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

MOTION FOR LEAVE TO FILE AND BRIEF OF SOUTH DAKOTA ADVOCACY SERVICES, NATIONAL JUVENILE DEFENDER CENTER, AND TOOK CROWELL INSTITUTE FOR AT-RISK YOUTH AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF *AMICI CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

Amici Curiae, South Dakota Advocacy Services, Inc. (accepted as *Amicus Curiae* in this case by the Eighth Circuit Court of Appeals), National Juvenile Defender Center, and Took Crowell Institute for At-Risk Youth, University of the District of Columbia David A. Clarke School of Law, respectfully move for leave of Court to file the accompanying brief under Supreme Court Rule 37.2(b). Counsel for Petitioner has consented to the filing of this brief and written consent has been filed with the Clerk of the Court; counsel for Respondents have withheld consent.

STATEMENT OF INTEREST OF *AMICI CURIAE*

South Dakota Advocacy Services (SDAS) is designated as South Dakota's protection and advocacy system. It provides legal representation and related advocacy services on behalf of persons with disabilities in South Dakota. Counsel of Record for *Amici Curiae* has practiced law in the area of special education for over twenty-five years, during which time he has personally represented the vast majority of parents of children with disabilities in South Dakota who have utilized their procedural safeguards under Individuals with Disabilities Education Improvement Act of 2004 ("IDEA") at the due process hearing and court levels.

The National Juvenile Defender Center (NJDC) is dedicated to ensuring quality representation for all

children. NJDC provides support and training in various areas, including special education and disability rights law with relevance to the juvenile justice system for public defenders, appointed counsel, child advocates, law school clinical programs, and nonprofit law centers.

The Took Crowell Institute for At-Risk Youth of the University of the District of Columbia David A. Clarke School of Law represents children and parents (or guardians) primarily in special education and school disciplinary matters. The Institute undertakes systemic reform work on behalf of at-risk youth, including pioneering and developing a nationally-acclaimed approach to address the problems of delinquency by supplementing traditional delinquency representation with, where appropriate, advocacy to address the special education needs of the children who are the subject of those delinquency proceedings.

The Eighth Circuit Court of Appeals' decision adversely affects the interests of the children that *Amici* serve by allowing school districts to unilaterally exclude students with disabilities from school without Due Process of the law in violation of established Supreme Court precedent and the IDEA. Of the utmost relevance to this Court is that in so doing, the Eighth Circuit Court of Appeals had decided an important federal question in a way that conflicts with relevant decisions of this Court. In urging this Court to grant Jonathan Doe's petition, *Amici's* brief specifically describes those cases and details how the Eighth Circuit's decision contradicts this Court's rulings. *Amici* also provide the Court a detailed analysis

of how the decision misinterprets IDEA's discipline procedures and how it will negatively impact children with disabilities. The decision will have wide-spread and harmful consequences to children with disabilities facing long-term suspension for alleged violations of a school district's code of student conduct. *Amici* ask for leave to file this brief to assist this Court when reviewing why Jonathan's petition should be granted.

For these reasons, *Amici* respectfully requests that the Court grant leave to file this brief.

June 17, 2011

Respectfully submitted,

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INTERESTS OF *AMICI CURIAE*[1]

South Dakota Advocacy Services, Inc., accepted as *Amicus Curiae* in this case by the Eighth Circuit Court of Appeals, is joined by the National Juvenile Defender Center and the Took Crowell Institute for At-Risk Youth of the University of the District of Columbia David A. Clarke School of Law, respectfully submits this brief in support of the Petitioner, Jonathan Doe. *Amici* fully agree with the arguments made by Petitioner that this case involves an important question of federal law that conflicts with relevant decisions of this Court. The Eighth Circuit Court of Appeals' decision adversely affects the interests of the children that *Amici* serve by allowing school districts to unilaterally exclude students with disabilities from school without Due Process of law in violation of established Supreme Court precedent and the Individuals with Disabilities Education Improvement Act of 2004 (IDEA). Specifically, the Eighth Circuit Court of Appeals' decision contradicts precedent this Court established in *Goss v. Lopez*, 419 U.S. 565 (1975) and

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, no counsel for a party authored this brief in whole or in part and no counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than *Amici Curiae* made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel of record received timely notice of the intent of *Amici* to file this brief at least 10 days prior to the due date. Counsel for Petitioner consented to the filing of this brief. All counsel for Respondents withheld consent. These documents have been filed with the Clerk of Court.

