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.

CAPTISTRANO UNIFIED SCHOOL DISTRICT,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the Reauthorized Individuals with Disabilities Education Improvement Act ("IDEA" or "Act") require public school districts to develop and offer an annual individualized education program ("IEP") to every parentally-placed private school student with a disability, when parents have not requested an IEP for that private school student?

2. Do the facts of this matter render it inappropriate for the Court to consider the claimed differences between the Circuit Courts of Appeal in IEP procedures for private school students?

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RELEVANT PROVISIONS INVOLVED

20 U.S.C. § 1412(a) (3), (4), (10)(A-C)

(a) In general A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

…

(3) Child find

(A) In general

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

(B) Construction

Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.

(4) Individualized education program

Anindividualized education program, or an individualized family service plan that meets the requirements of section 1436(d) of this title, is developed, reviewed, and revised for each child with a disability in accordance with section 1414(d) of this title.

…

(10) Children in private schools

(A) Children enrolled in private schools by their parents

(i) In general To the extent consistent with the 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 subchapter by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):

(I) Amounts to be expended for the provision of those services (including direct services to parentally placed private school children) by the local educational agency shall be equal to a proportionate amount of Federal funds made available under this subchapter.

(II) In calculating the proportionate amount of Federal funds, the local educational agency, after timely

and meaningful consultation with representatives of private schools as described in clause (iii), shall conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located in the local educational agency.

(III) Such services to parentally placed private school children with disabilities may be provided to the children on the premises of private, including religious, schools, to the extent consistent with law.

(IV) State and local funds may supplement and in no case shall supplant the proportionate amount of Federal funds required to be expended under this subparagraph.

(V) Each local educational agency shall maintain in its records and provide to the State educational agency the number of children evaluated under this subparagraph, the number of children determined to be children with disabilities under this paragraph, and the number of children served under this paragraph.

(ii) Child find requirement

(I) In general The requirements of paragraph (3) (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including religious, elementary schools and secondary schools.

(II) Equitable participation The child find process shall be designed to ensure the equitable participation of parentally placed private school children with disabilities and an accurate count of such children.

(III) Activities In carrying out this clause, the local educational agency, or where applicable, the State educational agency, shall undertake activities similar to those activities undertaken for the agency's public school children.

(IV) Cost The cost of carrying out this clause, including individual evaluations, may not be considered in determining whether a local educational agency has met its obligations under clause (i).

(V) Completion period

Such child find process shall be completed in a time period comparable to that for other students attending public schools in the local educational agency.

…

(vi) Provision of equitable services

(I) Directly or through contracts The provision of services pursuant to this subparagraph shall be provided—

(aa) by employees of a public agency; or

(bb) through contract by the public agency with an individual, association, agency, organization, or other entity.

(II) Secular, neutral, nonideological Special education and related services provided to parentally placed private school children with disabilities, including

materials and equipment, shall be secular, neutral, and nonideological.

(vii) Public control of funds

The control of funds used to provide special education and related services under this subparagraph, and title to materials, equipment, and property purchased with those funds, shall be in a public agency for the uses and purposes provided in this chapter, and a public agency shall administer the funds and property.

(B) Children placed in, or referred to, private schools by public agencies

(i) In general

Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

(ii) Standards

In all cases described in clause (i), the State educational agency shall determine whether such schools and facilities meet standards that apply to State educational agencies and local educational agencies and that children so served

have all the rights the children would have if served by such agencies.

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(iv) Exception

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement—

(I)shall not be reduced or denied for failure to provide such notice if—

(aa) the school prevented the parent from providing such notice;

(bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I); or

(cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and

(II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if—

(aa) the parent is illiterate or cannot write in English; or

(bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.

34 C.F.R. § 300.130

Definition of parentally-placed private school children with disabilities.

Parentally-placed private school children with disabilities means children with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the definition of elementary school in § 300.13 or secondary school in § 300.36, other than children with disabilities covered under §§ 300.145 through 300.147.

