No. 19-616

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DANIEL PETIGROW
Counsel of Record
DAVID H. STRONG
STEVEN L. BANKS
THOMAS, DROHAN, WAXMAN, PETIGROW & MAYLE, LLP
Counsel for Respondent
2517 Route 52
Hopewell Junction, New York 12533
845-592-7000
dpetigrow@tdwpm.com

December 16, 2019

QUESTIONS PRESENTED

The Individuals with Disabilities Education Act (IDEA) provides students with disabilities access to special education services, which the statute defines as consisting of "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability," along with related services, which the statute defines as "supportive services" "designed to enable a child with a disability to receive a free appropriate public education." 20 U.S.C. § 1401.

The questions presented are:

Whether the parents of a student with a disability are entitled under the IDEA to recover the cost of a private education that provides neither instruction nor related services specially designed to address the student's disability.

The extent to which the federal courts are required to defer to the educational expertise of state education officials on the question of whether a private placement unilaterally selected by parents is appropriate to meet the disabled student's unique needs.

PARTIES TO THE PROCEEDING

Petitioners, and plaintiffs below, are W.A. and M.S., the parents of a student with a disability, known as W.E.

Respondent, and defendant below, is the Hendrick Hudson Central School District.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. Factual Background 3

B. Proceedings Below 6

1. Administrative Proceedings 6

2. Judicial Proceedings 8

REASONS FOR DENYING THE PETITION 10

I. There Is No Actual Circuit Conflict For The Court To Resolve 11

A. The Cited Circuit Opinions Do Not Demonstrate A Meaningful Disagreement In Their Approach To Evaluating The Appropriateness Of A Private Placement 11

B. The Need For Courts To Defer To State Education Officials On Issues Of Educational Policy is Well Established And Not The Subject Of A Split Among The Circuits 16

II. The Second Circuit's Decision Below Is Correct 21

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Berger v. Medina City Sch. Dist.,
348 F.3d 513 (6th Cir. 2003) 15

Blount Cnty. Bd. of Educ. v. Bowens,
929 F. Supp. 2d 1199 (N.D. Ala. 2013),
aff'd, 762 F.3d 1242 (11th Cir. 2014) 20

Bd. of Educ. v. Rowley,
458 U.S. 176 (1982) ..... *passim*

C.B. v. Garden Grove Unified Sch. Dist.,
635 F.3d 1155 (9th Cir. 2011),
cert. denied, 565 U.S. 977 (2011) 19

Endrew F. v. Douglas Cnty. Sch. Dist. RE-1,
137 S.Ct. 988 (2017) 17, 18

Florence Cnty. Sch. Dist. Four v. Carter,
510 U.S. 7 (1993) 22

Forest Grove Sch. Dist. v. T.A.,
557 U.S. 230 (2009) 23, 24

Frank G. v. Bd. of Educ.,
459 F.3d 356 (2d Cir. 2006),
cert. denied, 552 U.S. 985 (2007) .. 12, 14, 15

Kerkam v. McKenzie,
862 F.2d 884 (D.C. Cir. 1988) 19

L.H. v. Hamilton County Dep't of Educ.,
900 F.3d 779 (6th Cir. 2018) 14

Leggett v. D.C.,
793 F.3d 59 (D.C. Cir. 2015) 12, 13

Loren F. v. Atlanta Ind. Sch. Sys.,
349 F.3d 1309 (11th Cir. 2003) 20

Murray v. Montrose Cnty. Sch. Dist. RE-1J,
51 F.3d 921 (10th Cir. 1995),
cert. denied, 516 U.S. 909 (1995) 20