Honig v. Doe, 484 U.S. 305 (1988), and contains numerous errors and misapplications of law in violation of Constitutionally guaranteed Due Process rights and the Individuals with Disabilities Education Improvement Act of 2004 (IDEA). This is a decision that demands to be reviewed and corrected in order to protect the Due Process rights of students with disabilities facing unilateral exclusion from school.

IDENTITY OF *AMICI CURIAE*

See Appendix A for a list and brief description of all *Amici.*

SUMMARY OF ARGUMENT

The Supreme Court should grant certiorari in this case because the Eighth Circuit's decision significantly misinterprets key provisions of the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 U.S.C. § 1400 *et seq.* (2004), and conflicts with this Court's precedent in *Goss v. Lopez*, 419 U.S. 565 (1975) and *Honig v. Doe*, 484 U.S. 305 (1988). If left uncorrected, the Eighth Circuit's decision nullifies Due Process and IDEA protections afforded to students with disabilities. The decision allows school districts to circumvent the Court's holdings in *Goss* and *Honig*, as well as the IDEA, by unilaterally

excluding students with disabilities from school without Due Process of law.

Amici Curiae agrees with Petitioner, Jonathan Doe, that this case involves questions of exceptional importance. The Court should find that the Eighth Circuit's opinion has "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c). The opinion conflicts with Supreme Court jurisprudence about school discipline and with the plain language of the IDEA. Moreover, this case presents an opportunity for this Court to clarify that all students, regardless of disability status, have a right to Due Process of law before being excluded from school. *See* U.S. CONST. amend. XIV.

The Eighth Circuit erred when it found that Jonathan's exclusion from school for thirty-eight days was not a suspension invoking Due Process rights. The Eighth Circuit also erred in ruling an IEP Team has the authority to stop a long-term suspension when the child's behavior is not a manifestation of his disability. These and other errors of law and overlooked facts demand that Doe's petition for certiorari be granted to rectify the wrongs that will occur to students with disabilities facing suspensions or expulsions should the Eighth Circuit's erroneous decision be permitted to stand.

ARGUMENT

I. THE EIGHTH CIRCUIT COURT OF APPEALS' DECISION CONTRADICTS UNITED STATES SUPREME COURT DECISIONS, DISTORTS IDEA'S PROCEDURAL SAFEGUARDS, AND REVOKES LEGAL PROTECTIONS FOR STUDENTS WITH DISABILITIES

The Supreme Court grants a writ of certiorari when "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. Rule 10(c). This case, in addition to conflicting with this Court's established jurisprudence on school discipline, presents an important federal question because excessive and harsh suspension and expulsion without Due Process of law unconstitutionally deprives students of their liberty and property interests in education.

Millions of students throughout the country are routinely facing excessive, overly punitive suspensions and expulsions from school. According to the most recent data from the United States Department of Education's Office of Civil Rights, each year over three million students are suspended and over 100,000 students are expelled. Matt Cregor and Damon Hewitt, *Dismantling the School-to-Prison Pipeline: A Survey from the Field*, 20:1 Poverty & Race Jan./Feb. 2011 at 5. This is nearly double the

rate of school suspension and expulsion in the 1970s, when this Court first held that students have the right to Due Process before being excluded from school. *Id.*; *see Goss*, 419 U.S. at 584. Discipline is also increasingly handled by law enforcement, and students are more likely to be arrested for minor in-school offenses. *See* Federal Advisory Committee on Juvenile Justice, *2010 Annual Report* at 9 (2010), *available at* http://www.facjj.org/annualreports/00-FACJJ%20Annual%20Report-FINAL%20508.pdf.

Despite clear law and Court precedent to the contrary, school administrators across the country continue to exclude children with education-related disabilities at alarmingly high rates. *See* Ronald K. Lospennato, *Multifaceted Strategies to Stop the School-to-Prison Pipeline*, 42 CLEARINGHOUSE REV. 528, 539 (2009) ("Despite Supreme Court decisions, legislative mandates, and widespread recognition of the pivotal role that education plays in our society, the denial of appropriate education to children because of their race or disability persists. When race and disability intersect, the extent of exclusion is profound"); Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate and Serve Youth with Education Related Disabilities Lead to Their Disproportionate Representation in the Delinquency System*, 3 Whittier J. Child & Fam. Advoc. 3, 28 (2003) (rather than developing and implementing behavior intervention plans, as required under the special education law, school personnel often have students arrested and referred to juvenile court). *See*

also Patrick Pauken & Philip T.K. Daniel, *Race Discrimination and Disability Discrimination in School Discipline: A Legal and Statistical Analysis*, 139 Educ. L. Rep. 759 (2000).

