No. _____

In The
Supreme Court of the United States

W.A. AND M.S., INDIVIDUALLY AND ON BEHALF OF W.E.,

Petitioners,

v.

HENDRICK HUDSON CENTRAL SCHOOL DISTRICT,

Respondent.

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

PETITION FOR A *WRIT OF CERTIORARI*

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QUESTIONS PRESENTED

1. When a school district defaults on its obligations to provide a student with a disability a free appropriate public education (FAPE) as guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*. (the IDEA), what is the standard to determine whether a parent's private placement is proper under the Act?

2. What is the level of deference that a district court must provide to the state proceeding on the issue of whether a private school is appropriate?

RELATED CASES

W.A. v. Hendrick Hudson Cent. Sch. Dist., No. 14-CV-3067 (KMK), 2017 WL 3066888 (S.D.N.Y. July 18, 2017)

W.A. v. Hendrick Hudson Cent. Sch. Dist., 219 F. Supp.3d 421 (S.D.N.Y. 2016)

W.A. v. Hendrick Hudson Cent. Sch. Dist., No. 14-CV-8093 (KMK), 2016 WL 1274587 (S.D.N.Y. Mar. 31, 2016)

Application of the Board of Education of the Hendrick Hudson Central School District, N.Y. State Educ. Dep't, State Review Officer, Appeal No. 14-015 (Mar. 18, 2014)

Application of a Student with a Disability, N.Y. State Educ. Dep't, State Review Officer, Appeal No. 12-138 (Jan. 31, 2014)

In Matter of Impartial Hearing, Impartial Hearing Officer Findings of Fact and Decision (Dec. 17, 2013)

In Matter of Due Process Complaint of W., Impartial Hearing Officer, Findings of Fact and Decision (June 21, 2012)

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INTRODUCTION

Congress passed the IDEA to "reverse th[e] history of neglect" of students with disabilities. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 52 (2005). To achieve that goal, the IDEA requires public school districts to provide every student with disabilities with a free appropriate public education (FAPE). If a school district fails to provide a FAPE, parents possess the right to place their child in a private school and seek tuition reimbursement. *See* 20 U.S.C. § 1412(a)(10)(C)(iii). Parents may receive reimbursement for a private school placement if it is "proper under the Act." *School Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369-70 (1985) (*Burlington*). That standard does *not* require the parents to show that the private placement satisfied the statutory definition for a FAPE applied to a public school. *Florence Cty. Sch. Dist. Four v. Carter By & Through Carter*, 510 U.S. 7, 11 (1993) (*Carter*).

Over the past 25 years, the various circuits have adopted conflicting approaches towards assessing whether a private placement is appropriate, i.e., reasonably calculated for educational benefits. Judicial review has ranged from looking solely at educational benefits and student progress to requiring that the placement school be structured to provide specially designed instruction, based on deferral to state policy. *Compare Leggett v. D.C.*, 793 F.3d 59, 70-71 (D.C. Cir. 2015) and *W.A.*, Pet. App. 1a-48a. This variation in standards has resulted in an inconsistent and inequitable application of federal law.

Petitioner W.E. suffered intractable migraines due to school anxiety in middle school. Although his school district did find W.E. eligible for services right before high school, it never finalized an IEP. The parents placed their son in a small supportive boarding school, and the progress was irrefutable. W.E. went from missing over 100 days of school, to missing 9 days and from receiving medical incompletes to maintaining a B average. He progressed from being socially isolated to being fully integrated in his school. Yet, the State Review Officer (SRO) and, ultimately, the Second Circuit, based on deference to the State on educational policy, determined that parents were not entitled to reimbursement, because the placement was not structured to provide specially designed instruction for W.E.'s unique needs. The Second Circuit deferred to the State on educational policy. Notably, the SRO rejected reimbursement because he viewed the educational benefits provided to W.E. (e.g., small class size, counseling, tailored class notes, required use of an electronic tablet) as benefits that any hypothetical parent would prefer for their child, whether disabled or not.

Resolution of the question of what constitutes a proper private placement under the Act is necessary in order to provide parents with an understandable and consistent standard for reimbursement. This case raises an important question connected with school choice and a student's educational opportunity when a school district has failed. The Second Circuit's standard from the last decade effectively precludes

reimbursement for the placement of a child in any mainstream school and reserves reimbursement to parents who place their child in a special education placement that serves exclusively students with disabilities. Conversely, other Circuits focus on the learning and progress of the student in the general curriculum of the private school and, accordingly, have awarded reimbursement for placement at a Montessori School (Sixth Circuit), a college preparatory school (D.C. Circuit) and a parochial school (Ninth Circuit). *See infra* at 19-26. The inconsistent application between the Circuits of a federal statute creates inequities in result. Additional inconsistencies exist in the standard of review that federal courts apply in giving the necessary "due weight" to the parents' evidence of the private placement and the initial assessment of that evidence. The natural link between the appropriate criteria for reimbursement and the court's standard of review offers the Court to resolve two identified splits between the Circuits in a single case.

This Court should grant the Petition to resolve the splits between the Circuits.

PETITION FOR A *WRIT OF CERTIORARI*

Petitioners W.A., M.S., individually and on behalf of W.E., respectfully petition for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is published at 927 F.3d 129 (2d Cir. 2019). Pet. App. 1a-48a. The first opinion of the United States District Court for the Southern District of New York is published at 219 F. Supp.3d 421 (S.D.N.Y. 2016). Pet. App. 49a-181a. The second decision *W.A. v. Hendrick Hudson Cent. Sch. Dist.*, No. 14-CV-3067 (KMK), 2017 WL 3066888 (S.D.N.Y. July 18, 2017) is unpublished. Pet. App. 182a-209a. The opinions of the New York State Education Department Office of State Review, Pet. App. 210a-343a, and the Impartial Hearing Officers, Pet. App. 344a-462a, are unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 14, 2019. Pet. App. 48a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The IDEA, 20 U.S.C. § 1400 *et seq.*, requires that public schools receiving federal funds for special education services provide each child with a disability a "free appropriate public education." 20 U.S.C. § 1401(9). The IDEA provides that a court may require a school district to reimburse parents for tuition in a private school when the school district "had not made a free appropriate public education available to the child in a timely manner . . . ." 20 U.S.C. § 1412(a)(10)(C)(ii); Pet. App. 463a. Under the statute, reimbursement is largely unqualified. The IDEA indicates that the court may reduce or deny reimbursement only if the parents fail to inform the IEP team or district of the placement and their intent to place their child at public expense, refuse to consent for evaluations, or "upon a judicial finding of unreasonableness with respect to actions taken by the parents." 20 U.S.C. § 1412(a)(10)(C)(iii); Pet. App. 463a.

