1988). When school personnel propose a disciplinary change of placement – a suspension that would extend beyond 10 school days – they must give written notice to the parent of the proposed change of placement and they must convene a meeting of the child's IEP team before the child has been suspended for 11 school days to determine whether the conduct that prompted the suspension was a manifestation

of the child's disability. 20 U.S.C. §1415(b)(3)(A); §1415(k)(5)(A).

If the IEP team determines that the child's conduct was a manifestation of his disability, except in special circumstances,[5] school administrators must reinstate the student in the regular school setting after the child has been suspended for 10 school days. If, as it did in the petitioner Jonathan Doe's case, the IEP team determines that the child's conduct was not a manifestation of his disability, then "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).

However, if the disabled student is going to be excluded from his or her regular school setting for more than 10 days, beginning on the 11th day, the school district must provide FAPE to that student in an interim alternative educational setting for as long as the student is suspended from the regular school. 20 U.S.C. §1412(a)(1)(A); 20 U.S.C. §1415(k)(1)(C). The IEP team must determine the interim alternative educational setting in which the student will receive FAPE after he or she has been suspended for 10 days. 20 U.S.C. §1415(k)(2).

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[5] Those special circumstances are set forth in 20 U.S.C. §1415(k)(1)(G). They are not applicable in this case. See: §1415(k)(7)(C); 18 U.S.C. §930(g)(2).

Parents of disabled children who disagree with any decision regarding placement or the manifestation determination have the right to appeal their grievance to an administrative hearing officer. 20 U.S.C. §1415(k)(3); 34 C.F.R. §300.532(a). If the child has been placed in an interim alternative educational setting, unless the parents and school personnel otherwise agree, the child must remain in the interim alternative educational setting while an appeal challenging a change of placement is pending. 20 U.S.C. §1415(k)(4)(A); 34 C.F.R. §300.533.

PROCEEDINGS IN THE DISTRICT COURT

In the district court, the plaintiff Jonathan Doe and the school district defendants moved for summary judgment. The parties agreed that Jonathan Doe was excluded from the Todd County High School for 38 school days without formal due process. The dispositive issue was a question of law: whether Jonathan's exclusion from the school was a long-term disciplinary suspension. The defendants argued that Jonathan's exclusion from the high school was not a long-term suspension because it was a change of placement under the IDEA.

The district court rejected the defendants' legal argument that a disciplinary suspension stops being a suspension when it becomes a change of placement under the IDEA. The court ruled that Jonathan's exclusion from the high school for 38 school days was a long-term suspension as a matter of law. That

ruling was based in large part on the court's determination that the reason for Jonathan's exclusion from the high school for more than 10 days was disciplinary, not educational: he was excluded from the high school for more than 10 days for conduct that violated the school disciplinary code, not because his IEP was insufficient to provide educational benefit.

The district court also compared the 8 hours a week of class time that Jonathan received in the After School Program with the 30 hours of weekly instruction he had been receiving in the high school and concluded that Jonathan's exclusion from the high school was, at the very least, a constructive suspension that entitled the petitioner to formal due process. The district court's opinion stated that the defendants had failed to produce "one scintilla" of evidence to support their claim that the IEP team had ended Jonathan's disciplinary suspension when they changed his placement to a temporary interim alternative setting while he was being excluded from the high school.

After ruling that Jonathan's exclusion from the high school was a long term disciplinary suspension, the district court turned to the constitutional question of what process was due. The court ruled that Jonathan was entitled to the formal due process procedures set forth in SDCL §13-32-4 and §13-32-4.2, including written notice of his rights to appeal and a hearing before the school board.

The district court ruled that the defendants had violated the petitioner's constitutional right to due process and granted summary judgment to the petitioner. The parties settled as to damages and final judgment was entered.

DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS

On appeal, the respondents did not challenge any finding of the district court as to the uncontested material facts. Instead, they argued that the district court erred in ruling that the petitioner's exclusion from the high school for more than 10 days was a disciplinary suspension.