Also alarming, students with disabilities and students of color are overrepresented in both school exclusion rates and juvenile incarceration. *See* Michael P. Krezmien, *et al*., *Suspension, Race, and Disability: Analysis of Statewide Practices and Reporting*, 14 J. EMOTIONAL & BEHAV. DISORDERS 217, 221-22 (2006); *see also* Robert B. Rutherford, *et al.*, *Youth with Disabilities in the Correctional System: Prevalence Rates and Identification Issues*, Center for Effective Collaboration and Practice (July 2002) (finding that youth with disabilities are disproportionately represented in the criminal justice system). In 2006-2007, Black, Latino, and Native American students were much more likely to be expelled than their White peers. *See* Advancement Project, *Test, Punish, and Push Out: How Zero-Tolerance and High Stakes Testing Funnel Youth into the School-to-Prison Pipeline* at 20-24 (March 2010).

In this Court's decision in *Goss v. Lopez* in 1975, the Court recognized that removing students from school for disciplinary reasons was significantly harmful. The Court stated that "education is perhaps the most important function of state and local governments . . . and the total exclusion from the educational process . . . is a serious event in the life of the suspended child." *Goss*, 419 U.S. at 576. In 2011,

research from the legal and psychology fields demonstrates how harmful school exclusion can be. *See generally* Advancement Project, *supra*. The American Psychological Association (APA) Zero Tolerance Task Force, after evaluating school disciplinary policies for ten years, found that zero-tolerance policies do not improve school safety, that suspensions and expulsions are associated with a higher risk of school dropout, and that the use of school suspensions and expulsions is associated with lower school-wide academic achievement. *See* American Psychological Association Zero Tolerance Task Force, *Are Zero Tolerance Policies Effective in the Schools?: An Evidentiary Review and Recommendations*, American Psychologist, Dec. 2008, at 852, 852-56. Suspended and expelled students are more likely to become involved with the juvenile or adult criminal systems. *See id.*

The APA also found that suspension, expulsion, and zero-tolerance policies were particularly inappropriate given adolescent development and recent advances in brain science. *Id.* Recognizing similar scientific evidence about adolescent development that the Court relied on in *Roper v. Simmons*, 543 U.S. 551 (2005) and *Graham v. Florida*, 130 S. Ct. 2011 (2010), the APA found that, used inappropriately, zero-tolerance can exacerbate adolescent challenges. *See* American Psychological Association Zero Tolerance Task Force at 855. *See also Graham*, 130 S. Ct. at 2026 ("As compared to adults, juveniles have a lack of maturity and an underdeveloped sense of

responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed") (internal quotations and citations omitted).

This case presents an opportunity for the Court to correct the illegal and unconstitutional actions sanctioned by the Eighth Circuit wherein school districts can unilaterally deprive students with disabilities of their property and liberty interests in their education, in violation of their Due Process rights. The sheer number of students suspended throughout the country, along with the disproportionate effect on students of color and students with disabilities, and the documented harmful effects of school exclusion, necessitates a Supreme Court ruling that guarantees students' Due Process rights.

In the case below, the District Court ruled that Todd County School District's ("Todd County") removal of Jonathan from his special education placement for thirty-eight school days constituted a long-term suspension, referred to as a "change of placement" under IDEA. 34 C.F.R. § 300.536(a) (2006). The District Court ruled that in doing so, Todd County failed to provide Jonathan with the statutorily and constitutionally-protected hearing he requested and was entitled to before the school board to contest the alleged violations of the code of student conduct.

