No. 21-1479

IN THE

Supreme Court of the United States

S.W. AND C.W., ON BEHALF OF THEIR MINOR CHILD, B.W., PETITIONERS

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE CALIFORNIA ASSOCIATION OF LAWYERS FOR EDUCATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

Amicus is a 501(c)(3) not-for-profit organization dedicated to educating and empowering students, parents, advocates, and a new generation of education attorneys to more effectively protect students' rights. *Amicus* is a collection of lawyers who represent families and students in education law disputes, including special education matters under the Individuals with Disabilities Education Act ("IDEA") (20 U.S.C. §§ 1400 et seq.). *Amicus'* primary goal is to secure appropriate educational services for children with disabilities in accordance with national policy by providing resources, training, and information for parents, advocates, and attorneys to assist them in obtaining the free appropriate public education these children are entitle to under the IDEA. *Amicus* attorney members represent children in civil rights matters, and support individuals with disabilities, their parents, and advocates, in seeking to safeguard the civil rights guaranteed to them under state and federal laws.

Amicus brings to this Court the unique perspective of parents, advocates, and attorneys for children with disabilities. Many children with disabilities experience significant challenges throughout their lives. Whether these children

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[1] Counsel for amicus curiae certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than above amicus curiae or their counsel has made a monetary contribution to the preparation or submission of this brief. Counsel of record for all parties consented to the filing of this brief notwithstanding that, due to a family medical emergency, counsel for amicus curiae inadvertently provided less than ten days' notice of the intent of amicus curiae to file this brief.

overcome these challenges and eventually gain employment, live independently, and become productive citizens depends in large measure on whether they secure their right to the free appropriate public education guaranteed under IDEA and related educational laws and policies. IDEA's expressly declared goal is 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 need and prepare them for further education, employment, and independent living. . . ." 20 U.S.C. § 1400(d)(1)(A). *Amicus'* interest in this case stems from its deep commitment to all children with disabilities and protecting their right to needed special education services.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court's review is needed to ensure that children are not deprived of the rights secured to them under the IDEA just because their parents did not invoke those rights in one particular manner. Special education rights should not be subject to Jeopardy! rules, where making a statement instead of asking a specific form of question makes a person lose. Every child is guaranteed the right to a free appropriate public education ("FAPE"). It is the obligation of the state government, through its school districts to ensure the provision of education and related services to each special education student.

A critical element of securing that right is the preparation of an annual individualized education program ("IEP"). The preparation of an IEP remains a necessary part of ensuring that a child with disabilities

has access to a free and adequate public education, even when the child has been enrolled in a private school due to a dispute over the adequacy of the special education plan offered by a school district.

In this matter, a Panel of the United States Court of Appeal for the Ninth Circuit concluded that Capistrano Unified School District was not obligated to develop an IEP for second grade for a child within the district's jurisdiction who had been identified as having special needs because the parents had not explicitly asked for one. This ruling was made despite it being undisputed that the child had been under an IEP, that the law requires IEPs to be revised annually, that the IEP provided by the school district was undisputedly inadequate, and that the child's parents had continued to invoke the child's rights to a FAPE by requesting reimbursement of private school tuition. Despite all of that, the Panel concluded that when a parent enrolls their child in a private school, the school district's obligation to prepare an IEP automatically terminates unless an IEP is specifically requested by the parents. None of the parties below argued for such a rule. Such a rule is not required by the text of the IDEA. The Panel's decision adopts a standard at odds with the decisions of other courts. And, the decision burdens the right of a child with disabilities to receive a FAPE by imposing a procedural hurdle to receive continued services that exalts form over substance.

Amicus respectfully submits this brief to show that while the IDEA is meant to be a benefit administered by the government for the benefit of children with disabilities, the Panel decision creates an unrequired procedural trap that foists obligations on

parents to specifically ask for what their children should already receive. This issue warrants granting certiorari to review the decision of the Panel and announce a uniform standard under IDEA for the continued review and preparation of IEPs for students enrolled in private school whose parents indisputably continue to seek a FAPE for their child.