The Eighth Circuit agreed with the respondents, reversed the district court and dismissed the petitioner's §1983 complaint. The Eighth Circuit ruled that Jonathan had no constitutional or state-created right to formal due process because his exclusion from the high school for more than 10 days was a change of educational placement under the IDEA, not a disciplinary suspension. The Eighth Circuit held that "Doe's right to procedural due process was limited to the procedures governing the IDEA decision-maker under 20 U.S.C. §1415."

The Eighth Circuit ruled that if the petitioner wanted to challenge his exclusion from the high school, instead of requesting a hearing before the school board, he had to file a complaint with the state educational agency alleging a violation of his IDEA

rights and request a hearing before an IDEA administrative hearing officer. Since he had not attempted to do so, the Court of Appeals dismissed his §1983 complaint for failure to exhaust administrative remedies.[6]

Although Jonathan Doe's §1983 claim and the district court's order granting summary judgment to the petitioner both focused squarely on the rights provided to the petitioner by SDCL §13-32-4 and §13-32-4.2, the Eighth Circuit's decision, while referring generally to the state's administrative rules, makes no mention of those statutes anywhere in its opinion.

The Eighth Circuit decision was also silent as to how an IDEA administrative hearing officer would have the authority to provide a remedy for a complaint which claimed that school administrators had denied the complainant his constitutional and state statutory rights, but which did not claim a deprivation of any right provided to the complainant under the IDEA.

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[6] The question as to whether the petitioner was required to exhaust IDEA administrative remedies was not raised by the respondents in their motion for summary judgment in the district court or in their appellate briefs. The issue was raised *sua sponte* by the Eighth Circuit on appeal.

REASONS FOR GRANTING THE PETITION

The Supreme Court should grant the petition because the Eighth Circuit's decision strips children with disabilities of their constitutional and statutory due process rights to appeal long-term disciplinary suspensions and expulsions.

Furthermore, the decision below cannot be reconciled with this Court's decision in *Honig v. Doe*, 484 U.S. 305 (1988); it abrogates key provisions of the IDEA; it defeats a major legislative purpose of the IDEA; and it nullifies state statutes that do not offend the constitution or any federal law.

I. The Eighth Circuit's Ruling That A Disciplinary Suspension Ends When It Becomes A Change Of Placement Under The I.D.E.A. Presents A Conflict In Principle With This Court's Holding In *Honig v. Doe*

The dispositive legal question in this case is whether the petitioner's exclusion from his high school for 38 school days was a disciplinary suspension. The Eighth Circuit acknowledged that if Jonathan's exclusion from the high school was a disciplinary suspension, then he was entitled to the formal due process provided by state law.

The Eighth Circuit ruled that Jonathan's disciplinary suspension from the high school ended when it became a change of educational placement under the IDEA. Although it was undisputed that Jonathan

was excluded from the high school for 38 school days, the Court of Appeals ruled that he was only suspended for disciplinary misconduct for 4 days.

The question presented is a pure question of law: for purposes of determining what process is due a student who seeks to challenge a disciplinary suspension, does the disciplinary suspension of a disabled student end when it becomes a change of educational placement under the IDEA?

The Eighth Circuit ruled that it does. That ruling cannot be reconciled with *Honig v. Doe*, 484 U.S. 305 (1988).

In *Honig v. Doe*, 484 U.S. 305, 326, n. 8, this Court held that when a school suspends a disabled student for more than 10 school days, the suspension constitutes a "change of placement" under federal special education law. No reasonable reading of *Honig v. Doe* would support the Eighth Circuit's view that the two terms – "suspension" and "change of placement" – are mutually exclusive, so that when a disciplinary suspension becomes a change of placement under the IDEA, the disciplinary suspension ends. Under any reasonable reading of the case, *Honig v. Doe* stands for the proposition that a disciplinary suspension of a disabled child that extends beyond 10 days is both a suspension *and* a change of placement under the IDEA.

If a suspension of more than 10 days is a change of placement for purposes of determining whether a child with a disability is entitled to the procedural

rights of Section 1415 of the IDEA, it does not follow that a suspension stops being a suspension when it becomes a change of placement under the IDEA.