The Eighth Circuit reversed, significantly misapplying several provisions of the IDEA to justify its ruling that Jonathan's long-term suspension was a

non-disciplinary change in placement. The Petitioner's brief emphasizes how the Eighth Circuit's decision strips children with disabilities who allegedly violate a code of student conduct, whose behavior is not a manifestation of their disability, and who are removed from their current educational placement for over ten consecutive school days, of the right to contest the underlying charges through a hearing before the local school board. Petitioner also emphasizes how the Eighth Circuit's ruling results in a deprivation of property and liberty interests violating the Due Process Clause. *Amici Curiae* strongly support Jonathan's Petition for a Writ of Certiorari, as not only did the Eighth Circuit rule, in conflict with Supreme Court decisions, that children with disabilities who are removed from their educational placement for over ten consecutive school days are not entitled to the Due Process afforded to regular education students, but it also distorted several provisions of IDEA.

A. The Eighth Circuit's Decision Ignores Supreme Court Precedent in *Honig v. Doe* and *Goss v. Lopez* and Denies Students Facing Disciplinary Removals Due Process of Law

The Eighth Circuit's decision raises an important federal question in a way that conflicts with relevant decisions of this Court and the Court should grant certiorari to address that error. *See* Sup. Ct. Rule 10(c). In *Goss v. Lopez*, the Court ruled that the Due

Process Clause prohibits school districts from suspending students for a violation of the code of student conduct without the opportunity for "fundamentally fair procedures to determine whether the misconduct has occurred." 419 U.S. at 574. The Court further ruled that suspensions trigger the protections of the Due Process Clause due to a sufficient deprivation of property and liberty interests. *Id*. at 574-76. For suspensions over ten consecutive school days, more formal process is due. *Id.* at 584. The fundamental ruling in *Goss* is that *all students* are entitled to Due Process *before* they may be excluded from school.

Subsequently, in *Honig v. Doe*, this Court ruled on students with disabilities' rights when facing a long-term suspension from school. 484 U.S. 305 (1988). In *Honig*, the school system asked the Court for the authority to unilaterally remove students with disabilities it considered dangerous or disruptive despite the plain statutory language that gave students the right to "stay put" in their current educational placement during the pendency of review proceedings. *Id.* at 308. The Court refused, citing in particular the Congressional intent in passing the Education of the Handicapped Act[2] ("EHA") in 1975:

[2] At the time of the *Honig* decision, the special education law was called the Education of the Handicapped Act, or EHA. The 1990 amendments changed the name to the Individuals with Disabilities Education Act (IDEA).

> Congress sought to 'assure that all handicapped children have available to them . . . a free appropriate public education. . . . [C]ongressional studies revealed that better than half of the Nation's 8 million disabled children were not receiving appropriate educational services. . . . Among the most poorly served were emotionally disturbed children.

Id. at 309. The Court described the EHA's "various procedural 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." *Id*. at 311-12.

The Court rejected "petitioner's invitation to rewrite the statute." *Id*. at 323. The Court instead found that it was "clear . . . that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students . . . from school." *Id*. (emphasis in original). The Court explained that Congress did not leave school districts without the authority to discipline students with disabilities or to ensure school safety, as they could still use their standard procedures for disciplining students, including detentions, timeouts, and restricted privileges. *Id*. at 325. In addition, under Department of Education policy, schools could suspend students with disabilities for up to ten school days before it becomes a prohibited "change in placement." *Id*. The Court in *Honig*, consistent with its ruling in *Goss v. Lopez*, prevented school administrators

from unilaterally excluding students from school for more than ten consecutive school days. *See id*. at n. 8. *See also Goss*, 419 U.S. at 584.

The Eighth Circuit's ruling, which permits school districts to remove children with disabilities for over ten consecutive school days without the right to Due Process, directly conflicts with the Court's rulings in *Goss* and *Honig*. The Eighth Circuit ruled that a removal from the child's then-current special education placement for disciplinary purposes to an interim alternative educational setting for thirty-eight school days was not a long-term suspension because Todd County instead referred to it as a "change of placement."[3] *Doe ex rel. Doe v. Todd County School Dist*., 625 F.3d 459, 464 (8th Cir. 2010).

This ruling has disastrous implications, as it opens the door to allow school districts to circumvent *Goss* and *Honig* by excluding children with disabilities for disciplinary purposes without affording them a hearing by calling the exclusion a "change of placement." Under the Eighth Circuit's ruling, the student can be removed from his or her educational placement indefinitely without ever having the opportunity for a hearing prior to the long-term exclusion to

[3] A long-term suspension (over ten consecutive school days) and a "change of placement" (over ten consecutive school days) for disciplinary purposes are one and the same. *See* 34 C.F.R. § 300.536(a). The Eighth Circuit, however, ruled a long-term suspension ends when a change of placement occurs. *Doe*, 625 F.3d at 464.

contest the alleged violation of the code of student conduct. This result is untenable under the Court's precedent established in *Goss* and *Honig* and this Court should grant the petition for certiorari.