STATEMENT OF THE CASE

A. Legal Background

Congress passed the predecessor of the IDEA, the Education for all Handicapped Children's Act, in 1975 to ensure that every child would receive a free, appropriate public education.[1] *See generally* 20 U.S.C. § 1401 *et seq*. The IDEA systematically details the obligations of the state and public school districts to provide a FAPE for students with disabilities, as well as the content of the IEP and required special education and related services. *See* 20 U.S.C. § 1414(d)(1)(A)(i). This Court has clarified that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). Central to the IDEA's purpose is the requirement that, "[t]o the maximum extent appropriate, children with disabilities, including children in public or private schools . . . , are educated in the least restrictive environment, with children who are not disabled . . . ." 20 U.S.C. § 1412(a)(5)(A).

This Court has enshrined reimbursement for private school tuition as an important means of enforcing the IDEA. In settled Supreme Court precedent reaching back three decades, the Court recognized that, as an equitable matter, if a school district denies FAPE,

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[1] "Congressional statistics revealed that for the school year immediately preceding passage of the Act, the educational needs of 82 percent of all children with emotional disabilities went unmet." *Honig v. Doe*, 484 U.S. 305, 309 (1988) (citations omitted).

the statute must allow private placement at public expense and without this remedy, the statute's promises would be less than complete. *Burlington*, 471 U.S. at 370. While the IDEA and its regulations specify the obligations of the school district, no comparable obligation exists for the parents to select a school that provides a FAPE or special education services in accordance with statutory or regulatory requirements in order to receive reimbursement. *See generally Carter.* *Carter* addressed and expressly rejected the view that a placement must meet the standards for FAPE and did not require state approval. *Carter*, 510 U.S. at 13-14. Indeed, the Court noted that "'it hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place.'" *Id*. at 14 (authority omitted).[2]

The Court did not define in *Carter* what standard the parents must meet to show that the placement is proper under the IDEA or even what factors to consider.[3] The Court simply stated that parents are

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[2] In *Carter*, the Court rejected the Second Circuit's position that placement in an unapproved school was not "proper under the Act," because it would violate the Act's requirement that placements "meet the standards of the State educational agency." *Tucker v. Bay Shore Union Free Sch. Dist.*, 873 F.2d 563, 568 (2d Cir. 1989), abrogated by *Carter* (1993).

[3] Most circuits, with varying results, have cited the Court's reference to "'reasonably calculated for educational benefits,'" *Carter*, 510 U.S. at 11 (quoting *Rowley*), to define the parents' standard. This test, derived from *Rowley* which set forth the

"entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act." *Id.* at 155. The subsequent statutory and regulatory amendments to the IDEA did not place any requirements on the parents' placement in order to receive reimbursement. *See* 20 U.S.C. § 1412(a)(10)(C)(iii); Pet. App. 463a. The regulatory language merely requires the parents' placement of their child to be "appropriate." This regulation clarifies that "[a] parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the [state educational agency] and [local educational agencies]." 34 C.F.R. § 300.148(c).

B. Factual Background

Petitioner W.E. attended public school in respondent Hendrick Hudson Central School District from kindergarten to eighth grade. Pet. App. 51a. He performed well in elementary school and began middle school engaged in academics, reading, art, music and his friendships. Pet. App. 51a. In middle school, he suffered from "profoundly severe" migraines which impacted "every aspect of [W.E.'s life]." Pet. App. 52a. W.E.'s migraines became substantially worse during eighth grade and he missed over 100 days of school

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"reasonably calculated" test as the measure of the adequacy of an IEP, addresses whether a school district provided a FAPE, not the propriety of the private school placement. *See Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982).

that year and became socially isolated. Pet. App. 58a. The parents were in frequent contact with the school district, *id*., sought treatment for W.E.'s condition and encouraged him to attend school. Pet. App. 59a. As a result of his absences, W.E. dropped his accelerated English class, could not take his biology Regents state examination and received medical incompletes in most classes for eighth grade. Pet. App. 59a. The parents eventually referred W.E. for special education services on April 12, 2011. Pet. App. 63a. The school district classified W.E. as having an Other Health Impairment (OHI) on August 26, 2011. Pet. App. 69a. *See also* 20 U.S.C. § 1401(3)(A) (identifying OHI as a covered disability under the IDEA).

For ninth grade, the school district's only proposal for W.E. was interim home instruction until they could identify a placement option. Pet. App. 70a-71a. Following the meeting, W.E.'s parents notified the school district that they were formally withdrawing him from the public school and would be seeking tuition reimbursement. *Id.* The school district provided a draft IEP to the parents in November 2011, Pet. App. 71a, but never finalized the IEP. Pet. App. 323a.

W.E. attended Northwood for his ninth and tenth grade years. Pet. App. 72a. Northwood is a small supportive college preparatory school. The school offered a general education environment with all non-disabled peers, which was important to W.E. and his parents

and doctors[4] with a focus on five core values of integrity, compassion, responsibility, courage and respect. Pet. App. 74a. W.E.'s ninth grade class had only 17 students and the class ratio was below 8:1. The school offered other services, including full time nursing services, regular faculty supervision, an organized study period, and outdoor activities. Pet. App. 74a-75a.