ARGUMENT

I. THE IDEA IS TO ENSURE EVERY CHILD RECEIVES A FREE APPROPRIATE PUBLIC EDUCATION AND COMPLYING WITH THE IDEA REQUIRES THAT A SCHOOL DISTRICT OFFER AN IEP

A. The purpose of the IDEA and necessity of an IEP

Congress enacted the IDEA in 1975 to ensure that children with disabilities that affect their ability to learn are provided a "free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A); *see id.* § 1401(3)(a); *see also Sch. Comm. Of Burlington v. Dep't of Educ. Of Mass.*, 471 U.S. 359, 367 (1985). When IDEA became a reality and was signed into law, "the majority of disabled children in America were either totally excluded from schools or sitting idly in regular classrooms awaiting the time when they were old enough to drop out." *Schaffer v. Weast*, 546 U.S. 49, 52 (2005) (internal quotations omitted) (quoting H.R. Rep. No. 332, 94th Cong. 1st Sess. 2 (1975)); *see also Honig v. Doe*, 484 U.S. 305, 309 (1988).

With the Act, Congress sought to "reverse this history of neglect." *Schaffer*, 547 U.S. at 52. The IDEA authorizes federal grants to States to help provide special education and related services to children with disabilities. 20 U.S.C. § 1411(a)(1). In order to receive federal funds, States must ensure that every child with a disability residing in the State has available to the child a "free appropriate public education" ("FAPE")—that is, the school must make available special education and related services designed to meet the child's unique needs. *Id.* § 1412(a)(1), (5).

The foundation of any FAPE is the "individualized education program" ("IEP"). *See I.H. v. Cumberland Valley Sch. Dist.*, 842 F.Supp.2d 762, 771 (M.D. Pa. 2012) (stating that it was unnecessary "to distinguish between the provision of a FAPE and the provision of an IEP," because an IEP is essentially "an offer of FAPE.") States must ensure that each local school district develops an IEP for each eligible child with disabilities. *Id.* § 1412(a)(4). **Every decision must endeavor to maximize students' access to a FAPE**. *Id.* §§ 1400(d)(1)(a), 1415(a); *see Joshua A. ex rel Jorge A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1039–40 (9th Cir. 2009) (explaining "Congress's sense that there is a heightened risk of irreparable harm inherent in the premature removal of a disabled child to a potentially inappropriate educational setting.").

Overall, the IEP must provide the child with a disability a "meaningful" educational benefit. *See J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 951 n.10 (9th Cir. 2010); *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999); *see also Deal v. Hamilton Cnty. Bd. of Educ.*, 392 F.3d 840, 862 (6th Cir. 2004) (an IEP must

provide a "'meaningful educational benefit' gauged in relation to the potential of the child at issue"). It must describe comprehensively the child's educational needs and the corresponding special education and related services that meet those needs. *See Burlington*, 471 U.S. at 368; 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.324(a)(2)(iv). The IEP must identify, *inter alia*, special education and related services, the child's academic achievement thus far, how the child's disability may affect involvement in the general education curriculum, measurable annual goals, and evaluation criteria. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(IV). Although an IEP need not be designed to "maximize the potential of each [disabled] child commensurate with the opportunity provided non[disabled] children," *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 200 (1982), in developing an IEP, school officials must consider a parent's request for particular educational programs or services. 20 U.S.C. § 1414(d)(3)(A)(ii).

"Special education," as defined by the IDEA, "means specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability," including instruction conducted in "hospitals," "institutions," and "other settings." *Id.* § 1401(29). The IDEA also provides that parents may secure reimbursement from the school district after placing the child in a private school or private setting if (a) the school district did not provide the child with a FAPE, (b) the private placement did provide the child a FAPE, and (c) the parents provided the school district timely notification that they were rejecting the proposed IEP and placing the child in a private placement. *Id.* § 1412(a)(10)(C)(ii); *Burlington*, 471 U.S.

at 369. The text of the IDEA thus contemplates that not all special education services must be provided in a public school context.