If a disabled child is no longer "on suspension" after his or her suspension becomes a change of placement under the IDEA, then no matter how long the student is excluded from school and no matter how arbitrary, mistaken or unlawful the reason for the exclusion may be, no child with a disability would ever be able to challenge a long-term suspension because he or she would never be "on suspension" after his or her removal from school extended into the 11th day.

If the Eighth Circuit's decision is allowed to stand, the effect of the decision will be to deprive children with disabilities who face long-term suspensions for violating school rules of their due process rights to "fundamentally fair procedures to determine whether the misconduct has occurred." *Goss v. Lopez*, at 574.

II. A Disciplinary Suspension Of A Disabled Student Does Not End When The I.E.P. Team Places The Child In A Temporary Interim Alternative School Setting While The Child Is Excluded From The Regular School

A related question is: for purposes of determining whether formal process is due, does a disciplinary

suspension of a disabled student end when the IEP team orders a temporary interim change of placement to an alternative school setting during the period of suspension from the regular school?

The Eighth Circuit ruled that it does and further ruled that Jonathan's grandmother consented to Jonathan's ongoing indefinite removal from the high school by participating in the IEP team's decision to place Jonathan in the temporary interim alternative school setting while he was excluded from the high school.

Once the IEP team had determined that Jonathan's conduct was not a manifestation of his disability, the IDEA required the IEP team to determine an interim alternative education setting. 20 U.S.C. §1412(a)(1)(A); §1415(k)(1)(C); §1415(k)(2). A person cannot consent when there is no choice. The idea of consent necessarily implies the power not to consent. Discussion of whether Dorothy consented to Jonathan's placement in an interim alternative educational setting is meaningless here because she did not have the power to withhold consent to what the law required.

A guardian or parent who is a member of an IEP team that places a disabled student in a temporary interim alternative school setting during a long-term disciplinary suspension cannot be deemed to have consented to the disciplinary suspension which made the interim temporary placement necessary. Here, the petitioner's guardian expressed her lack of consent to a long-term suspension in the only way the laws of

South Dakota allowed her to do that – by requesting a hearing before the school board.

The Eighth Circuit based its ruling on a legally incorrect premise: that the IEP team ordered Jonathan's exclusion from the high school. That is error. The IEP team did not order Jonathan's change of placement from the high school. The respondents, particularly the assistant principal, ordered that change of placement by ordering that the petitioner be suspended until a school board hearing was held and then refusing to schedule a school board hearing, which ensured that Jonathan's suspension from the high school would continue beyond 10 days. The IEP team only decided where he would receive FAPE after he had been indefinitely suspended from the high school by the respondents.

The IEP team did not have the legal power to order a disciplinary removal from the high school and the IEP team did not make the decision to suspend Jonathan. Only the respondents had the legal power to order a disciplinary change of placement and it was the respondents, not the IEP team, who made that decision.

Since appellate courts have no authority to make independent findings of fact, the Eighth Circuit's ruling that Dorothy "consented" to a disciplinary change of placement by participating in the IEP process was necessarily a ruling of law – a ruling of law that would be applicable whenever any parent exercised their right under the IDEA to participate

in IEP team decisions involving §1415 procedures. If that ruling is allowed to stand, it will undermine and defeat one of the most important legislative goals of the IDEA.

"Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness." *Honig v. Doe*, 484 U.S. 305, 311 (1988).

If parents of disabled children run the risk of forfeiting their child's rights to appeal a long-term suspension by participating in the IEP process, the obvious result will be to discourage them from participating in the IEP team process. By creating a strong legal disincentive for parents to participate in IEP team decision-making, the Eighth Circuit's ruling undermines and defeats one of the most important congressional goals of the IDEA.

The Eighth Circuit erred when it ruled that the respondents' disciplinary suspension of Jonathan ended when the IEP team ordered a temporary interim change of placement to an alternative school setting "during the suspension period." [App. 67.]