34 C.F.R. § 300.137

Equitable services determined.

(a) ***No individual right to special education and related services.*** No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school.

…

34 C.F.R. § 300.146

Responsibility of SEA.

Each SEA must ensure that a child with a disability who is placed in or referred to a private school or facility by a public agency -

(a) Is provided special education and related services -

(1) In conformance with an IEP that meets the requirements of §§ 300.320 through 300.325; and

(2) At no cost to the parents;

(b) Is provided an education that meets the standards that apply to education provided by the SEA and LEAs including the requirements of this part, except for § 300.156(c); and

(c) Has all of the rights of a child with a disability who is served by a public agency.

34 C.F.R. § 300.300

Parental consent.

(a) ***Parental consent for initial evaluation.*** (1)(i) The public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under § 300.8 must, after providing notice consistent with §§ 300.503 and 300.504, obtain informed consent, consistent with § 300.9, from the parent of the child before conducting the evaluation.

…

(b) ***Parental consent for services.***

(1) A public agency that is responsible for making FAPE available to a child with a disability must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child.

…

(c) ***Parental consent for reevaluations.***

(1) Subject to paragraph (c)(2) of this section, each public agency -

(i) Must obtain informed parental consent, in accordance with § 300.300(a)(1), prior to conducting any reevaluation of a child with a disability.

…

(d) Other consent requirements.

…

> **(2)** In addition to the parental consent requirements described in paragraphs (a), (b), and (c) of this section, a State may require parental consent for other services and activities under this part if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.

…

INTRODUCTION

Petitioners, S.W. and C.W. ("Parents") on behalf of their child, B.W. ("Student"), have petitioned this Court to grant certiorari regarding the question whether public school districts are required to develop annual individualized education programs ("IEPs") for all parentally-placed private school children with disabilities whose parents have expressed disagreement with their child's *previous* public placement offer, but who have not requested a *prospective* IEP for their child.

The Court should deny Petitioners' request for certiorari because (1) Congress has already answered this question definitively in the negative; (2) there is no material conflict among the Courts of Appeal regarding development of IEPs for parentally-placed private school children; and, (3) under the facts of this matter – with no litigation pending at the time Petitioners allege an IEP should have been offered, and with Petitioners announcing

in writing their intention to keep Student in private school – no Court of Appeal would have required the school district to convene an IEP meeting under any statute or regulation.

In the absence of any substantive basis for certiorari, Petitioners misdirect the Court with rhetoric claiming that the Ninth Circuit's plain reading of the IDEA "sabotages" parents' rights, permits public schools to unilaterally "abdicate their primary role in a child's educational planning," and, in so doing, "punish[es] children" for their parents' advocacy. This misdirection is unavailing – all Courts of Appeal agree that public school districts do not have an obligation to offer IEPs to a private school child with disabilities under the facts of this case.

All Courts of Appeal to have considered the question also agree that parents of private school students may obtain an IEP from their school district of residence simply by requesting one. Parents' fundamental right to direct the education of their child is not infringed by the reasonable expectation that, if parents of private school students are interested in receiving an offer of an educational placement from a public school, they may simply ask that public school district.

Below, the Ninth Circuit applied the plain language of the IDEA to reach the conclusion that school districts are not required to convene annual IEP meetings for parentally-placed private school students unless the parents of the child request an offer of free appropriate public education ("FAPE"). The Ninth Circuit's opinion is consistent with the statutory language, with its own precedent, and with its sister circuits' decisions, and this

Petition does not raise an important federal question on which there is any conflict. The Court should therefore reject Petitioner's request for certiorari.