Northwood designed an accommodation plan for W.E., which included extended time for assignments, preferential seating, graphic organizers and guided notes and regular counseling sessions. Pet. App. 76a. The counseling sessions were initially very structured but later the counselor found it more helpful to engage W.E. in an informal setting, such as when outdoors on a trail. Pet. App. 78a. The school had an outdoor education program, which the consulting school district psychiatrist had recommended for W.E., as one avenue to help W.E. "learn coping mechanisms for stress." Pet. App. 65a. W.E.'s treating psychiatrist viewed the school as appropriate for his needs, including his emotional needs. Pet. App. 94a. His psychologist viewed the school as "sort of a treasure chest" uniquely suited to W.E.'s needs and noted the small size of the school, the small classes and the structure provided throughout the day helped him. Pet. App. 95a. All of W.E.'s

[4] W.E.'s psychiatrist specifically recommended against a residential treatment center or a school with services specifically tailored for adolescents with more significant psychiatric disabilities. Pet. App. 447a. His mother testified that he needed a placement with non-disabled peers. Pet. App. 354a.

doctors noted the boarding aspect helped to break the cycle of migraines. Pet. App. 95a-96a.

W.E. made significant progress at Northwood. He attended classes regularly without experiencing frequent migraines; he became socially engaged and made educational progress. Pet. App. 79a-81a. He went from over 100 to 9 absences in the year and his grades went from medical incompletes to almost all As and Bs. Pet. App. 79a. The success continued during tenth grade. He maintained a B average with grades between A- and C+, Pet. App. 93a, while only missing ten days of classes with migraines. Pet. App. 151a. Northwood also added additional services to its accommodation plan for W.E., including assistive technology of use of an iPad in class, supervised study hall and, at W.E.'s request, an additional study period. Pet. App. 89a. W.E.'s parents also added services of an outside social worker in the latter half of the year. Pet. App. 92a. The Second Circuit agreed that W.E. made academic, social and behavioral progress at Northwood. Pet. App. 47a.

C. Proceedings Below

Administrative Proceedings

The petitioners sought reimbursement for W.E.s ninth and tenth grade years. Because the IDEA requires exhaustion of the administrative remedies, this petition outlines the administrative proceedings and then turns to the district court and Second Circuit decisions. Although the proceedings also cover relief

sought for the student's eighth grade year, the Petitioners are only seeking this Court's review of the Second Circuit panel's decision on the holdings for the student's ninth and tenth grade years, on the Second Circuit's standard for tuition reimbursement.

1. Ninth-Grade School Year

IHO Hearing and Decision

The Impartial Hearing Officer, for W.E.'s eighth and ninth grade years, determined that the school district breached its Child Find obligation for W.E. for the eighth grade. Pet. App. 418a-430a. The IHO further found that the district denied W.E. a FAPE for ninth grade. Pet. App. 430a-434a. As to placement at Northwood, the IHO found that the student was attending class, achieving good to excellent grades and becoming engaged with peers, yet, applying the Second Circuit standard, found Northwood inappropriate as the school did not provide W.E. with instruction or services specifically designed for his unique special education needs. Pet. App. 457a.

SRO Appeal and Decision

The Parents appealed the IHO's denial of reimbursement to the SRO. Pet. App. 269a. The SRO confirmed that the school district denied W.E. a FAPE during his ninth grade year as there was no finalized IEP. Pet. App. 323a. The SRO found that the student's social/emotional and academic functioning improved since the end of the eighth grade school year. Pet. App.

339a-340a. The SRO, citing to state and federal regulations, noted that a private placement is only appropriate if it provides education instruction specially designed for a student's needs. Pet. App. 325a (citing 20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; N.Y. Educ. Law § 4401(1); 8 N.Y.C.R.R. § 200.1(ww)). The SRO affirmed the finding that Northwood did not provide W.E. with specially designed instruction but with advantages and amenities that any parent would prefer for their child disabled or not, so the placement was not appropriate. Pet. App. 341a-342a (citing *Gagliardo v. Arlington Central Sch. Dist.*, 489 F.3d 105, 115 (2d Cir. 2007)).

2. Tenth-Grade School Year

IHO Hearing and Decision

In a subsequent hearing, the IHO again found that the school district had denied W.E. a FAPE. Pet. App. 356a-357a. The IHO further determined that Northwood provided educational instruction specially designed for the student's unique needs. Pet. App. 365a. Among other considerations, the IHO found that, in addition to the small class sizes and other features, the school's accommodation plan described in detail the school's "education in instruction specially designed to meet the unique needs of the student." Pet. App. 364a.

SRO Appeal and Decision

The school district appealed. Pet. App. 210a. The SRO agreed with the IHO that the District denied W.E. a FAPE. Pet. App. 237a-238a. The SRO, however,

reversed the portion of the IHO's decision ruling that Northwood was appropriate. Pet. App. 266a-267a. The SRO found that it was "without question that during the 2012-13 school year, the student exhibited progress." Pet. App. 262a. The SRO, citing to the same state and federal regulations as in its prior decision, noted that a private placement is only appropriate if it provides education instruction specially designed for a student's needs. Pet. App. 239a (citing 20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; N.Y. Educ. Law § 4401(1); 8 N.Y.C.R.R. § 200.1(ww)). The SRO concluded that Northwood was not an appropriate placement, as, again, he found that the school did not provide W.E. with "education instruction specially designed to meet his unique needs," as per state regulation. *See* 8 N.Y.C.R.R. § 200.1(vv). Pet. App. 266a. The SRO, citing *Gagliardo*, found that the placement provided W.E. with the "kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not" and thus was not appropriate. Pet. App. 266a.

3. District Court Proceedings

W.E's parents appealed each of the SRO's decisions. Pet. App. 50a. For each year, the school district conceded that it denied W.E. a FAPE. Pet. App. 126a. In reviewing the parents' entitlement to reimbursement, the district court applied Second Circuit standards and noted that "a unilateral private placement is appropriate only if it provides 'educational instruction specially designed to meet the unique needs of a

handicapped child.'" Pet. App. 128a. The court continued that, "'even where there is evidence of success in the private placement, courts should not disturb a state's denial of IDEA reimbursement where the chief benefits of the chosen school are the kind of advantages that might be preferred by parents of any child disabled or not.'" Pet. App. 128a-129a (quoting *Gagliardo*).