S.L. v. Upland Unified Sch. Dist.,
747 F.3d 1155 (9th Cir. 2014) 15

Salve Regina College v. Russell,
499 U.S. 225 (1991) 24

Sch. Comm. of Burlington
v. Dept. of Educ. of Mass.,
471 U.S. 359 (1985) 23

Spring Branch Ind. Sch. Dist.
v. O.W.,
938 F.3d 695 (5th Cir. 2019) 14

Sumter County Sch. Dist. 17
v. Heffernan,
642 F.3d 478 (4th Cir. 2011) 13, 14

Z.B. v. D.C.,
888 F.3d 515 (D.C. Cir. 2018) 19

Statutes

20 U.S.C. § 1400(d)(1)(A) 21

20 U.S.C. § 1401(14) 4

20 U.S.C. § 1412(a)(10)(A)(i) 22

20 U.S.C. § 1412(a)(10)(C)..... 23

20 U.S.C. § 1414(d)..... 12

20 U.S.C. § 1415(b)(6) 6

20 U.S.C. § 1415(f)(1)(A) 6

20 U.S.C. § 1415(g)..... 6

INTRODUCTION

In rejecting petitioners' bid to have the public schools pay for their child's education at a private college preparatory school, the court below reaffirmed the established principle that "primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's need, was left by the [IDEA] to state and local educational agencies[.]" *Bd. of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). In this instance, the court afforded deference to the educational expertise of the State Review Officer (SRO) who reviewed the administrative record and found that the college preparatory school did not provide the services necessary to address the student's particular deficits.

Having been unable to demonstrate at the administrative level that their chosen private placement addressed the emotional issues and poor organizational skills that constitute the student's particular disability, petitioners now ask this Court to alter the IDEA's promise to provide students with disabilities with appropriate and specially designed special education and related services. Rather, petitioners would have the IDEA be a vehicle for parents to bill the public schools for the cost of a private residential education whenever the student may have derived a benefit from the attributes commonly associated with a private residential

school, such as a bucolic setting, small class sizes, and attentive faculty.

To entice the Court to take up this issue, petitioners offer an illusory circuit split, principally arguing that the Second Circuit's treatment of petitioners' claim for reimbursement differed from the treatment of a handful of reimbursement claims in other circuits. However, none of the opinions cited by petitioners actually articulated that the particular circuit court's standard for assessing the appropriateness of a parent's unilateral private placement diverged from that in other circuits. Given the highly fact determinative nature of claims asserted under the IDEA, the purported circuit split suggested by petitioners is, in actuality, a product of factual distinctions and not dissimilar views of the law.

The petition does not offer an important or recurring question of law that requires the Court's resolution. Rather, the petition seeks to have the educational rights of one particular student reviewed by this Court. That student's disability is in no way typical of the disabilities of students covered by the IDEA, and the private college preparatory school that he attended has not been shown to be typical of the private placements that serve students with disabilities.

The Court should deny the petition.

STATEMENT OF THE CASE

A. Factual Background

Petitioner W.E. attended the public school system from kindergarten through eighth grade. In his sixth grade year, W.E. began to experience recurring abdominal migraines along with, in his seventh grade year, migraine headaches. These conditions caused W.E. to suffer pain and discomfort for extended periods of time and, as a result, W.E. missed 26 school days during seventh grade. Pet. App. 9a. W.E.'s psychiatrist attributed the migraines to W.E.'s difficulty coping with stress and anxiety.

W.E.'s struggles attending school prompted petitioners to ask for review by the respondent's "Section 504 Committee," responsible for evaluating students for accommodations under the Rehabilitation Act of 1973. In June 2010, the Section 504 Committee found W.E. to be eligible for accommodations, including extra time to complete assignments, nursing services, access to class notes, and home tutoring. Pet. App. 9a-10a.

During his eighth grade year (2010-2011 school year), W.E. continued to suffer from abdominal and conventional migraines, resulting in him missing more than 100 school days. Pet. App. 10a.

In March 2011, petitioners executed an agreement with Northwood School (Northwood) to have W.E. enroll there at the beginning of the 2011-2012 school year. At the time petitioners committed to enrolling W.E. at Northwood, they had not referred W.E. to the respondent's Committee on Special

Education (CSE), which is primarily responsible at the school district level for evaluating students with disabilities and developing a program of special education services. Pet. App. 11a.

Ultimately, petitioners referred W.E. to the CSE in the spring of 2011, and, at a meeting on August 26, 2011, the committee classified W.E. as a student with a disability under the IDEA, and discussed a program that would have provided W.E. with counseling services, nursing services, extra time for completing assignments, and a public school placement with class sizes limited to eight students. Petitioners quickly rejected the individualized education program (IEP) discussed by the CSE, *see* 20 U.S.C. § 1401(14), and enrolled W.E. at Northwood in accordance with the previously executed enrollment agreement. Pet. App. 278a.

