No. 19-____

# In the
# Supreme Court of the United States

---

W.A., M.S. individually and on behalf of W.E,

Applicant

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

---

## APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

---


Litman Krooks LLP
399 Knollwood Road
White Plains, New York 10603
Phone: (914) 684-2100

William A. Walsh, Esq.
Counsel of Record
16 Flanders Lane
Cortlandt Manor, NY 10567
Phone: (212) 558-5500
wwalsh@weitzlux.com

APPLICATION FOR EXTENSION OF TIME TO FILE
A PETITION FOR A WRIT OF CERTIORARI

TO: Justice Ruth Bader Ginsburg, Circuit Justice for the United States Court of Appeals for the Second Circuit:

Applicants, W.A., M.S., individually and on behalf of W.E., request an extension of sixty days to file a petition for a *writ of certiorari* pursuant to Rules of the Supreme Court 13.5 and 22. The petition will challenge the decision of the U.S. Court of Appeals for the Second Circuit in *W.A. v. Hendrick Hudson Central Sch. Dist.*, Nos. 17-3248, 17-3313 (2d Cir. June 14, 2019), a copy of which is attached. In support of this application, Applicants provide the following information:

The Second Circuit issued its decision on June 14, 2019. App-1. Without an extension, the petition for a *writ of certiorari* would be due on September 12, 2019. With the requested extension, the petition would be due on November 12, 2019. This Court's jurisdiction will be based on 28 U.S.C. § 1254(1). This application is submitted within ten days of September 12, 2019.

The IDEA and a Free Appropriate Public Education

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 et seq., states and public schools receiving federal funds for special-education services must provide each child with a disability a "free appropriate public education" (FAPE). 20 U.S.C. § 1401(9). A FAPE 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 Cnty. Sch. Dist. RE-1*, 137 S.Ct. 988, 1001 (2017).

When a state and school district fail in their essential obligation to a student, courts have the power to order school authorities to reimburse parents for their expenditures on a private placement for a student if the court ultimately determines that such placement is proper under the Act. *School Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1985). Parents' entitlement to tuition reimbursement is necessary to effectuate the IDEA's goal of affording children with disabilities an education that is both free and appropriate. *Id.* at 370.

In 1993, this Court held that a private school placement is "proper under the Act" when the private school provides an education "reasonably calculated to enable the child to receive educational benefits." *Florence Cnty. Sch. Dist. Four v. Carter,* 510 U.S. 7, 15 (1993). Further, *Carter* held that parents are not barred from reimbursement because the private school in which the student enrolled did not meet the IDEA definition of a "free appropriate public education." *Id.* at 13. As this Court stated in *Carter*, "[n]or do we believe that reimbursement is necessarily barred by a private school's failure to meet state education standards." *Id.* at 14.

Brief Case Background

The Hendrick Hudson Central School District denied applicant W.E., a student with a disability, a free appropriate public education for both ninth grade and tenth grade. After he missed over 100 days of school with no special-education services in eighth grade and without an IEP for high school, his parents placed him in a small private school with small classes, residential services, nursing services, a study hall, and counseling. Because W.E.'s educational performance and engagement improved drastically—he missed only nine days in his first year, for example—his parents sought tuition reimbursement for his ninth- and tenth-grade

years. The New York Office of State Review (SRO) denied reimbursement for both years; the SRO reversed the decision of one Impartial Hearing Officer (IHO) and concluded that W.E.'s placement did not provide specially tailored instruction in conformance with state standards. The district court granted the parents reimbursement for one school year, but the Second Circuit reversed the award and denied any relief.

Despite acknowledging that W.E. received academic, social, and emotional benefits, and conceding that the record reflected that the school appeared to be an "excellent placement," App-52-53, the Second Circuit ruled that its own precedents required deference to "the State on a question of educational policy," on whether the private school provided appropriate services. App-51, 53.

The Second Circuit Standard Conflicts with Other Circuits and *Carter*.

The Second Circuit's narrow analysis and application conflicts with *Carter*, even though that court has acknowledged the broad *Carter* standard for tuition reimbursement, and has created a split with its sister circuits. App-42. The petition will raise the question of whether, when a school district has failed to meet its obligation under the IDEA and denied the student a FAPE, the parents' unilateral placement is "proper" if it is "reasonably calculated to enable the student to receive educational benefits" as *Carter* requires and as the D.C. Circuit has concluded, *see Leggett v. D.C.*, 793 F.3d 59, 71 (DC Cir 2015), or if the parents must meet additional criteria including to show that the placement provides specially tailored instruction, as defined by state policy and standards, as the Second Circuit requires. App-52.

The Second Circuit quotes *Carter* on the "reasonably calculated for educational benefits" standard. However, rather than applying this standard or

looking at the totality of circumstances to decide if a private placement was "reasonably calculated for educational benefits," as measured by "grades, test scores and regular advancement," App-42, the Second Circuit gives great deference to "the State on ... question[s] of educational policy." By requiring that the private placement school's services meet these state definitions and policy, the Second Circuit collides with *Carter*'s conclusion that "reimbursement is not barred by a private school's failure to meet state education standards." *Carter,* 510 U.S. at 14. The Second Circuit also ruled, in contrast to other circuits, that reimbursement was not appropriate as the specialized services such as small class sizes at the private school provided him with "'the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not.'" App-49-50 (authority omitted).