III. The Eighth Circuit's Ruling That An I.E.P. Team Has Discretionary Power To Ignore The Language Of §1415(k)(1)(C) Abrogates A Key Provision Of The I.D.E.A.

The Eighth Circuit's decision effectively abrogates 20 U.S.C. §1415(k)(1)(C), which gives school administrators lawful authority to apply "the relevant disciplinary procedures applicable to children without disabilities" to discipline a disabled child "in the same manner and for the same duration in which the procedures would be applied to children without disabilities," if the conduct that prompted the disciplinary suspension was not a manifestation of the child's disability.

Applying §1415(k)(1)(C) to the facts of this case, when the IEP team determined that Jonathan's possession of a pocket knife was not a manifestation of his disability, that determination gave school administrators legal authority to apply "the relevant disciplinary procedures applicable to children without disabilities" to Jonathan "in the same manner and for the same duration in which the procedures would be applied to children without disabilities." That is, school administrators could suspend him for more than 10 consecutive school days. At the same time, the IEP team's manifestation determination gave Jonathan the right to appeal a long-term suspension in a hearing before the school board because "the relevant disciplinary procedures applicable to children without disabilities" would unquestionably

include the student due process procedures set forth in state statutes.

However, to support its ruling that the IEP team ended Jonathan's suspension, the Eighth Circuit interpreted some unspecified provision of the IDEA as giving the IEP team discretionary power to ignore the express language of 20 U.S.C. §1415(k)(1)(C) and then went on to rule that the IEP team decided to exercise that discretionary power when it changed Jonathan's placement to the After School Program.

According to the Eighth Circuit's opinion, after the IEP team determined that Jonathan's behavior was not a manifestation of his disability,

> the IDEA gave the team two significantly different procedural alternatives for dealing with the situation. First, the team could let school officials apply generally applicable disciplinary procedures and suspend Doe 'in the same manner and for the same duration in which the procedures would be applied to children without disabilities'. . . . Alternatively, the IEP team could act more affirmatively, as Doe's did in this case, by changing the child's placement from the school which suspended him to an alternative educational setting.

No provision of the IDEA gives an IEP team discretionary authority to exercise a power that effectively abrogates and nullifies 20 U.S.C. §1415(k)(1)(C). Nothing in the IDEA gave the IEP team any authority to prevent school authorities from applying

generally applicable disciplinary procedures to suspend Jonathan Doe. Nothing in the IDEA or the record supports the Eighth Circuit's ruling that Jonathan's IEP team elected not to allow school administrators to suspend Jonathan for more than 10 days.

As a matter of fact, the records of the meeting expressly state that Jonathan's placement would be changed to an alternative school "during the suspension period." [App. 67.] As a matter of law, the only way the IEP team could have ended Jonathan's suspension would have been by finding that his possession of a knife *was* a manifestation of his disability. 20 U.S.C. §1415(k)(1)(F); 34 C.F.R. §300.530(f).

The opinion points to no provision of the IDEA that would give an IEP team discretionary power to choose between being bound by the language of the statute and not being bound by such language. However, the decision seems to suggest that 20 U.S.C. §1415(k)(1)(G)(i) may provide statutory support for the Eighth Circuit's novel interpretation of the IDEA. It does not.

20 U.S.C. §1415(k)(1)(G)(i) gives school administrators unilateral power to "remove a student to an interim alternative educational setting" for up to 45 days if the student brings a "dangerous weapon" to school, regardless of whether the misconduct was a manifestation of the student's disability. 20 U.S.C. §1415(k)(1)(G) has no possible application to any issue in this case. The unilateral power to remove a student under §1415(k)(1)(G) can only be exercised by school administrators, not an IEP team, and Todd

County school administrators did not ever seek to invoke §1415(k)(1)(G) to remove Jonathan from the school. They would clearly have had no authority to do so because the IDEA expressly provides that a pocket knife with a blade less than 2 ½" long is not a "dangerous weapon" under §1415(k)(1)(G) and it is an undisputed fact, as shown by a photograph taken by school personnel of the open blade next to a ruler, that the blade of Jonathan's pocket knife was only 2 inches long. 20 U.S.C. §1415(k)(1)(G)(i); 20 U.S.C. §1415(k)(7)(C); 18 U.S.C. §930(g). Since Jonathan's pocket knife was not a dangerous weapon, §1415(k)(1)(G) has no application or relevance to any legal issue in this case.