Northwood is a private, college preparatory boarding school in the Adirondacks region of New York. Its program is not therapeutic in nature and does not principally focus on the education of students with disabilities. Pet. App. 11a, 18a, 248a. For the 2011-2012 school year, the ninth grade class was comprised of seventeen students, including W.E. Pet. App. 76a.

Northwood's accommodation plan for W.E. included extended time for in-class assignments, preferential seating, use of graphic organizers and an iPad, supervised study hall, counseling sessions, and access to a school nurse. Pet. App. 251a. The counseling Northwood provided was not therapeutic in nature, but consisted of informal conversations with a faculty member. Pet. App. 254a. The faculty

member who provided W.E. with counseling had no specialized knowledge about migraines or their triggers. Pet. App. 255a.

During his ninth grade year at Northwood, W.E. earned passing grades and missed significantly fewer school days because of migraines.

On June 14, 2012, the CSE reconvened to review W.E.'s needs and to develop a program of services and accommodations for the 2012-2013 school year. Based on the information before it, including reports from Northwood, W.E.'s private psychiatrist, and a school psychologist employed by the respondent, the CSE recommended that W.E. attend an out-of-district, publicly-funded day program that would provide him with small classes, counseling, nursing services, access to class notes, and testing accommodations. W.E.'s IEP established a series of goals intended to promote improvements in his academic organization and study skills, and his ability to cope with stress and anxiety. Pet. App. 86a, 214a.

Subsequently, W.E. was accepted into a therapeutic day program operated by the Southern Westchester Board of Cooperative Education Services that could provide W.E. with the services and accommodations recommended by the CSE. Pet. App. 215a. However, before the start of the school year, petitioners rejected the placement and enrolled W.E. at Northwood for his tenth grade year. Pet. App. 217a-218a.

For W.E.'s tenth grade year, Northwood offered an accommodation plan that again included extended

time on assignments, preferential seating, use of graphic organizers and an iPad, supervised study hall, counseling, and access to a school nurse. Pet. App. 89a. The counseling mostly consisted of periodic and informal discussions with a faculty member in W.E.'s room. Pet. App. 91a.

Academically, W.E.'s performance in tenth grade was uneven, with report cards indicating "a lack of engagement at times and . . . late and missing assignments, poor quiz grades in English, and occasional inappropriate behavior in class." Pet. App. 93a.

B. Proceedings Below

1. Administrative Proceedings

In November 2011, petitioners filed an administrative due process complaint pursuant to 20 U.S.C. § 1415(b)(6) challenging the IEP that had been prepared by the CSE for W.E.'s ninth grade year, and requesting that the respondent bear the costs for W.E.'s attendance at Northwood for the 2011-2012 school year. Pet. App. 368a. After an evidentiary due process hearing in accordance with 20 U.S.C. § 1415(f)(1)(A), the impartial hearing officer (IHO) denied petitioners' request for tuition reimbursement on the ground that Northwood "does not provide the student with any instruction or services specific to this student or his special education needs." Pet. App. 457a.

Petitioners appealed the IHO's finding to New York's state education agency for review by an SRO in accordance with 20 U.S.C. § 1415(g). On January 31,

2014, the SRO dismissed petitioners' administrative appeal having found that:

> [T]he hearing record lacks evidence demonstrating that [Northwood] provided instruction that was designed to address the student's tendencies to develop physical symptoms and exhibit school avoidance when under stress, or his need to develop coping skills to manage stress related to academics and social interactions, and to improve his organizational/study skills related to academics, and, that the instruction that the student received during the 2011-12 school year was, in fact, available to all students enrolled at [Northwood.]

Pet. App. 340a. While petitioners generally assert that the SRO found that the "student's social/emotional functioning improved" at Northwood, they conveniently omit the remainder of the SRO's findings, specifically, that the private school failed to address the student's unique needs, and any improvement on the part of the student was "apparently due in large part to the fact he was no longer required to engage in activities at the public school that he perceived as stressful." Pet. App. 339a-340a.