STATEMENT OF THE CASE

A. Factual Background: Parents Placed B.W. Privately And Disengaged From The Public School District.

Petitioners no longer reside within the District, having moved elsewhere near the end of the 2017-18 school year. (Pet. at 17.) While residing within the District, B.W. was eligible for special education and related services pursuant to the IDEA, under the category of Autism. 20 U.S.C. § 1400 *et seq.* During the 2015-16 school year (B.W.'s kindergarten year) and the first half of the 2016-17 school year (her first grade year), Parents enrolled B.W. in Community Roots Academy ("CRA"), a public charter school. At CRA, B.W. received special education and related services under a District IEP, the foundational education delivery plan for students with disabilities in public schools. (Pet. App. 10a.)

The Questions Presented do not involve the substance of any IEPs developed for B.W., but rather whether the District should have developed a new IEP for B.W. after Parents unilaterally removed her from the public charter school and placed her in a private school of their choosing.

In February 2017, Parents withdrew B.W. from CRA, and placed her in a private school. On February 23, 2017, the District responded to Parents' unilateral placement notice under 20 U.S.C. § 1412(a)(10)(C) via a letter of prior written notice. (Pet. App. 38a-39a.) Parents did not

respond. (Pet. App. 11a.) Parents pre-paid the private school registration fees for the 2017-18 school year on March 17, 2017, and did not request an IEP offer from the District for the 2017-18 school year. (Pet. at 16.) Instead, Parents announced to the District in writing that B.W. would stay in private school for "the remainder of first grade and for second grade," meaning through the end of the 2017-18 school year. (Pet. at 16.)

Parents had previously (in October 2016) filed an administrative due process action against the District regarding earlier IEPs, but they voluntarily dismissed that action in April 2017, after they had placed B.W. in private school and had announced their intention to keep her there through the 2017-18 school year. (Pet. at 16.) Accordingly, Petitioners dismissed the only action by which they could seek public reimbursement of their private school costs. 20 U.S.C. 1412(a)(10)(C).

Had B.W. been in public school during the spring of 2017, her next annual IEP review would have come due in May 2017. The purpose of an IEP meeting is to develop an offer of free appropriate public education. As B.W. was attending a private school and Parents had made clear their intentions to keep her there, the District did not convene an annual IEP meeting for B.W. in May 2017. Consistent with Parents' stated intentions, B.W. attended private school through the end of the 2017-18 school year. (Pet. at 17.)

In December 2017, Parents filed a new due process action against the District. On January 17, 2018, Parents amended their request for due process to include a new claim that the District should have convened an IEP for

B.W. in either May 2017 or before the beginning of the 2017-18 school year. In February 2018, the District offered to conduct an educational assessment of B.W., and to convene an IEP to discuss the results. (Pet. at 17.) Despite their new claim that an IEP should have been convened, Parents refused the District's assessment and IEP offers for months, ultimately requiring the District to seek an order permitting that assessment. (Id.)

In May 2018, the District again requested consent to the proposed assessment, which Parents did not provide. Parents later purported to consent to the assessment in order to moot the District's pending administrative hearing request. Despite Parents' stated consent to the District's proposed assessment, Petitioners acknowledge they never made B.W. available for the assessment. (Id.; see also, Pet. at 40a.) Prior to the issuance of the administrative hearing decision on Parents' due process action, Parents gave notice that they had moved out of the District and had enrolled B.W. elsewhere. (Pet. at 17.)

B. Procedural History.

After dismissing their initial due process action in April 2017, Parents did not contact the District or otherwise engage with the public school system for eight (8) months. Then, in December 2017, Parents filed their second administration due process action against the District. This is the action underlying the present case. Petitioners amended their due process complaint on or about January 23, 2018. Their claims in this new action, as amended, began in December 2015, while B.W. was at CRA, and continued with claims for the period after they withdrew B.W. from CRA and placed her in private

school. Among those new claims was the assertion that the District was obligated to continue preparing IEPs for B.W. even though she was unilaterally placed in private school, and even though Parents had announced their intention to keep her there. (Pet. App. 67a.) Parents also claimed that the District was legally obligated to have initiated litigation *against them* for not consenting to a prior IEP. (Id.)

