Nos. 19-1407 & 19-1429

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

C.W., a minor, by and through his parents B.W. and C.B.,

Appellant/Cross-Appellee,

v.

DENVER COUNTY SCHOOL DISTRICT NO. 1,

Appellee/Cross-Appellant.

Appeal from the United States District Court
For the District of Colorado
Civil Action No. 17-CV-2462-MSK-SKC
Honorable Marcia S. Krieger, Senior District Judge

OPENING-ANSWER BRIEF OF APPELLEE/CROSS-APPELLANT DENVER COUNTY SCHOOL DISTRICT NO. 1

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Oral Argument Requested

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NOTICE OF PRIOR OR RELATED APPEALS

There currently are no prior or related appeals, except that two separate case numbers, 19-1407 and 19-1429, have been assigned for the appeal and cross-appeal. As permitted by Federal Appellate Rule 4, Appellee/Cross-Appellant Denver County School District No. 1 may seek review of the merits of the district court's recent July 29, 2020 order awarding attorney's fees and taxing costs to Appellant/Cross-Appellee C.W.

STATEMENT OF THE CASE

This is a special education case involving novel issues of exhaustion and specification of services. Appellant/Cross-Appellee C.W., a minor, is enrolled in Appellee/Cross-Appellant Denver County School District No. 1 ("DPS" or "the District"). C.W., by and through his parents B.W. and C.B., commenced this civil action with a claim pursuant to 20 U.S.C. § 1415(i)(2)(A) of the Individuals with Disabilities Education Act ("IDEA") for review of a state administrative decision about C.W.'s educational program at the District. C.W. later amended the complaint to add claims against the District pursuant to Section 504 of the Rehabilitation Act ("Section 504"), the Americans with Disabilities Act ("ADA"), and 42 U.S.C. § 1983 for violation of the Equal Protection Clause of the United States Constitution ("Equal Protection").

The IDEA is a federal statute enacted to ensure that children with disabilities are provided a free appropriate public education ("FAPE") "that emphasizes special education and related services designed to meet [the] unique needs [of the child]." 20 U.S.C. § 1400(d)(1)(a). The cornerstone of the IDEA is the individualized education program ("IEP"). An IEP is a "written statement for each child with a disability that is developed, reviewed, and revised in accordance with [the IDEA]." 20 U.S.C. § 1414(d)(1)(A)(i). The IDEA requires school districts to develop an IEP

that is reasonably calculated to ensure that a student makes progress in light of his or her circumstances. *Endrew F. v. Douglas Cty. Sch. Dist., RE-1*, 137 S. Ct. 988, 1001 (2017).

C.W. has been a homebound student for several years with limited ability to receive instruction. As his condition deteriorated due to multiple disabilities, DPS determined his placement should be changed to residential treatment. C.W.'s parents adamantly opposed any location other than their home and flatly refused to cooperate with the District in selecting a specific residential treatment facility that could implement the IEP. They filed an administrative due process complaint, alleging a denial of FAPE. Largely unsuccessful, C.W.'s parents moved on to federal court and added Section 504, ADA, and Equal Protection claims, even though they had not exhausted those claims in the administrative process. In summary judgment briefing, the parents changed tack and argued for the first time that the District erred in not identifying a specific residential treatment facility. The district court agreed, though it found C.W.'s non-IDEA claims were barred.

C.W. and his parents, sadly, are in a situation of their own making. They had ample opportunity to engage with the District, and had they done so, the District could have identified a specific facility. They also could have included their Section 504, ADA, and Equal Protection claims in their due process complaint. If they had,

those claims would not now be barred. Their insistence on appeal that what is at most a procedural shortcoming in the IEP somehow amounts to a substantive error is both wrong and fundamentally unfair. It was not feasible to determine a specific residential treatment facility that can implement C.W.'s IEP without their input. Their renewed attempt to evade exhaustion is likewise erroneous and inequitable. The District was entitled to have an opportunity to attempt to remedy their concerns in the administrative process before having to face the prospect of money damages.

STATEMENT OF THE ISSUES

I. DPS's Issue.

Did the District substantively violate the IDEA when it documented a change in C.W.'s placement to residential treatment without identifying a specific facility?

II. C.W.'s Issue.

Was C.W. required to exhaust his Section 504, ADA, and Equal Protection claims in the state administrative process, was it enough that he exhausted only his IDEA claim, and does his pursuit of monetary damages excuse his need to have exhausted his other federal claims? Alternatively, was DPS entitled to summary judgment on C.W.'s Section 504, ADA, and Equal Protection claims because there is no set of facts that could establish the District discriminated against him because of his disabilities?

STATEMENT OF THE FACTS

I. C.W. Is Placed in a Homebound Setting.

C.W. has multiple disabilities, including autism, obsessive compulsive disorder, generalized anxiety disorder, sleep disorder, Ehlers-Danlos Syndrome, Tourette's disorder, eating disorder, and encopresis. Aplt. App. Vol. I at 175. C.W. is also twice exceptional due to identification as gifted and talented. *Id.* at 176.

C.W.'s disabilities impacted his school attendance. *Id*., Vol. III at 538. His parents insisted he must be educated at home because he was unable to get to school and could not receive more than two hours of direct instruction per day. *Id*., Vol. III at 544, 613, 630–31, 647, 665, 672, 678, 694, 701, 737; *Id*., Vol. VI at 1292–93. As a result of C.W.'s anxiety and medical needs, the IEP team placed him in a homebound setting beginning in November of 2014. *Id*., Vol. 2 at 539–40. In the homebound setting, the District was to provide direct instruction for two hours per day. *Id*., Vol. III at 630–35. DPS does not have any policy of limiting students with disabilities who receive services in a homebound setting to two hours of instruction per day. *Id*., Vol. 1 at 271. C.W.'s IEP team, including the parents, agreed that C.W. would receive two hours of direct instruction per day because C.W. was unable to sustain attention for a longer period of time. *Id*., Vol. III at 630–635.