On April 10, 2013, petitioners filed a separate administrative due process complaint regarding their claim for reimbursement for W.E.'s tenth grade year at Northwood. Pet. App. 344a. The complaint was assigned to a different IHO who, in a decision dated

December 17, 2013, found in favor of petitioners. Pet. App. 367a.

Upon respondent's administrative appeal, the SRO reversed the decision of the IHO and denied the request for tuition reimbursement on the same grounds as before:

> [P]lacing the student in the [non-public school] setting—which the hearing record did not show provided the student with specially designed instruction to address organizational needs, the need to develop insight, and his underlying vulnerability toward and lack of coping skills related to anxiety, stress, and somatization—is not sufficient in this case to meet the parents' burden to establish that [non-public school's] program provided the student with educational instruction specially designed to meet his unique needs. Rather, it appears that the student's placement at the [non-public school] provided him "the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not."

Pet. App. 266a (citations omitted).

2. Judicial Proceedings

The separate SRO decisions concerning petitioners' requests for tuition reimbursement for the 2011-2012 and 2012-2013 school years were

consolidated for judicial review after petitioners commenced separate actions challenging each SRO decision in the district court for the Southern District of New York. Pet. App. 50a, 96a.

The district court deferred to the SRO's analysis that Northwood had not been shown to be an appropriate placement for the ninth grade year, but reversed the SRO with respect to the tenth grade year, finding that "the SRO's decision with regard to the 2012-2013 school year failed to give adequate weight to many of Northwood's most beneficial features and erroneously discounted the value of some of those features merely because they were generally available to all students." Pet. App. 145a. The court ultimately found petitioners entitled to tuition reimbursement for W.E.'s tenth grade year at Northwood based on W.E.'s improved attendance, as well as specific attributes of the school, including use of an iPad, a second study hall, the availability of nursing services, and small class sizes. Pet. App. 151a-162a.

The Second Circuit subsequently affirmed the district court on the question of reimbursement for W.E.'s ninth grade year and reversed the district court on the question of reimbursement for W.E.'s tenth grade year, emphasizing the deference owed by the courts to the findings of state education authorities, and in particular the SRO, on issues that demand educational expertise. Pet. App. 41a-42a. "[T]he question of whether a private school placement provided special education services is precisely a question on which we defer to educational experts[.]" Pet. App. 41a (citation omitted).

> Because we are persuaded that the district court improperly substituted its judgment on matters of educational policy for that of the SRO, and in light of the district court's own acknowledgment that "[t]here is no question the SRO considered all of the evidence on the record," *W.A.*, 219 F. Supp. 3d at 476, we hold that the district court improperly failed to accord deference to the SRO's ruling that Northwood School was not an appropriate placement for W.E.'s tenth-grade year.

Pet. App. 42a.

REASONS FOR DENYING THE PETITION

This case presents the Court with a particularly minor issue in the realm of special education, and a dispute that turns on a very narrow factual background. Unlike many, if not most, students with disabilities who receive services under the IDEA, W.E.'s disability was such that he was able to attend and receive passing marks in a general education program at a private school. The question of petitioners' entitlement to reimbursement for the costs associated with W.E.'s education at the private college preparatory school from which he graduated will have little meaningful effect on other IDEA cases involving students whose disabilities require more significant intervention.

Further, the circuit court split that the petition promises is, upon examination of the actual opinions, a construct, based upon either the courts' differing use

of language or unique fact patterns. The circuit courts have not substantively diverged in their systemic approach to IDEA reimbursement cases, and thus there is no significant dispute that merits the Court's attention. Granting certiorari in this instance will only result in the Court weighing in on a unique dispute between petitioners and respondent, and not deciding a meaningful dispute among the circuits.

I. There Is No Actual Circuit Conflict For The Court To Resolve.

Petitioners liberally argue that the circuits' treatment of particular cases under the IDEA evidences the adoption of conflicting legal standards for assessing the appropriateness of a private placement and determining the extent to which the federal judiciary should defer to the conclusions of state education authorities. The circuit opinions themselves do not substantiate this argument.

A. The Cited Circuit Opinions Do Not Demonstrate A Meaningful Disagreement In Their Approach To Evaluating The Appropriateness Of A Private Placement.