B. The IDEA's procedural safeguards require school districts to prepare an IEP for students who continue to be eligible for a FAPE

The IDEA requires States to establish procedural safeguards to protect the rights of children with disabilities. The first forum for addressing the educational needs of a child with a disability is the IEP team, compose of the child's parents or guardians along with various teachers, other school personnel, and educational experts. 20 U.S.C. § 1414(d)(1)(B). That team develops a written IEP that includes a statement of the special education and related services to be provided to the child. *Id.* § 1414(d)(1)(A). The school must put an agreed-upon IEP into effect. *Id.* § 1414(d)(2)(A).

However, IEPs are not always agreed upon. Where the parents and school district disagree, the next step is for one or both of the parties to request a due process hearing, where an administrative officer determines the services and placement to which the student is entitled. *Id.* § 1415(f)(1); 34 C.F.R. §§ 300.503, 300.507. Thus, "[w]henever a complaint has been received under subsection (b)(6) . . . of this section, the parties involved in such complaint shall have an opportunity for an impartial due process hearing . . . ." 42 U.S.C. § 1415(f)(1).

California has enacted legislation to comply with the IDEA. *See* Cal. Educ. Code § 56000. California law provides that a parent may initiate a "due process hearing" regarding the provision of a free appropriate public education for a child with a disability and that such a hearing will be conducted "at the state level." *Id.* § 56501(a), (b)(4). The decision of the hearing officer "shall be the final administrative determination and binding on all parties" unless a party "exercis[es] the right to appeal the decision to a court of competent jurisdiction . . . within 90 days of receipt of the hearing decision." *Id.* § 56505(h), (k). The IDEA requires that this process, including available appeals, be explained to parents in writing upon the filing of an administrative complaint. 20 U.S.C. § 1415(d)(1)(C), (d)(2)(K)-(L).

The IDEA further provides that any party aggrieved by a "final" decision of the state education agency "shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." *Id.* § 1415(i)(2)(A). While the court must receive the records of the proceeding and give "due weight" to the hearing officer's decision, it is required to hear additional evidence at the request of a party and must base its decision on the preponderance of the evidence. *See Rowley*, 458 U.S. 176, 206 (1982); *Id.* § 1415(i)(2)(B).

II. THE IDEA IMPOSES AN AFFIRMATIVE OBLIGATION ON A SCHOOL DISTRICT TO PREPARE AN IEP FOR A CHILD WITH A DISABILITY, EVEN WHEN THAT CHILD HAS BEEN ENROLLED IN PRIVATE SCHOOL

A. A school district has an ongoing obligation to prepare an IEP for a child with disabilities within the district's jurisdiction who seeks a FAPE.

Through enactment of the IDEA and its predecessor statute, Congress imposed an **affirmative obligation** on states and local school districts to identify, locate, evaluate, and provide specialized services to disabled children to "ensure that all students 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); 34 C.F.R. § 300.1.

The IDEA generally places the onus on the government to ensure that services are provided. *See, e.g.*, 20 U.S.C. § 1414(d)(2)(A); 20 U.S.C. § 1412(11) and (12) (setting obligation for supervision, ensuring services, responsibility for services, financial responsibility with various public bodies); 34 CFR § 300.323 (setting forth standards that the public agency "must ensure"). Included in these mandates an IEP must generally be in effect for each child with a disability within a school district's jurisdiction at the beginning of each school year. 34 CFR § 300.323(a); Cal. Ed. Code 56344(c). The purpose of the IDEA is for

the government to provide assistance to obtain a FAPE to those who need it. Inverting the burden and forcing families of children with disabilities to chase the services they are entitled to flips the purpose of the IDEA on its head.

B. The Panel's decision to relieve the district of its IEP obligations jeopardizes the right of children to access their free and appropriate public education.