The Second Circuit's standard conflicts with other circuits' application of *Carter.* For example, the D.C. Circuit, in *Leggett,* reviewed an analogous fact pattern to *W.A.,* as the student did not have an IEP at the beginning of the school year and the parents placed the student in a college preparatory boarding school with small classes where the student made progress. The D.C. Circuit, ruling that the placement was appropriate under the IDEA, found that, "the private boarding school the parent selected was, at the time, the only one on the record "reasonably calculated to enable the child to receive educational benefits" designed to meet the child's needs." *Leggett,* 793 F.3d at 62. The facts are striking similar to W.A. and the approach of the courts stands in opposition. Specifically, the Second Circuit, in deferring to the SRO's reliance on state regulations, applies the *Carter* standard differently than any other circuit, as *Leggett,* 793 F.3d at 70-71, exemplifies.

A close analysis of other circuits reveals that other circuits follow the "reasonably calculated" standard more generally and equitably, like the D.C. Circuit, without strict adherence to the state definition of special education services

under state law or whether the services provided are generally available for all students. Although the cases cite the same standard, they apply it very differently. *See, e.g., Dallas Ind. Sch. Dist. v Woody*, 865 F.3d 303, 321 (5th Cir. 2017); *L.B. ex rel. K.B. v Nebo Sch. Dist.*, 379 F.3d 966, 978-79 (10th Cir. 2004); *Babb v. Knox Cnty. Sch. Sys.*, 965 F.2d 104, 108 (6th Cir.1992); *Tice v. Botetourt Cnty. Sch. Bd.*, 908 F.2d 1200, 1205-06 (4th Cir. 1990).

The Applicants will also ask this Court to resolve a split in the circuits over the level of deference that a district court must give in reviewing an administrative decision under the IDEA. Specifically, may a district court conduct a totality of the circumstances analysis and or must it defer to the state on policy judgments, absent objective error. Contrary to other circuits, the Second Circuit prohibits the district court from conducting its "own totality of the circumstances analysis" and "substitut[ing] its own subjective assessment for that of the State." App-52. Put another way, "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 only on its own disagreement with the State's evaluation of that resource." App-51. The Second Circuit's decision conflicts with a majority of the circuits, which have granted district courts the discretion to determine how much deference to give to the conclusions of a hearing officer or SRO. *See, e.g., Klein Indep. Sch. Dist. v. Hovem*, 690 F.3d 390, 394, n. 4. (5th Cir. 2012) (characterizing the district court's review as "virtually de novo"); *Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1219 (3d Cir. 1993) (observing that district courts have discretion to determine how much deference to accord the administrative proceedings); *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991) (stating that the district court is merely "required to explain" reversal of an administrative officer's factual determinations); *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th

Cir. 1995) (asserting that the degree of deference rests within district court's discretion); *Loren F. ex rel. Fisher v. Atlanta Indep. Sch. Sys.*, 349 F.3d 1309, 1319 (11th Cir. 2003) (noting that "some ... deference" is owed to state administrative proceedings; and the district court may reverse factual findings but "is obliged to explain why"); *Reid ex rel. Reid v. D.C.*, 401 F.3d 516, 522 (D.C. Cir. 2005) (confirming that district court review is "nondeferential" and less deferential than typical judicial review of agency actions).

Issues Presented are Important

Tuition reimbursement is an essential right under the IDEA and this Court has continually corrected the courts of appeals when they have given the reimbursement provision an overly narrow reading that conflicts with the IDEA's remedial purpose. *See, e.g., Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244-45 (2009) (observing that without the remedy of tuition reimbursement for a child not yet receiving special education services, a "child's right to a *free* appropriate education would be less than complete"); *Carter* 510 U.S. at 13; *Burlington,* 471 U.S. at 369-370. The Second Circuit's decision will impede the rights of many children to receive an appropriate education and constrict parental rights. In the circumstance where parents must consider placing their child in a private school, a decision with grave emotional and financial consequences, and where the school district has failed to provide a FAPE, courts should not hold parents to a higher standard than the state and school district.

Applicants Seek Extension for Good Cause

This application seeks to accommodate Applicants' legitimate needs. Counsel has been working with and consulting other counsel to secure input and expertise on the petition. The requested extension is necessary for all counsel to familiarize themselves with the IDEA, this Court's decisions, and how the courts of appeals have applied *Carter*. In addition, undersigned counsel is a senior member of a trial team currently preparing for a trial scheduled to begin on October 15, 2019, and those efforts have consume an extensive amount of time. The requested extension would guarantee that counsel can prepare a petition that fully and fairly presents the issues in the case.

For the foregoing reasons and good cause, Applicants request that the due date for the petition for a writ of certiorari be extended to November 12, 2019.

Respectfully submitted,

By: 

William Andrew Walsh, Esq.
Bar No. 310632
*Counsel of Record for W.A., M.S.*
16 Flanders Lane
Cortlandt Manor, NY 10567
Phone: (914) 714-4427
wwalsh@weitzlux.com

Arshi Pal, Esq.
Littman Krooks LLP
655 Third Avenue
New York, NY 10017
(212) 490-2020

Dated: August 30, 2019