The petition categorizes various circuit court opinions in an effort to demonstrate that the Second Circuit's approach to reimbursement claims, and the need to show that the private school offered the student specially designed services, is at odds with the approaches used in other circuits, which in the view of petitioners, focus entirely or almost entirely on the student's educational progress. The divide, it is argued, lies between the D.C., Fourth, Fifth, Sixth,

and Ninth Circuits on one side and the Second, Eighth, and Tenth Circuits on the other. However, the holdings in the circuit opinions cited in the petitioners' analysis rest on particular disparate facts and do not fit neatly into the divisions that petitioners have artificially constructed.

First of the circuit opinions cited by petitioners is the opinion of the D.C. Circuit in *Leggett v. D.C.*, 793 F.3d 59 (D.C. Cir. 2015). Petitioners' interest in *Leggett* is self-evident. In *Leggett*, the court held that the school district was required to reimburse the parent for the placement of a student with a disability, referred to as "K.E.", at a private boarding school. In reaching its holding, the D.C. Circuit announced its intention to review the appropriateness of a private placement using the standard announced in *Rowley*, 458 U.S. at 207, for evaluating an IEP offered by a public school district under 20 U.S.C. § 1414(d)—whether it is "'reasonably calculated to enable the child to receive educational benefits.'" *Leggett*, 793 F.3d at 70. The D.C. Circuit believed that this approach was consistent with this Court's opinion in *Rowley* and "with the practice of our sister circuits," including that of the Second Circuit as articulated in *Frank G. v. Bd. of Educ.*, 459 F.3d 356 (2d Cir. 2006). *Id.* at 70-71. Notably, in *Frank G.*, the Second Circuit explained that the same considerations generally apply when assessing the appropriateness of a private placement, with the central inquiry being whether the placement offered specially designed instruction to meet the student's unique needs. *See Frank G.*, 459 F.3d at 364-65.

Having first described a standard of review in line with *Rowley* and the decisions of other circuits,

the D.C. Circuit then proceeded to decide the case based on a narrow set of facts. The court determined that the private placement offered a program "reasonably calculated to provide [the student K.E.] educational benefit," including individualized tutoring and life-skills instruction consistent with her psychologists' recommendations as necessary for her education. *Leggett*, 793 F.3d at 66, 71-72. Because the holding in *Leggett* is compelled by its facts, it offers little evidence of a division that petitioners believe exists between the Second Circuit and the other circuits.

The other cited circuit opinions similarly fail to substantiate the alleged circuit split. Offered as representative of the approach of the Fourth Circuit to IDEA reimbursement cases, petitioners cite to *Sumter County Sch. Dist. 17 v. Heffernan*, 642 F.3d 478 (4th Cir. 2011). *Sumter County* concerns a severely autistic student whose parents removed him from the public schools in favor of a home placement in which the student received intensive applied behavioral analysis 30 hours a week, *id.* at 482, "the kind of therapy that the [school district] through its IEPs had concluded was necessary to provide [the student] with an appropriate education," *id.* at 489.

Given the intensive therapeutic services that the student in *Sumter County* needed and received, there is no reason whatsoever to believe that the Fourth Circuit, if it were to examine W.E.'s case, would conclude that petitioners are entitled to reimbursement for a unilateral private placement that offered the student no specialized services, especially when considered in light of the Fourth Circuit's statement that "[a] parental placement is

appropriate if the placement is 'reasonably calculated to enable the child to receive educational benefits[.]'" *Id.* at 488 (citation omitted).

From the Fifth Circuit, petitioners cite to *Spring Branch Ind. Sch. Dist. v. O.W.*, 938 F.3d 695 (5th Cir. 2019). However, this Fifth Circuit opinion includes almost no analysis regarding a standard for determining the appropriateness of a private placement. *Id.* at 712. Further, given the severe behavioral issues that were exhibited by the student in that case, the opinion has no relation to the present matter concerning an IDEA-eligible student's attendance at a college preparatory school.