The administrative matter was heard by the California Office of Administrative Hearings ("OAH") in May 2018. On July 25, 2018, OAH issued a decision. (Pet. App. at 66a-147a.) The OAH Decision held that the District was required to convene an annual IEP for B.W. in May 2017, and to have an IEP in place at the beginning of the 2017-2018 school year even though B.W. was attending private school. This element of the OAH Decision was overturned by the district court, which ruled that, under the facts of this case, no IEP was required. (Pet. App. at 57a-61a.). The district court also ruled that the District was not under an obligation to file an action against Parents for not consenting to a prior IEP, and reversed on that ground as well. (Pet. App. 55a-57a.).[1]

On cross-appeal to the Ninth Circuit, the Panel affirmed the district court's ruling that the District had no obligation to convene an IEP for B.W. while she was unilaterally placed in private school by her Parents. (Pet. App. at 22a-28a, affirming 57a-61a.) This determination forms the basis of Petitioners' current Petition before this

1. This issue arises under a unique provision of California law, not the IDEA. Cal. Educ. Code § 56346(f). While Petitioners allude to this issue in their Petition, it does not form the basis of any of the Questions Presented to this Court.

Court. The Ninth Circuit also confirmed that the District was not under an obligation to initiate legal action against the Parents under California Education Code Section 56346(f). (Pet App. at 20a-22a, affirming 55a-57a.)

Petitioners timely requested en banc review but no member of the full court requested review of the Panel's decision. (Pet. App. 65a.)

C. Relevant Statutory Provisions And Circuit Panel Conclusion.

The Petition concerns a small sub-set of parentally-placed private school children with disabilities whose parents have given notice to the district of their disagreement with a previous IEP, and of their intent to seek public reimbursement for the private school costs they have chosen to incur. See, 20 U.S.C. § 1412(a)(10)(C)(iii)(I). The first Question Presented asks whether these students are eligible to receive the annual IEP team meeting reviews provided for at 20 U.S.C. § 1412(a)(4), even when their parents have not requested an IEP. As determined by the district court and Ninth Circuit below, they are not.

The IDEA classifies children who are enrolled in private schools into two categories based upon who placed them there: (1) children who have been placed in private school by their parents, and (2) children who have been placed in private school by a public agency. 20 U.S.C. § 1412(a)(10)(A),(B). For students in the second category, who have been placed in private school by a public agency, the agency is obligated to serve the child in accordance with an IEP. 20 U.S.C. § 1412(a)(10)(B)(i); 34 C.F.R. § 300.146.

However, as to the first category, those whose parents placed them in private school, the IDEA does not include the requirement that IEPs be developed, and expressly defines them by the absence of such an IEP. 20 U.S.C. § 1412(a)(10)(A); 34 C.F.R. § 300.130 (definition of "parentally-placed private school children with disabilities" excluding students served under the IEP requirements of 34 C.F.R. § 300.146).

For students placed in private school by their parents, like B.W., the Code of Federal Regulations also provides that, "No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.137(a). Instead, the IDEA requires school districts to provide, "for such children special education and related services in accordance with [certain] requirements." 20 U.S.C. § 1412(a)(10)(A)(i). These certain requirements do *not* include the offer of an IEP, and this fact is what the Ninth Circuit affirmed. 20 U.S.C. § 1412(a)(10)(A)(i).

Notably, although the IDEA specifically declares that the, "requirements of paragraph (3) (relating to child find)[2] shall apply with respect to children with disabilities in the State who are enrolled in private … schools," there is no such statement for the requirements of paragraph (4) of the same section, which concerns convening IEPs. 20 U.S.C. § 1412(a)(10)(A)(ii)(incorporating for parentally-placed private school students the requirements of (a)

2. "Child find" refers to the process of ensuring the children potentially eligible for special education are identified by the relevant school district. 20 U.S.C. § 1412(a)(3)(A).