The crux of the Panel's decision is that a student placed in private school by a parent in response to the inadequacy of the educational services offered by the school district is not entitled to an updated IEP unless the parents use specific words to request one, even though the text of the IDEA obligates the district to provide one. *See* 20 U.S.C. § 1414(d)(2)(A). The Panel stated that where a parent requests an IEP, it demonstrates that a parent is "at least nominally seeking a public education for their child." (App. 23a). By contrast, the Panel concluded that it was not sufficient (i) for a child to be located in the school district's jurisdiction, (ii) have been identified as a child with special needs, (iii) have previously invoked their right to a FAPE, (iv) have been under an undisputedly inadequate IEP, (v) have participated in due process proceedings concerning the their FAPE, and (vi) have sought reimbursement for their private school education, to vindicate their FAPE rights. Although the parties below agreed that it was sufficient for parents to invoke the right to an IEP by asking for reimbursement—because such a request is an unequivocal demonstration of the family's intent to access the child's FAPE rights—the Panel concluded

that instead the parents must "ask for an IEP, and then the district must prepare one," and a "district only needs to prepare an IEP if the parents ask for one." (App. 25a).

By creating a new formulaic and hyper-technical procedural hurdle for families to surmount, the Panel's decision hampers children's rights to access their free appropriate public education. The text of the IDEA places the onus to lead the IEP process on the school district. 20 U.S.C. § 1414(d)(2)(A). Yet, the Panel's decision removes the public school's obligation to provide services when a child has been enrolled in private school by the parent and instead reverses the obligation, forcing the parents of the child to chase the district for the services required to be provided by the IDEA.

Such an inversion creates a rule that mandates that the parents of a child with a disability serve as the primary enforcer and ensurer of the rights secured by the IDEA. This not only conflicts with the IDEA's imposition of an affirmative obligation to ensure that each student receives a free and appropriate education, but it also perpetuates an imbalance of power. Where the government is tasked with overseeing the process and with preparing an IEP (absent a waiver by the parents of the child), it ensures that the public continues to offer the child a FAPE. *See Cumberland Valley*, 842 F.Supp.2d at 771. Further, only with an updated IEP can the school district and parent determine whether private school expenses may be reimbursable. *See Town of Burlington v. Department of Education*, 736 F.2d 773, 794 (1st Cir. 1984). By contrast, the Panel has relieved the school district from

these obligations under the IDEA, and now requires parents of students with disabilities to invoke a formulaic and hyper-technical request for an IEP. The result is that it risks the loss of an opportunity for the student to receive a FAPE over an issue of form-not-substance, which is exactly what happened here.

Here, the parents of the child engaged with the school district over years through various IEPs, some more successful than others. (App. 24a.) When the IEP for first grade proved undisputedly inadequate, the parents enrolled their child in private school and engaged in their right to due process by engaging with the district over reimbursement, indisputably seeking to vindicate the child's right to a FAPE. (*Id.*). The first due process complaint was withdrawn, and another instituted. (*Id.*). But, the Panel determined that such efforts to vindicate the child's FAPE rights were insufficient, because they did not include the formulaic and hyper-technical request for an IEP invented by the Panel. (*Id.*)

Giving school district license to ignore overt requests for help or overlook the clear engagement of parents in seeking a FAPE for their child in favor of a formulaic and hyper-technical approach not specifically mandated by any provision of the IDEA burdens the ability of a family to achieve a FAPE for a child with disabilities. This approach required by the Panel exacerbates the severe disadvantage parents of children with disabilities face when there is a disagreement over a child's FAPE. Only a fraction of parents exercise their IDEA rights to request a due

process hearing.[2] In significant part, this is because of the highly prohibitive costs associated with due process, including the expense of hiring attorneys and retaining expert witnesses. The average legal fees for a party involved in a due process hearing were $10,512.50 as measured in the middle of the last decade. Legal fees have not diminished appreciably in that time. Sasha Pudelski, Am. Assn Sch. Adm'rs, *Rethinking Special Education Due Process* 13 (2016). This major expense proves to be a significant barrier to parents' ability to prevail, and is especially a barrier to protecting the right to a FAPE for students' whose parents' or guardians' economic resources are limited. Tracy Gershwin Mueller & Francisco Carranza, *An Examination of Special Education Due Process Hearings,* 22 J. Disability P. Studies 7 (2011) (finding significant difference among the prevailing parties).