The two remaining cited opinions from the Sixth and Ninth Circuits similarly lend little or no support for the argument that there exists a circuit split. In *L.H. v. Hamilton County Dep't of Educ.*, 900 F.3d 779 (6th Cir. 2018), the Sixth Circuit approved a reimbursement claim for a parental placement at a Montessori-method school that provided the student with "an individualized lesson plan" and "a full-time aid to help [him] with his work and keep him on task." *Id.* at 787. In reaching its holding, the Sixth Circuit confirmed that "the private school must satisfy the substantive IEP requirement" for providing specially designed instruction, and cited to, among other authority, the Second Circuit's opinion in *Frank G.* as support for that proposition. *Id.* at 791. The Sixth Circuit further sought to adhere to a standard announced in its previous opinion "that a unilateral private placement does not satisfy the IDEA unless it, 'at a minimum, provide[s] some element of special education services in which the public school placement was deficient'; for example, specific special-

education programs, speech or language therapy courses, or pre-tutoring services." *Id.* at 791 (quoting *Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 523 (6th Cir. 2003)). Thus, the Sixth Circuit's approach aligns with the Second Circuit's requirement for a showing of specially designed instruction.

In *S.L. v. Upland Unified Sch. Dist.*, 747 F.3d 1155 (9th Cir. 2014), the Ninth Circuit stated that the standard for evaluating the appropriateness of a private placement required a showing that "'the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.'" *Id.* at 1159 (citation omitted). As with the D.C., Fourth and Sixth Circuit, the Ninth Circuit acknowledged the Second Circuit's standard as articulated in *Frank G.* for assessing a private placement's appropriateness. *Id.* at 1159 (citing *Frank G.*, 459 F.3d at 365). The significance of *S.L.* for petitioners is that the Ninth Circuit rejected the school district's argument that the private school had not provided the student "with a sufficiently individualized educational benefit," based on the private school having provided the student "with instructional materials and curriculum, structure, support, and socialization." *S.L.*, 747 F.3d at 1160.

Rather than supporting petitioners' contention that there exists a "profound[] conflict" among the circuits regarding the standard for evaluating the appropriateness of private parental placements, the cited circuit court opinions universally articulate the need for the private placement to provide the student with specially designed instruction tailored to meet

his or her unique needs. Regardless of the variations in language voiced in the circuit opinions to describe the services that the private placement must offer the student with a disability—"reasonably calculated to enable the child to receive educational benefits" or "a sufficiently individualized educational benefit"—none of the cited circuit courts has embraced the idea of reimbursement under the IDEA for a parental placement that offers the student an education that does not purposefully address the student's disability.

Unable to truly demonstrate that the circuit courts are divided over the legal standard to be applied to IDEA reimbursement claims, petitioners' argument devolves into a comparison of the outcomes of the circuit court opinions, including, in particular, the holding of the Second Circuit in this matter with the holding of the D.C. Circuit providing the parent of the student in *Leggett* with an award for the costs associated with a placement at a private residential school. Juxtaposing two individual cases and asserting that the results are incongruent hardly demonstrates a meaningful circuit split that demands the Court's time or attention.

B. The Need For Courts To Defer To State Education Officials On Issues Of Educational Policy Is Well Established And Is Not The Subject Of A Split Among The Circuits.

In addition to challenging the portion of the Second Circuit's analysis concerning the need for a private placement to provide "specially designed" services, petitioners contend that the Court should also review the question of the amount of deference

owed by the federal courts to the findings of state educational authorities on questions requiring educational expertise, including the question of the appropriateness of a private placement unilaterally selected by parents. In the present case, the Second Circuit's opinion rested in large part on its prior holdings that the federal courts "must give due weight to the administrative proceedings, mindful that the judiciary generally lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy." Pet. App. 32a (internal quotation marks and citations omitted). Insofar as the district court's divergence from the SRO on the issue of whether Northwood was an appropriate placement for J.C.'s tenth grade year resulted in a reversal by the Second Circuit, petitioners' interest lies in having the Court hold that the judiciary owes little or no deference to the administrative determinations of state education officials.

This Court, however, has already—and recently—affirmed the circumscribed role of the courts in reviewing individualized placement decisions under the IDEA.

> The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for 'an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.'

> At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue.

Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017) (quoting *Rowley*, 458 U.S. at 206, 208-209). While the question before the Court in *Endrew F.* concerned the adequacy of the program offered by the school district, and the Court did not reach the question of the appropriateness of the parental placement, the Court expressly recognized the need for deference on the part of the judiciary, as a general matter, on questions that benefit from educational expertise.

Petitioners' argument does not discuss the concept of deference presented in *Endrew F.*, but asks the Court to "address[] what deference a court should provide on the question of reimbursement" because of what they contend are "diametrically opposed" positions of the Second Circuit, to extend "substantial deference" to the findings of the SRO, and the D.C. and Ninth Circuits' supposedly pure *de novo* standard of review. The petition asserts that the positions of the Tenth and Eleventh Circuits on the issue of deference lie somewhere in the middle.

Opinions from the D.C. and Ninth Circuits do not support the existence of a sharp division with the Second Circuit on the issue of deference. In both circuits, deference or "due weight" is afforded to the finding of the administrative judicial officer on matters involving questions of educational expertise, as long as the finding is supported by the record and is well-reasoned. *See, e.g., Z.B. v. D.C.*, 888 F.3d 515, 523 (D.C. Cir. 2018) ("[W]e must give 'due weight' to the hearing officer's determinations, but we afford 'less deference than is conventional in administrative proceedings,' especially when the decision is insufficiently supported by fact or reasoning.") (citations omitted); *Kerkam v. McKenzie*, 862 F.2d 884, 887 (D.C. Cir. 1988) ("Deference to the hearing officer makes sense in a proceeding under the Act for the same reasons that it makes sense in the review of any other agency action—agency expertise[.]"); *C.B. v. Garden Grove Unified Sch. Dist.*, 635 F.3d 1155, 1160 (9th Cir. 2011) ("In conducting our de novo review of the 'proper' test [for evaluating a parental placement], we give weight to the ALJ's findings.") (citation omitted), *cert. denied*, 565 U.S. 977 (2011).

In the present matter, the Second Circuit similarly noted the judiciary's lack of "specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy," Pet. App. 32a (internal quotation marks and citation omitted), but also made clear that "deference" did not require the courts to rubber stamp determinations that are unsupported by the record or poorly reasoned. Under the Second Circuit's approach, a reviewing court is required to "look to the factors that normally determine whether any

particular judgment is persuasive, and must ultimately defer to the SRO's decision on matters requiring educational expertise unless [the court] concludes that the decision was inadequately reasoned[.]" Pet. App. 33a (internal quotation marks and citation omitted).

Contrary to the petition, courts in the Tenth and Eleventh Circuits similarly adhere to the requirement articulated in *Rowley* that reviewing courts give due weight to administrative determinations regarding the education of students with disabilities.

> [T]he court must give "due weight" to the administrative hearing officer's determination: "The fact that § 1415[] requires that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement that due weight shall be given to these proceedings. As such, "administrative factfindings are considered to be prima facie correct, and if a reviewing court fails to adhere to them, it is obliged to explain why."

Blount Cnty. Bd. of Educ. v. Bowens, 929 F. Supp. 2d 1199, 1201 (N.D. Ala. 2013) (quoting *Rowley*, 458 U.S. at 206-207 & *Loren F. v. Atlanta Ind. Sch. Sys.*, 349 F.3d 1309, 1314 n. 5 (11th Cir. 2003)), *aff'd*, 762 F.3d 1242 (11th Cir. 2014). *See also Murray v. Montrose Cnty. Sch. Dist. RE-1J*, 51 F.3d 921, 927 (10th Cir. 1995), *cert. denied*, 516 U.S. 909 (1995).

In short, each of the circuits embraces the need for reviewing courts to defer—or accord due weight—to the administrative determinations of educational officials, unless the determination is unsupported. Even assuming that the deference shown to administrative determinations varies among individual cases, which is not demonstrated in the petition, this would not constitute a meaningful split among the circuits as to the applicable legal standard for how courts review administrative determinations regarding the appropriateness of education of children with disabilities.

II. The Second Circuit's Decision Below Is Correct.

The Court should not intervene in this case because the decision below is plainly correct. The IDEA does not entitle parents to reimbursement for a private placement that does not provide the student with the specially designed services needed to address the particular disability that brought the student within the ambit of the IDEA in the first instance.