Under that standard, the district court engaged in a meticulous analysis of the administrative proceedings, the SRO decisions and each feature and service of Northwood in relation to W.E.'s needs, as well as his progress for both years. Pet. App. 130a-162a. The court affirmed in part and reversed in part, finding that the parents had met their burden and were entitled to reimbursement for W.E.'s tenth-grade year, but not for ninth grade. As to tenth grade, the district court reviewed Northwood's services and structure specific to W.E. and concluded that the record belied the SRO's finding that Northwood failed to provide specially designed instruction to address W.E.'s organization and stress-related needs. Pet. App. 161a. Specifically, the court found that the small class size, boarding component, 24-hour nursing coverage addressed W.E.'s specific needs. Pet. App. 161a. The district court concluded that the equities favored reimbursement. Pet. App. 163a.

The school district appealed to the Second Circuit the ruling that the district reimburse the parents for tuition at Northwood. The Parents cross-appealed the ruling that Northwood was not appropriate for the ninth-grade year.

4. Second Circuit Decision

The Second Circuit held that reimbursement for Northwood was inappropriate for both school years. The court noted it would "defer to the final decision of the state authorities, that is, the SRO decision." Pet. App. 33a. In reversing the district court's award of tuition reimbursement for W.E.'s tenth-grade year, the Second Circuit found that the district court erred in "conduct[ing] a true *de novo* analysis of whether each factor favored reimbursement . . . ." Pet. App. 46a. The court stated that it agreed with the district court that a resource that benefits an entire student population can constitute special education in certain circumstances, Pet. App. 46a, but did not elaborate. In rejecting the district court's analysis, the court continued:

> Under our precedents, however, a reviewing court is not entitled to overrule the State on a question of educational policy – such as whether a generally available resource is specially tailored to a particular disabled student's needs – based merely on its own disagreement with the State's evaluation of that resource.

Id. Deference to the SRO was appropriate, reasoned the court, because the record lacked evidence showing that Northwood provided W.E. with "specially designed instruction to meet his ongoing need[s] . . . ." Pet. App. 47a. The Second Circuit did not consider that W.E.'s parents had provided additional evidence to the

district court. Pet. App. 76a-77a, that was not available to the SRO. Pet. App. 1a-48a.

The court acknowledged, but was unmoved by the benefits Northwood provided W.E., including "endorsements of the private school by W.E.'s medical professionals, and various emblems of W.E.'s academic, social, and emotional growth during his tenure . . . ." Pet. App. 47a. The court gave short shrift to these benefits, stating that many of the features that appear to have abated W.E.'s stress and migraines are those that any parent would desire in an educational setting. *Id.* The court concluded that "even though the record may support the view that Northwood was an excellent placement for W.E., it also supports the SRO's conclusion that Northwood was not methodologically or therapeutically structured in the way required for reimbursement under the IDEA. This educational policy judgment likewise reinforces the deference that we believe we must give the SRO's opinion." *Id.* (citing *Gagliardo*).

REASONS FOR GRANTING THE *WRIT*

The right of parents to receive tuition reimbursement for an appropriate private placement has undergone conflicting judicial application and curtailment over the past 25 years, dependent upon the jurisdiction. This Court has stated in *Carter* that the placement must be "proper" under the Act and has noted

it should further the Act's purposes. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 251 (2009). Thus, without a set standard, the circuit courts have constructed differing standards for assessing the appropriateness of a private placement and, as a consequence, produced inequitable results. Lower courts have either focused on the terms "reasonably calculated for educational benefits" or "specially designed instruction" to establish standards for the private placement that, particularly in the last decade, conflict with one another. This Court should use the instant case to resolve the conflict and ensure a consistent application of federal law and define the standard which parents must meet for reimbursement consistent with the goals of the IDEA.

Along with establishing the standard for granting reimbursement, this Court should detail a court's standard of review for evaluating the parents' placement. In this context, the Court should also examine the "due weight" that a court must give to the underlying administrative determination under the IDEA of the parents' placement of their child. Judicial deference ranges from substantial deference to the administrative proceeding in the Second Circuit to a *de novo* review of the underlying facts. Along with defining the parents' standard to receive partial or full reimbursement, this Court should determine the appropriate standard of review for courts to apply when reviewing the underlying determination and accompanying preponderance of the evidence. Just as this Court provided the purview of the term "appropriate"

in *Rowley* and *Endrew F.*, the instant case calls upon the Court to explain the factors courts should consider when deciding whether a private school is appropriate under the IDEA.

I. The Courts Of Appeals Apply Inconsistent Standards For Parents To Obtain Tuition Reimbursement Under The IDEA

The various Courts of Appeals have developed differing standards to determine whether a placement is proper and fulfills the purposes of the Act. They profoundly conflict on whether: 1) it is sufficient to determine that the student is benefiting from the private program in its general curriculum; or 2) whether it is structured to provide specially tailored services based on the state definition.

The D.C., Fourth, Fifth, Sixth and Ninth Circuits, in recent applications, have adopted approaches that hold that educational progress should be sufficient to show that a placement is appropriate. Under this standard, they examine whether the placement is "reasonably calculated for educational benefits" for the student, based on his or her unique circumstances, by viewing whether he or she is progressing in the general curriculum of the private school. These courts give only secondary consideration to whether the private school provides special education services. The Third Circuit has adopted its own standard that also looks toward educational progress and meaningful benefit, as well as the least restrictive environment.

The Second Circuit, and to a lesser degree the Eighth and Tenth, have held that, while progress is relevant, it is not dispositive and that, in order to be proper under the IDEA, a placement must be structured to provide specially designed services. The Second Circuit, however, stands alone in its requirement that the decision requires deferral to the "State's evaluation of the [private school's] resources" that are available to all students and preferred by any parent, such as small classes. Pet. App. 46a. Thus, as applied and interpreted, the Second Circuit's *W.A.* standard, with its focus on State policy and the structure of the "specially designed instruction," conflicts with the majority of circuits and still requires what is tantamount to the "stamp of approval" of the State, eschewed in *Carter*. This stands in contrast to the recent approaches of the other Circuits to focus on student progress in the general curriculum of a private school.