(3)(child find) of the same section, but *not* (a)(4) (IEPs)). Congress also did not incorporate the general rule that an IEP should be in effect at the beginning of each school year for each student. Id. (no reference or incorporation of 20 U.S.C. § 1414(d)(2) as one of the "requirements" for parentally-placed private school children.) The Panel concluded that if Congress had intended to require IEPs for parentally-placed private school students, it would have done so expressly, just as it did with school districts' child find duty.

A small subset of parentally-placed private school children with disabilities incur private school tuition with the hope that they may eventually recover the cost of tuition from the school district. 20 U.S.C. § 1412(a)(10)(C). To have any claim to private school reimbursement, the family must request a due process hearing. *James ex rel. James v. Upper Arlington City Sch. Dist.*, 228 F.3d 764, 770 (6th Cir. 2000) (parents are obligated to challenge an IEP by requesting a hearing if they seek tuition reimbursement); *Warren G. ex rel. Tom G. v. Cumberland Cnty. Sch. Dist.*, 190 F.3d 80, 84 (3d Cir. 1999) (parents "are not entitled to reimbursement for private school tuition until they request review proceedings"); 20 U.S.C. § 1412(a)(10)(C)(ii). To succeed at hearing, the family must prove both that the previously offered "public placement violated IDEA and that the private school placement was proper under the Act." *Florence Cnty. Sch. Dist. Four v. Carter By & Through Carter*, 510 U.S. 7, 15 (1993).

In proceedings below, Petitioners argued for a third category of private school students, not established by Congress. They asserted that the conditional reimbursement provision of the IDEA, 20 U.S.C. section

1412(a)(10)(C), meant that parentally-placed private school students whose families disagreed with an IEP offered prior to their unilateral enrollment in private school should be treated differently from all other parentally-placed private school students, even when no administrative hearing had been requested. The Ninth Circuit analyzed subparagraph (C), noting that it, "begins by saying '[s]ubject to subparagraph (A)'" and held that this provision, "rather than establishing a third category . . . instead simply addresses reimbursement for a subset of students." (Pet. App. at 26a; *see also,* 34 C.F.R. § 300.130.) The Panel found that this subset of parentally-placed private school students is subject to the same rights and obligations as all other parentally-placed private school students – and this means that under unambiguous statutory and regulatory language, they have no right to an annual IEP, unless they request one. (Id.)

REASONS FOR DENYING THE PETITION

A. Certiorari Should Be Denied Because The IDEA Is Clear And There Is No Conflict Within the Ninth Circuit Nor Among Circuits On The Questions Presented.

Here, it is undisputed that during the relevant time, B.W. was a parentally-placed private school child with a disability whose parents had not requested an IEP from the District. (Pet. App. at 16-17.) Petitioners claim that the District was nevertheless obligated to develop an annual IEP for B.W. in May 2017 or prior to the 2017-18 school year, even in the absence of a parental request for an IEP. The Ninth Circuit held that no such obligation exists under the plain language of the IDEA.

1. Petitioners do not direct the Court to any circuit court decision that conflicts with the outcome of the Panel Decision below. Instead, Petitioners allude to an illusory "intra-Circuit" conflict they claim exists between the Panel Decision and another Ninth Circuit case, *Anchorage Sch. Dist. v. M.P.*, 689 F. 3d 1047 (9th Cir. 2012). Petitioners refer several times to, and in heavy reliance upon, *Anchorage*, but fail to note that in *Anchorage* the student was not enrolled in private school, but in public school. (Id. at 1052.)

Both the district court and Ninth Circuit Panel directly addressed Petitioner's continuing misinterpretation of *Anchorage* finding that it is inapposite to the present case. (See, Pet. App. 59a, where the district court notes that for this reason *Anchorage* "does not shed light" on the present matter; see also, Pet. App. 27a, where the Panel Opinion notes that, ". . . in *Anchorage*, because the student remained in public school, the student obviously had not been enrolled in private school by his parents. So 20 U.S.C. § 1412(a)(10)(A) did not apply.")