By interpreting an unspecified or unwritten provision of the IDEA as giving an IEP team discretionary authority to prevent school officials from suspending a disabled child whose conduct was not a manifestation of his disability, the Eighth Circuit abrogated §1415(k)(1)(C) of the IDEA.

IV. The Eighth Circuit Nullified State Statutes That Do Not Offend The Constitution Or Any Federal Law

In deciding whether the petitioner was entitled to a school board hearing, a related question is whether the school board would have had the authority to order Jonathan's reinstatement in the high school if a hearing had been held. The Eighth Circuit ruled that even if the respondents had granted Jonathan's request for a hearing and the school board had determined that the assistant principal's decision to

suspend Jonathan was arbitrary or unwarranted, a hearing before the school board would have been "meaningless" because after the IEP team changed his placement to the alternative school, only the IEP team had the legal authority to order Jonathan's reinstatement in the high school. In so ruling, the Eighth Circuit again abrogated §1415(k)(1)(C) and effectively nullified state statutes.

In addition to giving students due process rights, SDCL §13-32-4 and §13-32-4.2 give school superintendents and school boards specific duties and decision making authority in matters involving long-term suspensions and expulsions. SDCL §13-32-4.2 gives a superintendent of schools discretionary authority to revoke a suspension ordered by a principal "at any time." SDCL §13-32-4 and §13-32-4.2 give school boards the duty and the authority to hear and rule on any student's appeal of a long-term suspension or expulsion.

The Court of Appeals abrogated and nullified the statutory powers of South Dakota school boards when it ruled that "even if the District had held a *Goss* hearing at which Doe persuaded the school board that a long-term suspension was not warranted, the board could not have ordered Doe's reinstatement at TCHS." [App. 10.] The Eighth Circuit ruled that even if the school board had held a hearing and found Jonathan's suspension was arbitrary or mistaken, "the school board could not remedy the deprivation." [App. 10.] According to the Eighth Circuit, when the IEP team determined that Jonathan

would receive instruction in the Alternative School during the suspension period, the IEP team's decision "gave the IEP team, rather than the District's school board, control of the situation." [App.12.]

That is plain error. Pursuant to §1415(k)(1)(C), when the IEP team determined that Jonathan's conduct was not a manifestation of his disability, "the relevant disciplinary procedures applicable to children without disabilities . . . ," including those set forth in state statutes, were then applicable to Jonathan. The IEP team's no-manifestation determination gave the school board "control of the situation" by giving them the power to exercise their lawful statutory authority to vacate an unlawful or arbitrary suspension.

Moreover, §1415(k)(1)(A) expressly gives school personnel authority to "consider any unique circumstances on a case-by-case basis when determining whether to order a change of placement for a child with a disability who violates a code of student conduct."

In ruling that if a child with a disability seeks to exercise due process rights under SDCL §13-32-4 and §13-32-4.2, the IDEA operates to strip school boards and school superintendents of their statutory authority, the Eighth Circuit again abrogated key provisions of the IDEA and engaged in "blatant federal-court nullification of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996).

V. The Injuries Claimed By The Petitioner In His §1983 Complaint Could Not Have Been Remedied By An I.D.E.A. Hearing Officer

Section 1415(l) of the IDEA requires an aggrieved party to exhaust all administrative remedies before bringing a §1983 civil action, if the plaintiff is "seeking relief that is also available" through IDEA administrative procedures.

The Eighth Circuit ruled that relief for the injuries of which Jonathan Doe complains in his §1983 complaint was available through the administrative procedures of Section 1415 of the IDEA and dismissed his complaint for failure to exhaust administrative remedies.