A. The Conflict Between The Circuits

1. Private School Must Be Reasonably Calculated For Educational Benefit, As Measured By Student Progress

a. Evaluation Of Student Progress

The majority of circuits focus on student progress in evaluating private placements. The D.C. Circuit exemplifies this approach and requires, based on equities, that the parents must demonstrate that their child made educational progress in the placement in

order to receive reimbursement. *See Leggett v. D.C.*, 793 F.3d 59 (D.C. Cir. 2015). In *Leggett*, K.E. had attended D.C. public schools from kindergarten up to her first attempt at the eleventh grade. *Id.* at 64. Like W.E., K.E. was identified as a student of above-average intelligence; she began failing her courses, "often due to inattention, disorganization and anxiety." *Id.* Consistent with the private psychologist's recommendation, K.E.'s parent moved her to a private college preparatory boarding school and she "thrived there" in a program consistent with her psychologist's recommendations. *Id.* at 66. The Circuit Court observed, "The proof is in the results: whereas K.E. had failed to complete the eleventh grade at Wilson, she pulled all A's and B's in her first semester at Grier." *Id.* The D.C. Circuit simply ruled that "'"the issue turns on whether a placement – public or private – is 'reasonably calculated to enable the child to receive educational benefits.'"'" *Id.* at 71 (authority omitted). While the court quoted the Second Circuit's more equitable *Frank G.* decision, it only did so to cite the *Rowley* standard. *Id.*; *see* footnote 6.

Similarly, the Fourth Circuit has endorsed an application that looks at student progress. *See Sumter Cty. Sch. Dist. 17 v. Heffernan ex rel. TH*, 642 F.3d 478 (4th Cir. 2011). The court noted that the parents' evidence about a home placement was not extensive. Nonetheless, the court found that the evidence was sufficient, to support the district court's conclusion that the placement was reasonably calculated to

enable T.H. to receive educational benefits. *Id.* at 488-89. The Fifth Circuit has adopted a similar approach that focuses on student progress. In this case, the district court, citing 34 C.F.R. § 300.148(c), noted, the student did "not receive special education services at Fusion," he did receive an academic benefit from one-on-one individualized instruction and a nonacademic benefit from the opportunity to interact with both non-disabled and disabled peers. *Spring Branch Indep. Sch. Dist. v. O.W.*, No. 4:16-CV-2643, 2018 WL 2335341, at *9 (S.D. Tex. Mar. 29, 2018), *aff'd in part, rev'd in part and remanded sub nom.*, *Spring Branch Indep. Sch. Dist. v. O.W. by next friend Hannah W.*, 938 F.3d 695 (5th Cir. 2019). The Third Circuit has adopted its own standard that looks to whether a private placement (1) provides "significant learning" and confers "meaningful benefit," and (2) it occurs in the least restrictive educational environment. *Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 276 (3d Cir. 2007).

b. Evaluation Of "Some Special Education Services For Which Public School Placement Was Deficient"

The Sixth Circuit standard focuses on student progress in the private school general curriculum and requires that a private school have some element of special education services in which the "'public school placement was deficient.'" *See L.H. v. Hamilton County Dep't of Educ.*, 900 F.3d 779, 791 (6th Cir. 2018) (authority omitted). The approach of *L.H.* is inapposite to *W.A.*, as the Sixth Circuit, applying *Endrew F.*,

specifically endorsed a placement in a general education Montessori School, as it found that the student's interaction with non-disabled peers favorably compared to the restrictive placement of the public school. *Id.* at 797-98. In contrast to *Gagliardo*, the court considered the general benefits of the school available to all. *See id. Cf. Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 523 (6th Cir. 2003). The First Circuit has followed a similar test but has been stricter on requiring special education services." *See Mr. I. ex rel. L.I. v. Maine School Admin. Dist. No. 55*, 480 F.3d 1, 23-24 (1st Cir. 2007) (noting that the reasonableness of the private placement depends on the nexus between the special education required and what is provided).

The Ninth Circuit has followed a similar approach to the First and Sixth Circuits and implicitly rejected the Second Circuit approach of discounting the benefits of general education services. *See S.L. ex rel. Loof v. Upland Unified Sch. Dist.*, 747 F.3d 1155, 1159-60 (9th Cir. 2014). In *Loof*, the court rejected the school district's argument that the school did not provide the student with a "sufficiently individualized" educational benefit. It awarded reimbursement for a general education parochial school, because the student's aides worked within the larger context of the school curriculum. *Id.* at 1160; *see also C.B. v. Garden Grove Unified Sch. Dist.*, 635 F.3d 1155, 1159-60 (9th Cir. 2011) (observing, while citing the flexible *Frank G.* standard, that while the private school did not satisfy all of student's needs, everything that it provided was proper,

reasonably priced, and appropriate, and the program benefitted him educationally).

2. Private School Must Be Structured To Provide Specially Designed Instruction Based On State Educational Policy

In contrast to the majority focus on student progress, the Second Circuit, as exemplified by *W.A.*, focuses on the structure of the private placement. The Second Circuit, while acknowledging that progress is relevant, requires that a private school provide "education instruction [specifically] designed to meet the *unique* needs of a handicapped child." *W.A.*, Pet. App. 39a-40a; *see also Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 451-52 (2d Cir. 2015) (denying tuition reimbursement because school "did not offer special education services and did not modify its curriculum to fit the student"). In this analysis, the Second Circuit has required that, even where the private placement yields evidence of the child's success, courts should not disturb a state's denial of IDEA reimbursement where the chief benefits of the chosen school are the kind of advantages that might be preferred by parents of any child, disabled or not. *See Gagliardo*, 489 F.3d at 115. No other circuit has endorsed the *Gagliardo* standard to discount general education benefits in a private school, applicable to all students.