II. THE EIGHTH CIRCUIT COURT OF APPEALS' DECISION DISTORTS SEVERAL PROVISIONS OF IDEA'S PROCEDURAL SAFEGUARDS, AND OPENS THE DOOR FOR SCHOOL DISTRICTS TO UNILATERALLY EXCLUDE STUDENTS WITH DISABILITIES

In its 1997 amendments to IDEA, with further revisions in 2004, Congress codified the principles set out by the Court in *Honig* and *Goss* in crafting discipline procedures for children with disabilities. The Eighth Circuit's decision disregards Congress' plain language, misinterpreting those procedures to allow school districts to remove children with disabilities from their educational placement for an indefinite period of time without ever having the opportunity to contest the charges against them.

A. IDEA's Discipline Procedures are Intended to Protect Students with Disabilities from Unilateral School Exclusion

A triggering event for additional rights in special education discipline matters is a "change of placement." A "change of placement" occurs if a child with a disability is removed from the child's current

Individualized Education Program (IEP) placement for more than ten consecutive school days. 34 C.F.R. § 300.536(a). Whenever a change of placement is to occur, IDEA requires the IEP Team to conduct a "manifestation determination" within ten school days of the decision to suspend. 20 U.S.C. § 1415(k)(1)(E).[4] If the IEP Team determines the behavior in question was a manifestation of the child's disability, the disciplinary process stops and the child must return to the placement from which the child was removed, consistent with the requirements of 20 U.S.C.

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[4] "(i) In general[.] Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine –

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

(ii) Manifestation[.] If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

§ 1415(k)(1)(F).[5] This is the only circumstance set out in IDEA where the IEP Team determination stops the long-term suspension process, the child is returned to the setting from which he was removed, and the suspension is dismissed.

When the IEP Team determines that the behavior was not a manifestation of the child's disability, and the suspension exceeds ten school days, which is what happened in the instant case:

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[5] IDEA sets out a separate procedure for "special circumstances," which essentially provides an exception to the "manifestation determination" outcomes.

> School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child – (i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency; (ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or (iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

20 U.S.C. § 1415(k)(1)(G); *see also* 34 C.F.R. § 300.530(g). In these circumstances, IDEA allows a district to remove a child with a disability to an interim alternative educational setting, even if the behavior in question was a manifestation of the child's disability. This exception did not apply because the pocket knife Jonathan possessed did not qualify as a "dangerous weapon."

> *[T]he 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*, except as provided in section 1412 (a)(1) of this title although it may be provided in an interim alternative educational setting.

20 U.S.C. § 1415(k)(1)(C) (emphasis added). The Eighth Circuit failed to follow this key step. The disciplinary procedures the Eighth Circuit overlooked in this case include the right to notice and the opportunity to be heard.

IDEA also requires that if the student is suspended after having had the opportunity to defend against the allegations in a hearing, the district must continue to provide educational services *during the long-term suspension*. 20 U.S.C. § 1415(k)(1)(D).[6] The IEP Team must determine the educational setting for the services the suspended student will receive. 20 U.S.C. § 1415(k)(2). In these sections, Congress

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[6] "A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall –

(i) continue to receive educational services, as provided in section 1412(a)(1) of this title, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. . . ."

ensured that even if students with disabilities are excluded from their current educational placement, they have access to services under the IDEA until their suspensions end.

IDEA, therefore, contemplates that when a student with disabilities is to be suspended from school for more than ten consecutive school days, he or she receives procedural protections to prevent the school from unilaterally removing students with disabilities. *See generally Honig*, 484 U.S. 305. These protections are in addition to, and not in place of, the Due Process protections all students have when facing suspension or exclusion from school.