The question presented is whether adequate relief for the injuries claimed by Jonathan Doe in his §1983 complaint was available through IDEA administrative procedures.

The IDEA's exhaustion requirement is "not an inflexible rule . . . Rather, Congress specified that exhaustion is not necessary if (1) it would be futile to resort to the IDEA's administrative procedures . . . or (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies," citing H.R.Rep. No. 296, 99th Cong., 1st Sess. 7 (1985). *Murphy v. Arlington Cent. School District Board of Education*, 297 F.3d 195, 199 (2d Cir. 2002) (J. Sotomayor).

Here, resort to the IDEA's administrative remedies would have been futile and adequate relief could not have been obtained by pursuing such remedies.

A. Resort to administrative remedies for the injuries claimed by the petitioner would have been futile

To show futility, a plaintiff must demonstrate that adequate remedies are not reasonably available or that the wrongs alleged could not or would not have been corrected by resort to the administrative hearing process. *Coleman v. Newburgh Enlarged City School District*, 503 F.3d 198, 205 (2d Cir. 2007).

"Relief available" under IDEA administrative procedures means "relief for the events, condition, or consequences of which the person complains . . . " *Polera v. Board of Education of Newburgh Enlarged City School District*, 288 F.3d 478, 488 (2d Cir. 2002). A court's "primary concern in determining whether a plaintiff must use the IDEA's administrative procedures relates to the source and nature of the alleged injuries for which he or she seeks a remedy . . . " *Robb v. Bethel School District No. 403*, 308 F.3d 1047, 1050 (9th Cir. 2002).

In determining whether exhaustion of administrative remedies was required here, the first question to be decided is: what are the injuries that the petitioner claims in his §1983 complaint?

The Eighth Circuit's decision is based on a demonstrably false premise. The false premise is that the petitioner's claim is that he was denied due process "when his Individualized Education Program (IEP) team placed him in an alternative high school setting for thirty-eight days." [App. 2.] In fact, the petitioner's §1983 complaint makes no reference to an alternative school setting, to the IEP team, to the IDEA, or to the fact that he is a child with a disability.

Beginning from that false premise, the Court of Appeals went on to analyze the issues in the case as though the petitioner had complained that his IDEA rights had been violated. In fact, his civil complaint made no such claim. Contrary to the panel's conclusion that "Doe's procedural due process complaint was not primarily about being disciplined for misconduct," a fair and objective reading of his complaint would show that Doe's §1983 complaint was entirely about being disciplined for misconduct without formal due process and nothing else. [The petitioner's §1983 complaint is reprinted in the Appendix at App. 73-88.]

The injuries of which the petitioner complains in his civil action are constitutional injuries: school administrators deprived him of 14th Amendment property rights without due process. His complaint states that the respondents suspended him for violating the school code of conduct without providing him with fundamentally fair procedures to determine whether the misconduct had occurred – specifically, the procedures he was entitled to use under SDCL §13-32-4 and §13-32-4.2. His chief complaint is that he was denied his right to a school board hearing before his

suspension extended into the 11th day. The complaint claims that the respondents' refusal to give him a hearing caused him actual injury. [App. 86.][7]

Those injuries could not have been remedied by an IDEA hearing officer. The IDEA gives parents of children with disabilities the right to appeal to an IDEA hearing officer and then to a state or federal court against any FAPE decision they deem to be inappropriate. *Honig v. Doe*, 484 U.S. 305, 311-312 (1988). The IDEA does not give a hearing officer free-ranging authority to second-guess a principal's determination to suspend a student with a disability for violating the school's code of conduct. Nor does the IDEA give a hearing officer any authority to determine whether a disabled student's constitutional rights have been violated. The IDEA authorizes an administrative hearing officer to decide whether a disabled student has been denied FAPE. 20 U.S.C. §1415(E)(i) and (ii); 34 C.F.R. §300.513(a). An IDEA complaint that does not claim a denial of FAPE as a result of a substantive or procedural violation of the IDEA can and should be dismissed without a hearing for failure to state a claim for which relief

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[7] In a hearing, the petitioner would have been able to show that the indefinite long term suspension ordered by the assistant principal violated state law. SDCL §13-32-4.2 only authorizes a school principal to order a suspension of up to 10 days; only a superintendent of schools or a school board can order a suspension of more than 10 days; and no school administrator has the authority to suspend a student for an indefinite period of time.

can be provided through IDEA procedures. 34 C.F.R. §300.508(d)(2).