The Second Circuit standard, under *Gagliardo*, effectively precludes reimbursement in a placement where the chief benefits of a school are those that

might be preferred by all parents, in other words, a general education private school. District courts, applying the standard, have denied reimbursement, despite marked progress in a student's performance, for schools that, following state determinations, are not structured to provide specially designed services. *See John M. v. Brentwood Union Free Sch. Dist.*, No. 11 CV 3634 PKC SIL, 2015 WL 5695648, at *10 (E.D.N.Y. Sept. 28, 2015) (denying reimbursement in parochial school even though student made progress after severe bullying and denial of FAPE); *Stevens ex rel. E.L. v. New York City Dep't of Educ.*, No. 09 CIV. 5327(DLC), 2010 WL 1005165, at *9 (S.D.N.Y. Mar. 18, 2010) (denying reimbursement for a private general education school). Indeed, since *Gagliardo*, the Second Circuit has only granted reimbursement for placements in schools that exclusively serve students with disabilities[5] and, after 2006, the court has never affirmed reimbursement for a general education placement. *Cf. Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 364-65 (2d Cir. 2006), *cert. denied*, 552 U.S. 985 (2007).[6]

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[5] *See, e.g.*, *T.K. v. New York City Dep't of Educ.*, 810 F.3d 869 (2d Cir. 2016) (holding "a State-approved school devoted to educating students with learning disabilities" appropriate); *C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 834 (2d Cir. 2014) (court approved placement at Eagle Hill School, a private school that educates children with language-based learning disabilities); *M.H. v. New York City Dep't of Educ.*, 685 F.3d 217, 253 (2d Cir. 2012) (court approved private placement at the Brooklyn Autism Center, and acknowledged no interaction with non-disabled peers).

[6] In *Frank G.*, the Second Circuit identified and adopted a flexible approach involving a consideration of "the totality of the circumstances in determining whether that placement reasonably

In application, the Second Circuit's standard, in contrast with other circuits, also undercuts the IDEA's goal of placing students in the least restrictive environment, with maximum interaction with non-disabled peers. *Compare W.A.* with *L.H.* No other circuit has required that courts disregard or scrutinize general education benefits.

The Tenth Circuit and the Eighth Circuit also require, to a lesser degree, that a private placement be structured to provide specially designed instruction. The Tenth Circuit has set up its own test for residential placements which requires in relevant part, that the placement must provide special education, "i.e., 'specially designed instruction . . . to meet the unique needs of a child with a disability . . . .'" *Jefferson Cty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227, 1236-37 (10th Cir 2012), *cert. denied*, 570 U.S. 918. Although not as strict as the Second Circuit, the Eighth Circuit has also required instruction specially designed for the student's unique needs. *T.B. ex rel. W.B. v. St. Joseph School Dist.*, 677 F.3d 844, 847-48 (8th Cir. 2012) (quoting *Rowley*) (holding that T.B.'s home-based program is not "proper" within the meaning of the IDEA). *See also C.B. ex rel. B.B. v. Special Sch. Dist. No. 1, Minneapolis, Minn.*, 636 F.3d 981, 991 (8th Cir. 2011).

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serves a child's individual needs." *See Frank G.*, 459 F.3d at 364-65. While the decision provides broad language that numerous courts have cited, the Second Circuit adopted a stricter standard in *Gagliardo* that, as noted, requires courts to devalue benefits available to all students, disabled or not, 489 F.3d at 115, and effectively precludes placement in a general education school.

B. The Circuit Split Is Ripe For Resolution

The question presented has had sufficient time to percolate for over 25 years since *Carter* and in the decades since the enactment of key amendments in 1997 and 2004. Without this Court's intervention, the parents' right to place a student at a private school and receive tuition reimbursement for a child with a disability depends on the state in which he or she lives.

The division in the standard for private school reimbursement produces continuing inconsistent decisions on reimbursement. If W.E. had lived in the D.C. Circuit, based on *Leggett*, his parents almost certainly would have received reimbursement based on his substantial progress. In the Sixth Circuit, it is likely the courts would have granted reimbursement, due to the student's progress in the general curriculum of his school and as Northwood provided some of the special education services lacking in the public school district. As the school district provided no IEP for ninth grade and a conflicting program with no mainstreaming for tenth, it is likely the parents would prevail under this test. In the Second Circuit, where the court discounted general education benefits and required a school to be "methodologically or therapeutically structured," under the IDEA, the placement fell short. Pet. App. 47a. This Court noted in *Endrew* that two similarly-situated IEP students on different sides of a Circuit border should not expect markedly different results from their near-identical procedures under IDEA. That preventable disparity would continue in the

reimbursement context should the Second Circuit's decision in *W.A.* stand.

The inequitable application of the federal statute offers this Court a ripe and fully developed division between the circuits ready for review. While each circuit agrees that a proper placement is one that is reasonably calculated for educational benefits, they apply divergent approaches on whether to emphasize the structure of the placement based on state educational policy or the student's progress in determining whether "the placement is proper under the Act." Twenty-six years after the *Carter* decision, this Court should grant the instant application for a *writ of certiorari*, resolve the variations and provide a standard that every court can apply in requests for reimbursement.

C. Deciding The Standard For Private Schools Will Make An Important Difference In The Rights Of Children With Disabilities

In deciding the standard for tuition reimbursement, the progress-oriented standard, as adopted by the majority of circuits, differs significantly in effect from the standard of the Second Circuit which requires that a placement be structured to provide instruction specially designed for a student's unique needs based on deference to the State, and to discount benefits applicable to all students. The depth of the split is profound but requires analysis, as, to be sure, many

circuits cite the 2006 Second Circuit *Frank G.* standard which shows flexibility but which *Gagliardo* has restricted, particularly for schools with benefits available for all students, i.e., general education schools. *See supra* at fn. 6. Lower-court rulings demonstrate that the specially designed standard and the progress standard have produced vastly different results for students with disabilities as to private school placement.