In short, *Anchorage* addressed school districts' obligations to continue developing annual IEPs for students attending *public* school, but did not address an asserted obligation to develop IEPs for students enrolled in *private* school by their parents, and therefore has no relevance to the question presented. Petitioners not only fail to note this dispositive distinction that each lower court identified, but persist without explanation in erroneously treating the facts in the present case as if they were convergent with those in *Anchorage*. (Pet. App. 28, 31.)

2. Similarly, rather than documenting any conflict between circuits, Petitioners refer to circuit court opinions that are consistent in outcome with the Ninth Circuit's ruling that school districts are not obligated to convene annual IEPs for private school students under these factual circumstances. Here, there was no pending litigation between the parties at any relevant time, Parents did not request an IEP, and Parents had announced their intention to continue their private school placement of B.W. Petitioners couch their request for certiorari in terms inconsistent with these facts, in seeking to create a conflict among circuits on a material element of this case. There is no such conflict.

Nearly forty years ago, in 1984, the First Circuit, in dicta, took it upon itself in the absence of then-current statutory language to "facilitate implementation of the Act," and advised that school districts should continue to develop IEPs annually for parentally-placed private school children when there is pending litigation on a prior IEP. *Town of Burlington v. Dep't of Educ. for Com. of Mass.*, 736 F.2d 773, 794 (1st Cir. 1984). Although given the opportunity, this Court declined to adopt the First Circuit's dicta regarding the development of IEPs for private school students during the pendency of litigation. See, *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 367 (1985) ("express[ing] no opinion on any of the many other views stated by the Court of Appeals.") Moreover, when Congress refashioned the IDEA in 1997, it outlined the equitable factors to consider in whether private school tuition may be sought from the school district. In doing so, Congress chose *not* to include the First Circuit's judicial rule for IEP development during any pending litigation over previous IEPs. See, 20 U.S.C. § 1412(a)(10)(C).

Later courts have referred to the First Circuit's dicta, and Petitioner alludes to some of them in this matter, but they are in accord with the Ninth Circuit's opinion under the facts of this case: IEPs are not required for private school children where, as here, no litigation was pending and where no IEP was requested. (See, e.g., *Amann v. Stow Sch. Sys.*, 982 F.2d 644, 651 (1st Cir. 1992) (Parents' placement of the child in private school in 1987 relieved the school district of any obligation to develop, implement, review, or revise the student's IEP in subsequent school years, based on prior regulation.); *James, supra*, 228 F.3d 764, 770 (6th Cir. 2000) (The district's obligation to develop an IEP did not arise until parents requested one, years after their initial placement in private school.); *MM ex rel. DM v. Sch. Dist. of Greenville Cnty.*, 303 F.3d 523, 537 (4th Cir. 2002) (The school district had no obligation to develop an annual IEP for M.M. in 1997, after she was withdrawn from public school and placed privately in 1996.); *D.P. ex rel. Maria P. v. Council Rock Sch. Dist.*, 482 F. App'x 669, 672 (3d Cir. 2012) (rejecting the First Circuit's dicta to simply hold: "[I]f a student is enrolled at a private school because of a parent's unilateral decision, the school district does not maintain an obligation to provide an IEP.")

The foregoing decisions were issued over the course of roughly 20 years, during which time the statutory and regulatory landscapes evolved, but nonetheless, the outcomes are consistent with the Panel's decision here. All circuits would conclude, as the Ninth Circuit did here, that there were no factual circumstances requiring the District to propose an IEP for this parentally-placed private school student. There is therefore no actual conflict among the circuits on the Questions Presented in this matter.