If every fact stated in the petitioner's §1983 complaint were assumed to be true, the complaint does not state a denial of FAPE or any violation of the IDEA. Since an IDEA administrative hearing officer is only authorized to remedy violations of a complainant's IDEA rights, resort to IDEA administrative remedies would have been futile.

The scope of an IDEA hearing officer's authority is the same as that of a court in a judicial appeal of a decision made by a hearing officer, as set forth in *Board of Education v. Rowley*, 458 U.S. 176 (1982). In *Rowley*, this Court stated that

> a court's inquiry . . . is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Rowley, at 206-207.

Jonathan Doe's §1983 complaint does not claim, either expressly or implicitly, that there was any violation of IDEA procedures or that his IEP was insufficient to confer educational benefit. Therefore, under *Rowley*, an IDEA hearing officer would have no authority to provide relief for the injuries claimed by the petitioner.

One Circuit Court of Appeals has addressed the question of whether an IDEA hearing officer had the authority to reduce the length of a disciplinary suspension of a disabled child whose misconduct was not a manifestation of the child's disability. In *District of Columbia v. Doe*, 611 F.3d 888 (C.A.D.C. 2010), an administrative hearing officer who reduced a school administrator's disciplinary suspension of a disabled student whose conduct was not a manifestation of his disability from 45 to 10 days would have exceeded his authority under the IDEA, but for the fact that a Washington D.C. municipal statute expressly authorized an IDEA hearing officer to reduce a disciplinary suspension.

No such statute exists in the laws of South Dakota.

Since the petitioner's complaint does not claim a denial of FAPE, the IDEA would not have authorized a hearing officer to provide any remedy for the constitutional injuries claimed by the petitioner in his §1983 complaint. Any attempt to seek a remedy for those injuries through IDEA administrative procedures would have been futile.

B. Adequate relief for the injury done to the petitioner was not available through I.D.E.A. administrative procedures

For the relief provided by IDEA administrative procedures to be adequate, such relief must be sufficient "to give realistic protection to the claimed right." *Murphy v. Arlington Cent. School District*

Board of Education, 297 F.3d 195, 199 (2d Cir. 2002) (J. Sotomayor).

Even if an IDEA hearing officer had any authority to attempt to fashion a remedy for the injuries claimed by the petitioner, IDEA hearing procedures could not have provided a remedy that would have given realistic protection to the petitioner's right to a formal pre-deprivation *Goss v. Lopez* hearing.

The claimed right at issue here is the right of a student to challenge a long-term suspension in a formal hearing *before* the proposed long-term suspension begins – under South Dakota statutes, before the student has been suspended for 11 days.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotes omitted). The Supreme Court has described the "root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest . . . " *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

Here, by the time that Dorothy was first informed that the respondents would not allow Jonathan to appeal his long-term suspension in a school board hearing, a long-term suspension had already occurred. When she received the assistant principal's letter of September 29 denying her request for a hearing, Jonathan had already been excluded from the Todd County High School for 20 calendar days. If Dorothy had filed an IDEA complaint on that same

day and an expedited hearing was ordered, Jonathan would have had to wait up to another 30 days before the hearing officer even rendered a decision. 20 U.S.C. §1415(k)(4)(B). During that time, he would still have been excluded from the high school. 20 U.S.C. §1415(k)(4)(A). If Dorothy had filed a complaint seeking an administrative remedy on September 29, Jonathan would have been excluded from the high school for up to 50 days before a hearing officer even rendered a decision as to whether he should be excluded from the school for more than 10 school days.