For example, in *L.H. v. Hamilton* the district court had initially applied a standard that looked at the structure of the Montessori School and found that the instructional approach was not sufficiently structured for L.H.'s individualized needs. *L.H.*, 900 F.3d at 796-97. The Sixth Circuit disagreed, and found that, as to the student's need for systematic instruction, the school's benefits, such as an involved qualified teacher, were sufficient. *L.H.*, 900 F.3d at 798-99. Similarly, in *Leggett*, the district court originally ruled that the placement was not appropriate under the IDEA. The district court noted that "even the Learning Skills program at [Grier] is an elective class, designed for any student still developing organizational or study skills, or in need of individual instruction in specific subjects." *K.E. v. D.C.*, 19 F. Supp.3d 140, 150 (D.D.C. 2014) (quoting the hearing officer). However, the D.C. Circuit rejected the position that the school had to be structured to provide special education services and reversed the district court. *See Leggett*, 793 F.3d at 70-72.

Establishing a progress-based standard furthers the purposes of the IDEA as it places the focus on the

student. Conversely, the Second Circuit standard of requiring that the private placement provide structured special education services and discounting any benefits applying to all students, severely limits parent choice. Under its application, as noted, the Second Circuit's standard effectively compels students to attend restrictive private schools structured to only serve students with disabilities, in order to receive reimbursement. This contravenes the IDEA mandate that students should be placed in the least restrictive environment, as the Sixth Circuit recognized in *L.H. v. Hamilton*. *L.H.*, 900 F.3d at 798 (student fully mainstreamed in private school, among other benefits). In *Endrew F.*, this Court developed a progress-based standard and emphasized that "[w]hen a child is fully integrated in the general curriculum, as the Act prefers, [a FAPE] means providing a level of instruction reasonably calculated to permit advancement through the general curriculum." *Endrew F.*, 137 S.Ct. at 1000.

II. The Courts Of Appeals Are Split Over The Level Of Deference That A District Court Must Give To Administrative Decisions

The applicable standard of review is directly connected with the standard necessary to demonstrate an entitlement to reimbursement under the IDEA. The circuit courts have adopted substantially different positions in assessing what "due weight" the federal court should give to the underlying administrative process. The scope of review has varied from a *de novo*

review to substantial deference to the state's determination.[7]

A. Background On Standard Of Review

This Court initially examined the question of deference to the underlying administrative proceeding in *Rowley*. After discussing the competing positions, the Court determined that the statutory language created an "implied requirement that *due weight* shall be given to these proceedings. *Rowley*, 458 U.S. at 206 (emphasis added). Notably, the remaining aspects of the Court's analysis addressed the District's FAPE obligation. *See id.* at 206-07. As *Rowley* predates *Burlington* and *Carter*, the Court did not, and subsequently has not, addressed what deference a court should provide on the question of reimbursement when the school district has denied a FAPE to the student. This question is important; this Court should resolve whether deference is appropriate to the state when evaluating private remedies. As the Fourth Circuit has noted, deference is wholly appropriate to a school district's professional judgment on an IEP. However, when the state and school district have defaulted, "this common

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[7] Congress was "rather sketchy" in defining the substantive requirement. *Rowley*, 458 U.S. at 206. Further, Congress specified a trial standard in stating that the courts shall base their "decisions on the preponderance of the evidence . . . ." *See* 20 U.S.C. § 1415(i)(2)(C)(iii). The use of evidentiary language suggests that federal courts would operate under a *de novo* review and provide an independent decision on the case and the Senate conference report supports this position. *See* S. Conf. Rpt. No. 94-455 at 1502.

sense principle of judicial review, however, has no application . . . ." *Tice By & Through Tice v. Botetourt Cty. Sch. Bd.*, 908 F.2d 1200, 1208 (4th Cir. 1990).

The split in the standard for review determines the outcome. As again exemplified in the conflict between *W.A.* and *Leggett*, the standard for review in both cases also yielded diametrically opposed results. The D.C. Circuit looked to whether a preponderance of the evidence established that the parent's placement yielded educational benefits, and reversed the administrative judge, whereas in *W.A.*, the court merely deferred to a decision of the highest administrative level based upon its assessment of the State Review Officer's reasoning. Had the court in *W.A.* applied both an "educational benefit" and preponderance of the evidence approach in *W.A.*, the only possible conclusion would have been to award the tuition reimbursement.

1. The Second Circuit's Substantial Deference To The SRO

The Second Circuit offers token lip service to "due weight" and the preponderance of the evidence in adhering to a standard of review that provides substantial deference to the SRO's decisions. The court, in addressing judicial review of the underlying decision has stated that: "An assessment of educational progress is a type of judgment for which the district court should defer to the SRO's educational experience, particularly where, as was the case here, the district

court's decision was based solely on the record that was before the SRO." *M.S. ex rel. S.S. v. Bd. of Educ. of the City Sch. Dist. of the City of Yonkers*, 231 F.3d 96, 105 (2d Cir. 2000). This Court, however, has addressed and rejected deference to lower court or administrative determinations when *de novo* reviews are required. In *Salve Regina College v. Russell*, 499 U.S. 225 (1991), the Court rejected the idea of "*de novo* review 'cloth[ed] in "deferential" robes.'" *Id.* at 236. The Court first observed that "the mandate of independent review will alter the appellate outcome only in those few cases where the appellate court would resolve an unsettled issue of state law differently from the district court's resolution, but cannot conclude that the district court's determination constitutes clear error." *Id.* at 237-38. These few instances, however, continued the Court, "make firm our conviction that the difference between a rule of deference and the duty to exercise independent review is 'much more than a mere matter of degree.'" *Id.* at 238.

The Third Circuit has also adopted a "clear error" standard resulting in a comparable degree of deference to the administrative proceeding. *See Warren G. ex rel. Tom G. v. Cumberland Cty. Sch. Dist.*, 190 F.3d 80, 83-84 (3d Cir. 1999) (citing *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 526 (3d Cir. 1995)). In this case, it did not rule that deference was required to the administrative judge on whether equities prohibited reimbursement and reversed the ALJ and District Court ruling. The court "exercised plenary review over the district court's conclusions of law and review its findings of fact for

clear error." Notably, however, the Third Circuit's deference is to the trier of fact and not to a SRO, which is a review officer.