3. The circuits are similarly in accord with the corollary proposition that a school district must develop an IEP for a student currently attending a private school when parents request an IEP, thereby notifying the district that a public education is, at least nominally, being sought for the child. *Bellflower Unified Sch. Dist. v. Lua*, 832 F. App'x 493, 496 (9th Cir. 2020) ("BUSD violated the IDEA by refusing to convene an IEP meeting in 2015 and 2016 *despite multiple requests*" from parents (emphasis added)); *James, supra*, 228 F.3d 764, 768 (6th Cir. 2000) (where parents "specifically approached the school district about re-enrollment and obtaining a new IEP," the district violated IDEA by "refusing to do an IEP pre-enrollment"). Conversely, the school district is not required to develop an IEP for a parentally-placed private school student where no IEP was requested directly. *A.B. through Katina B. v. Abington Sch. Dist.*, 841 F. App'x 392, 396 (3d Cir. 2021) (parents' general inquiries about public programs that may be available were insufficient to trigger the district's duty to assess and develop an IEP for the privately placed child).

On the facts presented in this matter, all Courts of Appeal are in accord because there was no pending litigation and Parents made no request for an IEP. If Parents had requested an IEP, then all Circuits would also find that an IEP must be convened. There is therefore no material conflict or confusion between circuits for this Court to mediate, and the Petition should be denied.

B. This Case Is Not An Appropriate Vehicle To Review Minor Differences In Dicta Between The Courts Of Appeal.

Petitioners do not point out any material conflict within or among circuits, and further, the variations of factual patterns addressed in these cases render this case an inappropriate vehicle for certiorari. Some circuits, as noted, have addressed a school district's duty to develop an IEP for parentally-placed private school students incorporating into their analyses the question whether litigation is pending between the family and district regarding *previous* IEPs offered to the child.

However, under the facts of this matter – where there was no litigation pending between the parties at the time Petitioners claim B.W.'s annual IEP was due – that circumstance is not present. The Court should therefore deny the Petition because it does not provide a meaningful vehicle to consider any material question that could modify the outcome.

Below, the Ninth Circuit declined to adopt the First Circuit's dictum, and relied instead upon the express statutory language, holding that school districts were not required to continue the development of IEPs for parentally-placed private school children with disabilities in the absence of a parental request, even when litigation of a prior IEP was pending. (Pet. App. 24a-28a.)

However, here there was no litigation at the relevant time, so the facts of this case do not present an appropriate vehicle for certiorari on this point. The Panel rightly characterized the underlying facts of this case as, "an

unusual series of events." (Pet. App. 24a.). As the Panel notes, B.W.'s Parents made an administrative challenge to B.W.'s December 2015 and May/September 2016 IEPs, but voluntarily dismissed it without explanation on April 18, 2017, well before her May 2017 annual IEP might have otherwise been due. (Pet. App. 24a.).

There was still no litigation pending when the 2017-18 school year began. (Id.) Accordingly, there was no litigation pending at any time that the District might have offered an IEP under the First Circuit's *Burlington* dicta. The Ninth Circuit's rejection of the First Circuit's suggested rule for situations involving pending litigation simply had no impact on the outcome of this matter. These circumstances render this case inappropriate this Court's consideration of the First Circuit's dicta because it would not be dispositive of the outcome. The Court should therefore deny the Petition on the separate ground that it does not provide an appropriate vehicle to address any question material to the outcome of this matter.

C. The Panel Decision Below Does Not Infringe Upon Parental Participation Nor Impact A Fundamental Right.

The central purpose of the IDEA is to provide children with disabilities a free appropriate *public* education. 20 U.S.C. §§1400 *et seq.; Endrew F., ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1,* 137 S. Ct. 988 (2017). However, not all children with disabilities attend public schools. Parents have a fundamental right "to direct the upbringing and education of children under their control," including by their choice to enroll their child in private schools. *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925).