The Panel's rule profoundly exacerbates an already uneven system where the protocols of the IDEA favor wealthy, educated, and sophisticated parents who can navigate an adversarial system, creating a disparate impact that disproportionately affects rural, low income, and people of color. GAO, *Special Education: IDEA Dispute Resolution Activity in Selected States Varied Based on School Districts' Characteristics* 20 (Nov. 2019); Elisa Hyman et al., *How IDEA Fails Families Without Means: Causes and Corrections from the Frontlines of Special Education*

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[2] For every 1,000 special education students, only 2.6 due process requests are filed each year. *See* Joseph B. Tulman et al., *Are There Too Many Due Process Cases? An Examination of Jurisdictions with Relatively High Rates of Special Education Hearings*, 18 D.C. L. Rev. 244, 247 (2015)

Lawyering, 20 Am. U. J. Gender & L. 107, 111 (2011) ("The obstacles that families without resources face in the IDEA are compounded by the increasingly technical nature of the IDEA and the inability of these families to retain professionals to assist in navigating the intricacies of disability definitions, evaluation processes, the development of IEPs, the complex of procedural safeguards, among other provisions in the statute").

This Court has previously held with crystalline clarity that the rights of parents and disabled children under the IDEA must be interpreted to ensure that some children are not excluded from its protections and benefits, stating: "[w]e find nothing in the [IDEA] to indicate that when Congress required States to provide adequate instruction to a child 'at no cost to parent,' it intended that only some parents would be able to enforce that mandate." *Winkelman ex rel. Winkleman v. Parma City Sch. Dist.*, 550 U.S. 516, 533 (2007). The Panel decision here burdens the ability of parents to enforce that mandate, by allowing the opportunity for an IEP (and thus a FAPE) to be inadvertently squandered even when parents are taking action (such as seeking reimbursement) clearly in pursuit of their child's FAPE rights.

Here, there is nothing in the IDEA that mandates a particular form of request for an IEP. By fashioning its own implied requirement, the Panel interprets the IDEA's structure in a way that results in the inadvertent forfeiture of an IEP in a manner contemplated by neither party, and defeats the intent of the IDEA to give children with disabilities, "an

appropriate education and a free one." *Burlington*, 471 U.S. at 372

III. INCONSISTENT APPLICATIONS OF LAW BY THE VARIOUS CIRCUITS RESULTS IN UNEQUAL APPLICATION OF THE IDEA FOR CHILDREN ACROSS AMERICA.

Because the IDEA is silent as to the mechanics of the continuing obligations of a school district to prepare an IEP when a parent has enrolled their child in private school while still seeking access to their special education rights, courts have come to inconsistent conclusions as to what a school district must do and when. This issue is ripe for clarification by this Court.

Within a decade of passage of the IDEA, this issue became evident as the First Circuit confronted a situation similar to the instant case. In *Town of Burlington v. Department of Education*, 736 F.2d 773 (1st Cir. 1984), the First Circuit concluded that where parents sought review of an IEP, had placed their child in private school in the interim, and the IEP had lapsed, the school district had a continuing obligation to review and revise the child's IEP in accordance with applicable law. *Id.* at 794. This approach is sensible. Where a family is seeking review of an IEP, it is clear that the family continues to seek the FAPE guaranteed by the IDEA. The First Circuit acknowledged that the IDEA did not specify whether or how IEPs were to be revised during such review. *Id.* It concluded that not requiring continued IEPs, but instead allowing a subsequent "rear view proposal," of IEPs prepared years later, "could not comply with the statutory requirements for

drafting IEPs. . . ." *Id.* The decision of the First Circuit in *Burlington* was affirmed by this Court, albeit on limited grounds. *Sch. Comm. Of Burlington v. Dep't of Educ. Of Mass.*, 471 US. 359 (1985).