2. Circuits Favoring *De Novo* Review

The Ninth Circuit and D.C. Circuit have held that district courts should conduct a *de novo* review of the underlying proceeding. As the D.C. Circuit observed, the court will review the decision *de novo*, while also providing "due weight" to the hearing officer's determination. *See Z.B. v. D.C.*, 888 F.3d 515, 523 (D.C. Cir. 2018). Indeed, in instances where the district court relied on the underlying record and did not consider any new evidence, as the IDEA permits, the Court of Appeals stands in the same position as the district court and reviews the matter *de novo*. *See id.*; *see also Leggett v. D.C.*, 793 F.3d at 66. The Ninth Circuit follows the same approach, acknowledging the due weight owed to the hearing officer's decision, but characterizing its standard of review as *de novo*. *See C.B. ex rel. Baquerizo v. Garden Grove Unified Sch. Dist.*, 635 F.3d 1155, 1159 (9th Cir. 2011); *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). On its own review, the Ninth Circuit will review the district court's factual determinations for clear error, but "review *de novo* the ultimate determination of the appropriateness of the education program. *Id.* at 1145.

3. The Remaining Circuit Courts Following A Modified *De Novo* Review

The remaining Courts of Appeal have taken a diverse approach to giving due weight to the underlying decision. The Tenth Circuit has required modified *de novo* review. The Court has ruled that, unlike the deferential review typically afforded to administrative adjudication of statutory claims, Congress requires district courts to apply a modified *de novo* standard when reviewing agency disposition in the IDEA context. *See Murray by and through Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d 921, 927 (10th Cir. 1995); *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 974 (10th Cir. 2004). The Eleventh Circuit, in contrast, has held that the IDEA grants "broad discretion" to district courts, and allows them to "grant such relief as the court determines is appropriate." *Blount Cty. Bd. of Educ. v. Bowens*, 762 F.3d 1242, 1246 (11th Cir. 2014) (authority omitted).

The IDEA grants the authority for district courts to receive and consider new evidence. 20 U.S.C. § 1415(i)(2)(C)(ii). In instances where the lower court has reviewed new evidence, most of the Courts of Appeals have adhered to a broader or *de novo* review of the district court's decision in such cases. The Second Circuit inconsistently varies its standard in such cases on whether to defer to the SRO. *Compare W.A.* (failing to acknowledge the additional evidence and requiring full deference to SRO) with *Frank G.* (parent submitted additional evidence, stripping SRO of deference).

B. The Circuit Split Is Ripe For Resolution

This Court, facing ambiguous statutory language, directed in 1982 that courts considering a denial of FAPE under the IDEA should give "due weight" to the initial proceedings before an IHO or other form of administrative judge. *Rowley*, 458 U.S. at 206. Congress has not amended the language in the intervening 36 years. As a result, the different circuit courts have developed varying approaches to the underlying decisions and the appropriate degree of deference that they should apply. The variances between Circuits have produced inconsistent results in federal review of decisions under a federal statute. The question is ripe for review and the establishment of a single standard will produce greater continuity in federal decisions examining questions of a denial of FAPE and reimbursement under the IDEA.

III. This Case Presents An Excellent Vehicle For Resolving An Unclear Standard And Different Applications In Circuits

This case provides the Court with a well-developed and non-disputed fact pattern. The district in this case conceded that it failed to offer a FAPE for two years. All reviewing courts and administrative bodies agree that W.E. made progress at Northwood. The record reflects that equities support the parents' claim. The only remaining issue is whether the unilateral placement, a college preparatory school where the student made progress, is proper under the Act for reimbursement. This Court should grant the petition.

IV. The Second Circuit Erred In Requiring Parents To Meet A Higher Standard Than The School District

A fundamental purpose of the Act is "to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1)(B). The IDEA sets a specific mandate for the school districts; either "give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting . . . ." *Carter*, 510 U.S. at 15. When a state has violated the child's fundamental rights and failed to provide a FAPE, parents should not have to demonstrate that the placement is structured based on State policy to provide instruction specially tailored for the student's unique needs. As noted, as the *Carter* Court repeated, "the school district's emphasis on state standards is somewhat ironic. '[I]t hardly seems consistent with the Act's goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child's needs in the first place.'" *Id.* at 14 (quoting underlying Court of Appeals decision).

The IDEA does not require that a placement be structured a certain way, based on the judgment of the state, for reimbursement. *See* 20 U.S.C. § 1412(a)(10)(C)(iii). Once the school district has failed and denied the student a FAPE, the appropriate criteria for the parents should be a more equitable approach that focuses on whether their child is making progress at the private

school. Contrary to the Second Circuit's position, a private mainstream school can meet this standard. A broad standard for reimbursement will protect the student and the parents' interest to identify an appropriate private placement in the least restrictive environment to fulfill the purposes of the IDEA. *See Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 529 (2007). In W.E.'s case, the curtailment of reimbursement based on scrutiny of how the placement was not structured to provide instruction to his needs despite his success, was not equitable. The parents did not even have a copy of an IEP when they placed him, due to school district failure. Pet. App. 411a.

The Second Circuit standard conflicts with the letter and spirit of the IDEA. In *Endrew F.*, for public placements, this Court highlighted the importance of considering a child's particular circumstances and noted that an IEP must aim to enable the child to make appropriate progress based on his or her unique circumstances. This Court noted that this emphasis "reflects the broad purpose of the IDEA, an 'ambitious' piece of legislation enacted 'in response to Congress' perception that a majority of handicapped children in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'"'" *Endrew F.*, at 999 (2017) (citations omitted). As with public placements, for private placements, "[a] substantive standard not focused on student progress

would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act." *Id.*

To realize the promises of the IDEA, tuition reimbursement is essential, as the remedy is needed when the state has failed in its obligation to a student. Just as this Court acted in *Endrew* to resolve the inconsistent standard for whether a student receives a FAPE, so now Petitioners respectfully plea that this Court accept this case to make coherent a grossly inconsistent application of that Act on this essential remedy so that students with disabilities in every state receive a consistent opportunity to regain their education.

CONCLUSION

The petitioners respectfully request that the Court grant their petition for a *writ of certiorari*.

Respectfully submitted,

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