Families choose to place their children with disabilities in private schools at their own expense for a wide variety of reasons. A small subset of parents choose to incur private school tuition "at their own financial risk" with the hope that they may eventually recover the cost of tuition from their school district. *Burlington, supra*, 471 U.S. 359, 374 (1985); 20 U.S.C. § 1412(a)(10)(C). To initiate their claim to recover of private school reimbursement, the family must file a request for a due process hearing and must prove both that the previously offered "public placement violated IDEA and that the private school placement was proper under the Act." *Carter*, *supra,* 510 U.S. 7, 15 (1993).

Petitioners assert that the Ninth Circuit's opinion below permits school districts to *unilaterally* abdicate their role in the education of children. But this claim disregards the fact that it is parents who have chosen to exercise their right to withdraw from public school. It is not the role of public schools to second guess the educational decisions parents make for their children in private schools.

Families are free to disengage from their school districts, as B.W.'s family did here. But, they cannot both exercise their freedom to disengage and then fault their school district for honoring their exercise of that freedom. It is clear that the "IDEA was not intended to fund private school tuition for the children of parents who have not first given the public school a good faith opportunity to meet its obligations." *C.H. v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 72 (3d Cir. 2010) (rejecting tuition reimbursement to parents who withdrew their child from public school and placed them privately on the basis an IEP was not completed, and then refused to complete the IEP.)

For the subset of parents with children in private school who *do* want to obtain tuition reimbursement, the existing statutory and regulatory scheme allows parents and school districts a good faith opportunity to design a program that would meet the child's needs. 20 U.S.C. § 1412(a)(10)(C). As this Court noted, "parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley*, 458 U.S. 176, 209 (1982). Courts of Appeal that have considered the question agree that parents may continue to seek a FAPE for their child by simply requesting an IEP from their school district. Functionally, the relevant provisions of the IDEA and its regulatory scheme for pursuing reimbursement, simply encourages parents to maintain engagement with the school district if they wish to obtain public funding for their private decisions.

The Court should deny this Petition because the facts do not present an important federal question on which there is any material conflict among Circuits, and the Act's expectation of participation and advocacy from parents does not infringe upon parents' fundamental rights to direct the education of their children.

D. The Ninth Circuit's Correct Application Of A California Statute Does Not Present A Federal Question.

While not in the Questions Presented, Petitioners also assert that the Ninth Circuit erred in its interpretation of California Education Code Section 56346 below. (Pet. at 30-31.) This argument does not present a federal question suitable for the Court's review.

After parents consent to an initial IEP, the IDEA does not require parental consent prior to implementation of annual IEPs. See, 34 C.F.R. § 300.300. Thus, in many states, annual IEPs are implemented as soon as developed by the IEP team, unless the parents request due process to prevent their implementation. However, the IDEA also provides that, "a State may require parental consent [to other IDEA provisions, such as annual IEPs] if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE." 34 C.F.R. § 300.300(d)(2).

California has taken that step, by adding a unique provision to the Education Code that permits parents to pick and choose the *components* of an IEP to which they wish to consent. Cal. Educ. Code § 56346(e). California also requires districts to request due process to override parental non-consent, if, and only if, *the district determines* that the implementation of the *components* of the IEP to which parents have not consented is necessary to provide the student with FAPE. Cal. Educ. Code § 56346(f).

Below, Petitioners alleged that this provision required the District to initiate litigation against them to implement B.W.'s IEP over their objections, even after they had removed her from public school. They devote two paragraphs to the Ninth Circuit's rejection of their claim. (Pet. App. 30-31.) The Ninth Circuit rightly rejected Petitioners' position on this state law question, which is answered, as the lower courts both found, by the language of the statute. (Pet. App. 56a (also citing *I.R. ex rel. E.N. v. Los Angeles Unified Sch. Dist.* 805 F.3d 1164 (9th Cir. 2015)). California's provisions for partial consent are clear,

but unique to it alone. No federal question exists, and it is not appropriate for this Court's consideration.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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