The Panel of the Ninth Circuit in this case acknowledged the pragmatic sensibilities of the First Circuit approach. (App. 23a). The Panel, however, concluded that it could not locate a specific affirmative mandate for continued IEPs in such a circumstance. Thus, the Panel concluded that the First Circuit approach was not grounded in text. The Panel, consequently, determined to fashion its own rule to facilitate the implementation of the IDEA by requiring parents to specifically request an IEP. The Panel did not point to any particular text requiring such a process, because there is no such text. There is no identified section of the IDEA that says, "a child enrolled in public school may only receive an IEP if one is specifically requested by their parent."). Rather, ignoring the expressly stated goal of the IDEA 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 need and prepare them for further education, employment, and independent living. . . ." (20 U.S.C. § 1400(d)(1)(A)), the Panel concluded that the structure of the IDEA warranted such a hyper-technical rule. The Panel arrived at this result by concluding that 20 U.S.C. §1412(a)(10) only recognizes two categories of students in private school. There are those who have been placed in private school by a public agency under § 1412(a)(10)(B), who are entitled to IEPs. And there are those who have been placed in private school by a parent under § 1412(a)(10)(A), who are entitled to

IEPs—but only with a formulaic and hyper-technical parental request.

Other circuits who have addressed the issue are divided, the Fourth Circuit requires a school district to continue developing IEPs for a child with disabilities "even if a child is no longer attending its schools when a prior years IEP for the child is under administrative or judicial review." *MM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 536-37 (4th Cir. 2002). This approach is roughly consistent with the First Circuit.

By contrast, the Third Circuit approach is consistent with the Panel decision here. *See A.B. through Katina B. v. Abington Sch. Dist.*, 841 Fed App'x 392, 395-96 (3rd Cir. 2021). In *Abington*, the Third Circuit concluded that where a parent has removed their child from public school and enrolled the child in private school, that an IEP must only be prepared where the parent either "manifests an intent to enroll the child or requests an evaluation" *Id.* at 396. The Eleventh Circuit uses a similar standard. *See Dubrow v. Cobb Cnty. Sch. Dist.*, 887 F.3d 1182, 1192-93 (11th Cir. 2018) (stating that even overt requests for help or other forms of testing do not qualify as a request for evaluation under the IDEA).

Because of the different approaches and standards adopted by the various circuits, children with disabilities receive disparate procedural protections under the IDEA. In some parts of America, a child whose parents seek review of an IEP is automatically entitled to have their IEP reviewed and revised. *Burlington*, 736 F.2d at 794. In others, even an overt request for help is insufficient, unless the parent

formulaically requests an IEP. *Dubrow*, 887 F.3d at 1192-93.

Amicus respectfully urges this Court to announce a standard for all students with disabilities in the nation. Specifically, *amicus* requests this Court adopt the standard suggested by Petitioner, that consistent with the language of 20 U.S.C. § 1414(d)(2)(A), where a child has been identified as a child with special needs within a school district's jurisdiction, that the district must continue to conduct an IEP annually and must have in place an IEP, unless the child's parents have agreed that the district does not need to continue to review and revise the IEP. The critical distinction under the IDEA is best framed as whether the parents manifest an intent to obtain a FAPE for their child—not whether they have made a request in the proper form or decided to re-enroll a child in a public school. Such a rule is entirely consistent with the text of the IDEA, the expressly stated goal of the IDEA, and avoids the risk of an inadvertent forfeiture of rights.

CONCLUSION

Children are guaranteed the right to a free appropriate public education, which requires a school district prepare an individual education plan for all children living within its jurisdiction who seek access to special education. The decision of the Panel of the Ninth Circuit imposed a procedural hurdle not required by the text of the IDEA, which unduly burdens the special education rights of children with disabilities whose parents have enrolled them in private school due to an inadequate individual education plan. Because

other circuit courts have adopted different standards and criteria for when a school district must prepare an IEP for children enrolled in public school, children across America are now treated unequally. This Court should grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

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