B. The Eighth Circuit's Decision Violates the Plain Language of IDEA's Discipline Process

The Eighth Circuit ignored the plain language of the IDEA set out above, and in the instant case erroneously concluded that Jonathan's removal from school was not a suspension. This analysis violates the plain language of IDEA's disciplinary protections. The evidence on the record demonstrates Jonathan's removal for thirty-eight school days was purely a punitive disciplinary action, and thus subject to the IDEA requirements and the Court's rulings under *Goss* and *Honig*.[7]

[7] The school proposed that Doe be suspended for an indefinite amount of time – "until a hearing with the School Board can

(Continued on following page)

More specifically, under IDEA, since Jonathan's behavior *was not a manifestation* of his disability, he was subject to the same "regular" disciplinary process as any other student, with the proviso that once suspended for more than ten consecutive school days, the District must provide him with educational services in a different setting, which the IEP Team determines, through the duration of the suspension. *See* 20 U.S.C. § 1415(k)(1)(C), (D), and (k)(2).

The Eighth Circuit first agreed with this analysis, stating that children with disabilities who allegedly violate student codes of conduct maintain their Due Process protections under *Goss* and South Dakota rules. *Doe*, 625 F.3d at 463. However, the Eighth Circuit then created and followed an extra-statutory analysis and created an "alternative" to the procedures in IDEA.[8] The Eighth Circuit stated, "Alternatively, the IEP team could act more affirmatively, as Doe's

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be arranged." Brief for the Petitioner, at Appendix 55. The IEP document contains no language stating the IEP Team ended Doe's suspension. To the contrary, it clearly states a suspension has occurred and Jonathan would be removed to the alternative school beginning September 19 for the length of his suspension. On page two of the IEP Addendum, the district wrote: "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*." Brief for the Petitioner, at Appendix 67 (emphasis added).

[8] "After the IEP team determined on September 13 that Doe's misconduct was not a manifestation of his disability, the IDEA gave the team two significantly different procedural alternatives for dealing with the situation." *Doe*, 625 F.3d at 463.

did in this case, by changing the disabled child's placement from the school which suspended him to an alternative educational setting." *Id*. at 464. The Eighth Circuit went on to declare that after the IEP team changed the placement, the suspension ended and school board had no authority to rule on the suspension. *Id.* The Eighth Circuit failed to cite to any provision of IDEA that supports its allowing the IEP Team to become the decision-maker and stop the suspension process. In fact, the Eighth Circuit could not have done so, as no such provision exists.

Specifically, as its supposed authority for an IEP Team to stop a long-term suspension by changing a student's placement, the Eighth Circuit erroneously cited 34 C.F.R. § 300.530(d)(5), 20 U.S.C. § 1415(k)(2), and 34 C.F.R. § 300.531. *These sections apply only when students with disabilities are subject to disciplinary action*. Section 300.530(d)(5) states: "If the removal is a change of placement under Sec. 300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section." The "change of placement" referred to in § 300.536 is when a *disciplinary change of placement* occurs and the student is removed for more than 10 consecutive school days (the same as this Court articulated in *Honig*) or when a series of removals totaling over 10 school days are determined to be a disciplinary change of placement. 34 C.F.R. § 300.536(a); *see Honig*, 484 U.S. at 326 n. 8. Under section 300.531 and 20 U.S.C. § 1415(k)(2), the child's IEP Team determines the interim alternative educational setting for services

when the child is subject to a long-term suspension. The Eighth Circuit erroneously held that these regulations, which apply only *when there* ***is*** *a long-term suspension/disciplinary change of placement*, somehow also provide the IEP Team with authority to stop the long-term suspension process, and remove the student indefinitely to an alternative placement. To the contrary, determination of an interim alternative educational setting does not end the long-term suspension. It is merely the designated *location* wherein the district carries out the student's long-term suspension. 20 U.S.C. § 1415(k)(1)(D); 34 C.F.R. § 300.530(d)(1).

The Eighth Circuit misapplied the IDEA's procedures that are supposed to protect children with disabilities from unfair and harmful long-term suspension by creating a new process wherein the IEP Teams may exclude a student from his or her IEP placement. The decision allows districts to effectively carry out a suspension by removing students to an interim alternative educational setting by labeling the removal a change of placement instead of a suspension, thereby eliminating students with disabilities' Constitutional right to challenge the underlying offense at a school board hearing.