The Eighth Circuit's decision is based on a fundamental misunderstanding of the "stay put" provision of the IDEA, 20 U.S.C. §1415(j), which, "[e]xcept as provided in subsection (k)(4)," allows a disabled child to stay in "the then current educational placement" while an IDEA appeal is pending. The Eighth Circuit ruled that instead of requesting a school board hearing, Dorothy should have filed an IDEA complaint and invoked the stay put provision, which, in the Eighth Circuit's view, would have compelled the respondents to reinstate Jonathan in the high school pending a final resolution of the IDEA complaint. Invocation of the stay put provision was never an option for the petitioner and it has no application to this case because 20 U.S.C. §1415(k)(4)(A) makes the general stay put provision unavailable when a parent is challenging a disciplinary change of placement.

Section 1415(k)(4)(A) provides that when an administrative appeal challenging a proposed change of placement has been requested by either the parent

or the local educational agency, "the child shall remain in the interim alternative educational setting" unless the school and the parent agree otherwise. "[A]n aggrieved child does not have the right to return to the school from which he or she has been removed while the administrative and judicial review is underway." *Coleman v. Newburgh Enlarged City School District*, 503 F.3d 198, 205 (2d Cir. 2007).

Pursuant to §1415(k)(4)(A), if Jonathan had sought to challenge his long-term suspension by seeking an administrative hearing under the IDEA, he would have been excluded from the high school until his IDEA complaint was finally decided, by which time he would have been excluded from the High School for up to 50 days.

The Supreme Court has "consistently held that some form of hearing is required before an individual is finally deprived of a property interest." *Mathews v. Eldridge*, 424 U.S. at 333, citing *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

For the petitioner, IDEA administrative procedures would have been inadequate to give realistic protection to the claimed rights at issue here because IDEA procedures could not have provided Jonathan with one of the fundamental requirements of constitutional due process: a hearing that *preceded* the deprivation of the 14th Amendment property interest. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 313 (1950); *Boddie v. Connecticut*,

401 U.S. 371, 379 (1971); *Waln v. Todd County School District*, 388 F.Supp.2d 994, 1004 (D.S.D. 2005).

VI. The Eighth Circuit's Decision Deprives An Entire Class Of School Children Of Equal Protection And Due Process Of Law

Equal protection of the law prohibits states from treating children with disabilities differently unless the state's actions are rationally related to some legitimate government purpose. *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 366-68 (2001).

If the State of South Dakota had enacted a statute that said all public school children in the state, except children with disabilities, have formal due process rights to appeal a long-term suspension or expulsion, there can be little doubt that such a law would be struck down as unconstitutional. Here, the Eighth Circuit has accomplished that same unconstitutional result by judicial interpretation of a federal statute.

This decision by the Eighth Circuit deprives school children with disabilities of any meaningful opportunity to challenge a long-term disciplinary suspension or expulsion in a formal pre-deprivation hearing.

Furthermore, if this decision is allowed to stand, parents who disagree with a school administrator's

decision to suspend a disabled child for misconduct will have no option but to attempt to contest disciplinary decisions by school administrators in a full blown quasi-judicial administrative hearing before an IDEA hearing officer, despite the hearing officer's lack of authority to resolve such questions. If a hearing officer were to rule on the merits of such a complaint, since the IDEA gives parents and schools the right to bring a civil action to appeal any adverse decision by an IDEA hearing officer, parents and school personnel who are not satisfied with the decision of the IDEA hearing officer will then have the right to present questions of whether a student violated a school disciplinary rule and whether school administrators imposed an appropriate punishment to a federal district court to decide.

That is not a result that Congress could have foreseen or intended when it enacted the IDEA.

The issues raised in this case are recurring issues of vital importance that are potentially present whenever school personnel suspend or expel a student with a disability for serious disciplinary misconduct. Therefore, it is vital that the Supreme Court grant the writ and decide whether the IDEA operates to bar children with disabilities from exercising constitutional and state-created statutory rights to appeal long-term disciplinary suspensions and expulsions from state public schools.

CONCLUSION

For the foregoing reasons the Court should grant the writ of certiorari and reverse the decision of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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