First among the purposes of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). The emphasis on special education and related services tied to the student's unique needs applies whether the student is receiving a publicly or privately-provided education.

> To the extent consistent with number and location of children with disabilities in the State who are enrolled by their parents in private elementary schools and secondary schools in the school district served by a local educational agency, provision is made for the participation of those children in the program assisted or carried out under this part by providing for such children special education and related services[.]

Id. § 1412(a)(10)(A)(i). As the Court previously ruled, parents "are 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." *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993) (emphasis in original).

While the meaning of "proper" is a flexible concept, *Carter* does not support the proposition advanced by petitioners that reimbursement is available under the IDEA for private placements that do not provide the student with specially designed instruction and supportive services. Notably, the student addressed by the *Carter* opinion had been "classified as learning disabled," and had been placed by her parents at a private school "specializing in educating children with disabilities." *Id.* at 10. The private school provided "an education otherwise proper under the IDEA," except that it was not "under public supervision and direction" and did not provide the student with "an IEP . . . designed by a representative of the local educational agency." *Id.* at 12-13 (internal quotation marks and citation omitted).

The SRO did not find W.E.'s placement at Northwood unworthy of reimbursement because it failed to adhere to obligations placed on the public schools under the IDEA, but because it had not provided W.E. with the specialized program that students with disabilities are entitled to under the IDEA. Pet. App. 38a-40a, 47a.

Nor can petitioners rely on 20 U.S.C. § 1412(a)(10)(C) as a basis for obtaining reimbursement for the costs of a private placement that did not provide the student with required services. Section 1412(a)(10)(C)(iii) lists criteria for the reduction or denial of the costs of reimbursement including, *e.g.*, if "the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency" or "the parents did not give written notice to the public agency" within 10 business days of the removal of the student from the public school. The Court has already examined § 1412(a)(10)(C) and found that its clauses "are . . . best read as elucidative rather than exhaustive." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 242 (2009). The Court expressly reaffirmed its holdings in *Carter* and in *Sch. Comm. of Burlington v. Dept. of Educ. of Mass.*, 471 U.S. 359 (1985), that, in order to merit reimbursement, the private placement chosen by parents must be "'appropriate' in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with 'a free appropriate public education which emphasizes special education and related services designed to meet their unique needs.'" *Burlington*, 471 U.S. at 369. The requirement that the "private-school placement is appropriate" "is essential to ensuring that reimbursement awards are

granted only when such relief furthers the purpose of the Act." *Forest Grove Sch. Dist.*, 557 U.S. at 242 n. 9.

Further, the Second Circuit's deference to the well reasoned and factually supported findings of the SRO on complex matters that require the application of educational expertise, is both reasonable and legally sound. The Court has consistently cautioned the judiciary, in both *Rowley* and *Endrew F.*, not to "substitute their own notions of sound educational policy for those of the school authorities which they review." The Second Circuit's standard of review and its deference to the SRO on questions that require educational expertise—such as the appropriateness of a private placement for a student with a disability—except if the SRO's determination is unsupported by the hearing record, is entirely consistent with the Court's guidance. Because the SRO's analysis of the program of instruction provided to W.E. by Northwood was based on the hearing record, and was well reasoned, the Second Circuit's finding that deference was owed to the SRO was correct. Pet. App. 45a-46a.

Petitioners' reliance on *Salve Regina College v. Russell*, 499 U.S. 225 (1991), for the proposition that the reviewing court should afford no deference to the findings of education officials, is misplaced. The issue in *Salve Regina College* concerned the nature of a federal appellate court *de novo* review of "a district court's determination of state law." *Id.* at 231. The Court's concerns with the judiciary blundering into the complex realm of educational policy—for which it lacks independent expertise—is simply not present in the discussion of *de novo* review in the opinion in *Salve Regina College*.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

DANIEL PETIGROW
Counsel of Record
DAVID H. STRONG
STEVEN L. BANKS
THOMAS, DROHAN,
WAXMAN, PETIGROW
& MAYLE, LLP
2517 Route 52
Hopewell Junction, NY
12533
(845) 592-7000
dpetigrow@tdwpm.com

Counsel for Respondent