C. The Eighth Circuit's Erroneous Analysis Allows School Districts to Circumvent Both the General Due Process Requirements and the Discipline Procedures Set Out in IDEA

Under the Eighth Circuit's decision, students with disabilities are stripped of the right to ever challenge the allegations that they violated the student code of conduct. The decision allows school districts to exclude children with disabilities for an indefinite time period without the opportunity to challenge the charges against the student, in direct contradiction of this Court's holdings in *Goss* and *Honig*. If the Eighth Circuit's decision is allowed to stand, students with disabilities will face serious and pervasive exclusion from school. The decision will allow school districts to unilaterally exclude students without ever needing to show in a hearing that they actually violated a student code of conduct, and without ever allowing students to present a defense.

Under the plain language of IDEA and this Court's prior decisions, if a student with disabilities is facing disciplinary action, various steps should take place. First, an allegation is made that a student with a disability has violated the code of student conduct warranting a long-term suspension. Next, after receiving notice, the parent requests a hearing to challenge whether the student committed the offense. A manifestation determination must be made by the IEP Team. If the IEP Team determines the behavior was not a manifestation of the child's disability, the

IEP Team determines the interim alternative educational setting **if** the school district upholds the suspension. 20 U.S.C. § 1415(k)(1)(C), (k)(2). Following this, the student is entitled to a hearing *before* the suspension extends beyond ten consecutive school days. If the student is found to have committed the violation, the student is suspended and continues to receive special education services, now in the interim alternative education setting. 20 U.S.C. § 1415(k)(1)(D). If the allegations are not substantiated, the student returns to his or her current IEP placement.

Under the Eighth Circuit's erroneous ruling in the instant case, there is an unquestionable danger that school districts will follow the decision rather than IDEA's statutory language and the law will be misapplied to deny Due Process rights to students with disabilities. The decision permits schools to disregard the appropriate steps and procedures as outlined above. Instead, the decision opens the door for the following: First, an allegation is made that a student with a disability has violated the code of student conduct warranting a long-term suspension. Next, after receiving notice, the parent requests a hearing to challenge whether the student committed the offense. The IEP team makes a manifestation determination. If the IEP Team determines the behavior was not a manifestation of the child's disability, the IEP Team determines the interim alternative educational setting if the school board upholds the suspension. At this point, instead of following IDEA's statutory process, the district follows the

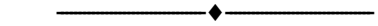
Eighth Circuit's erroneously created second option. It "act[s] more affirmatively" and informs the parent that the student is not entitled to a hearing to contest the alleged violation of the code of student conduct because the IEP Team ended the suspension when placing the student in the interim alternative educational setting. The district parrots the Eighth Circuit, stating the removal became a "change of placement" instead of a long-term suspension. *See Doe*, 625 F.3d at 464. As a result, the student is removed from his or her educational placement and placed in an alternative setting, where the student likely receives subquality education for only a few hours per week.[9] While the suspension supposedly ended, the student is not permitted to return to his original IEP placement. This is particularly problematic where a student is innocent of the underlying charges and would have easily proven his innocence if afforded the opportunity for a school board hearing.

With the Eighth Circuit's creation of this new "second option," districts can bypass having to demonstrate at a hearing that a student with a disability committed the violation of the code of student conduct. The inherent danger is that districts may now remove any child with a disability where the alleged violation of the code of student conduct is found not to be a manifestation of the child's disability, as the

[9] This, in fact, is exactly what happened in Jonathan Doe's case. Brief for the Petitioner, at Appendix 15.

issue of the student's "guilt" or "innocence" of the alleged infraction no longer comes into play in this analysis. Districts can use the Eighth Circuit's ruling to remove children with disabilities to an alternative setting for an indefinite length of time based on any fabricated or trumped-up charges (so long as the district can argue the fabricated behavior was not a manifestation of the child's disability). The danger that school districts will use the Eighth Circuit's decision to remove children with disabilities without affording Due Process of law is real. The history this Court discussed in *Honig* and the information provided by *Amici Curiae* in I., *supra*, demonstrates that they will.

In the case at bar, Todd County's actions denied Jonathan the opportunity to assert his Constitutional right to Due Process and defend the underlying alleged conduct. Upholding Todd County's position would give districts throughout the Eighth Circuit *carte blanche* to not only deny students with disabilities facing long-term suspensions their Constitutional Due Process rights, but also to ignore IDEA's discipline procedures and South Dakota's statutory and administrative discipline procedures.



CONCLUSION

Amici Curiae urges that the Court grant Jonathan Doe's Petition for a Writ of Certiorari. The Eighth Circuit's decision turns *Goss*, *Honig*, and

IDEA on their head by creating and allowing what this Court and Congress attempted to prevent – the unilateral exclusion of children with disabilities for more than ten consecutive school days without Due Process. It makes meaningless this Court's and Congress' determination that a "change of placement" means a removal for a violation of the code of student conduct in excess of ten consecutive school days. The Court should grant Jonathan Doe's Petition for a Writ of Certiorari and rule that school districts do not have the authority to unilaterally exclude students with disabilities from school without Due Process.

Respectfully submitted,

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APPENDIX A

Doe v. Todd County School District

IDENTITY OF *AMICI CURIAE*

South Dakota Advocacy Services (SDAS) is an independent non-profit agency designated as South Dakota's protection and advocacy (P&A) system. SDAS is authorized under various federal statutes to provide legal representation and related advocacy services on behalf of persons with all types of disabilities in a variety of settings in South Dakota. Nationally, the P&A system comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. P&A lawyers often represent or assist parents of children with disabilities in the impartial due process hearings and appellate proceedings authorized under the Individuals with Disabilities Education Improvement Act (IDEA).

Counsel of Record for *Amici Curiae* has practiced law in the area of special education for over twenty-five years, during which time he has personally represented the vast majority of parents of children with disabilities in South Dakota who have utilized their procedural safeguards under IDEA at the due process hearing and court levels. Counsel is periodically invited to lecture at university level classes on special education topics. Counsel is the lead author of "*What Parents Should Know* . . . About Special Education in South Dakota," a 240-page book published in 2007 that has been distributed to over 19,000 parents and professionals throughout South Dakota.

The **National Juvenile Defender Center** (NJDC) was created to ensure excellence in juvenile defense and promote justice for all children. NJDC responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. NJDC gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. NJDC provides support to public defenders, appointed counsel, child advocates, law school clinical programs, and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural, and tribal areas. NJDC also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building, and coordination.

In 2009, NJDC released the second edition of the John D. and Catherine T. MacArthur Foundation's Juvenile Court Training Curriculum, which provides in-depth training materials on the most up-to-date adolescent development research and its application to juvenile court practice. Module 3 of the curriculum, *Special Education and Disability Rights*, provides an overview of education-related disabilities, the laws pertaining to special education and disability rights, and the relevance of special education and disability rights for juvenile courts. In particular, the module

covers the major provisions of the Individuals with Disabilities Education Improvement Act, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973. The applicability of each of these statutes to juvenile court processing and advocacy is explained. In addition, the module includes discussion of school discipline practices and policies that impact the court involvement of youth with disabilities, with a particular focus on the IDEA school discipline protections.

The **Took Crowell Institute for At-Risk Youth of the University of the District of Columbia David A. Clarke School of Law** was founded in 2010 in connection with the long-standing U.D.C. Juvenile and Special Education Law Clinic and is an innovative legal clinic and advocacy program designed to help at-risk youth become educated and productive members of society. The Took Crowell Institute meets a critical need in the District to intervene for children who, because of a school disciplinary problem or administrative issue, are at a higher risk for dropping out of school or being incarcerated – becoming part of the school-to-prison pipeline. Every semester, faculty and students in the clinic represent parents, guardians, and students with respect to their education rights. Representation includes advocating on behalf of students facing suspension or expulsion from school, advocating for students to receive a free appropriate public education under special education law, and advocating for the educational interests of youth in the delinquency

system. The Took Crowell Institute enhances the ability of the clinic to take on systemic reform work on behalf of at-risk youth in the District of Columbia and nationwide.

Over the past twenty-one years, clinic faculty pioneered and developed a nationally-acclaimed approach to addressing the problems of delinquency by supplementing traditional delinquency representation with, where appropriate, advocacy to address the special education needs of the children who are the subject of those delinquency proceedings. With the support of the Annie E. Casey Foundation, faculty and students developed a 200-page manual outlining how special education advocacy can be applied nationwide and distributed it to juvenile defenders in every state. The Clinic conducted bi-annual training sessions between 1991 and 1996 for District of Columbia attorneys and advocates regarding special education law and practice. In addition, clinic faculty provided a short training regarding the applicability of special education law and remedies to delinquency and neglect cases for the local judges; and clinic faculty regularly provide similar training sessions around the country.