DPS made multiple attempts to find appropriate service providers, including

hiring an outside contractor preferred by C.W.'s parents (Mr. Yaw, who declined the position). *Id.* at 540, 741. C.W.'s parents refused to allow some teachers to work with their son. *Id.* at 540, 741–43. Finally, the District directed Cathy Kromrey, an Associate Director of Special Education, to provide services. *Id.*, Vol. II at 541; *id.*, Vol. V at 1153, 1222–23. During the summer of 2015, compensatory services were provided for the time C.W. had been at home without instruction. *Id.*, Vol. III at 541–42; *id.*, Vol. V at 1239–40.

Ms. Kromrey provided C.W. academic instruction in a variety of core and elective subjects including literature, writing, mathematics, science, geography, art, and music. *Id.*, Vol. III at 542, 544; *id.*, Vol. V at 1140–41, 1155, 1178, 1199. She consulted with gifted and talented teachers and taught C.W. at a higher grade level. *Id.*, Vol. I at 179–80; *id.*, Vol. II at 542; *id.*, Vol. V at 1140–41, 1155. She did not provide formal gifted and talented instruction because DPS does not provide formal gifted and talented instruction to any student receiving homebound instruction. *Id.*, Vol. I at 263. Ms. Kromrey was seriously injured in October of 2015 and could not resume instruction until March of 2016. *Id.*, Vol. II at 543. The District was unable to find a substitute but offered compensatory education for the time without instruction. *Id.* at 544. By the end of the 2015–16 school year, C.W. was unable to tolerate more than 15 minutes of instruction at a time. *Id.* The IEP team considered

residential treatment, but it ultimately concluded—at C.W.'s parent's recommendation—that homebound was still the best placement option. *Id*., Vol. II at 543; *id.*, Vol. III at 679.

C.W. transitioned to middle school for the 2016–17 school year, and a new teacher, Bryan Sanchez, was assigned to provide his instruction. *Id*., Vol. II at 544; *id*., Vol. V at 1199. Initially, Mr. Sanchez successfully helped C.W. leave his home to attend school clubs and visit community spaces. *Id*., Vol. V at 1178. Yet, C.W.'s temporary improvement quickly deteriorated. By October of 2016, he again struggled to engage in instruction for more than 15-minute intervals, was rarely available for instruction because he refused to come out of his room, and he stopped wearing pants. *Id*., Vol. II at 545–46. The District then sought permission to evaluate C.W. because homebound instruction was no longer working. *Id.*

II. C.W.'s Parents File a Due Process Complaint.

On September 22, 2016, C.W.'s parents filed a due process complaint with the Colorado Department of Education ("CDE"). *Id*. at 380–409. They asserted that the District had failed to provide a FAPE to C.W. because there were significant gaps in the services provided to C.W., and alleged that the District had failed to provide specific clinical services, including cognitive behavioral therapy and occupational therapy services. *Id.*

III. C.W.'s Placement is Changed to a Residential Setting.

Meanwhile, after completing the evaluation, the District convened an IEP meeting on February 10, 2017. *Id*., at 546–47; *id.*, Vol. III at 719–33. C.W.'s father attended the IEP meeting. *Id*., Vol. II at 547; *id*., Vol. III at 720. All of C.W.'s providers determined he could no longer make progress in the homebound setting. *Id*., Vol. II at 547; *id*., Vol. III at 730. The IEP team, with the exception of C.W.'s father, agreed he needed a therapeutic element that could not be met at home or in a district school, so it offered placement in a residential treatment facility. *Id.* Two possible locations were identified in the IEP meeting, but C.W.'s parents disagreed with placement in any residential treatment facility and declined to discuss such a placement any further. *Id*., Vol. II at 435, 492; *id*., Vol. IV at 847, 959–63, 1044–45; *id.* Vol. VI at 1259–62, 1301.

DPS considers it necessary to allow the Parents to participate in the approval of any residential facility. *Id*., Vol. II at 538; *id*., Vol. III at 734; *id*., Vol. VI at 1257, 1261. C.W.'s parents made it clear that they had no intention of participating in the process of finding a specific residential treatment facility for their son. *Id*., Vol. II at 435, 493; *id.*, Vol. VI at 1262. They disparaged the facilities DPS identified without appropriate investigation, representing without evidence that one facility only served students who had been abused, and while they claimed without evidence that the

other school is only appropriate for students going through the criminal justice system, who have committed sexual assaults, and who need support with drug and alcohol addiction. *Id*., Vol. II at 492–93; *id.* Vol. IV at 960–63. Consequently, the District was unable to identify a specific residential treatment facility for C.W. *Id*., Vol. VI at 1261.

IV. C.W.'s Residential Placement is Affirmed at the Due Process Hearing.

At a March 2, 2017 status conference for the due process proceeding, C.W.'s Parents informed the Administrative Law Judge ("ALJ") that they disagreed with the District's February 10, 2017 offer of FAPE. *Id*., Vol. II at 426–27. The ALJ ordered that the IEP would be considered in the due process hearing, which was held on May 31, 2017 and June 1, 2017. *Id*. at 426–27, 536.

After hearing the evidence, the ALJ held that the District failed to provide FAPE to C.W. from September 22, 2014 through November 2014; March 2015 through May 2015; October 2015 through March of 2016; and January 31, 2017 through February 10, 2017. *Id*. at 426–27. Nonetheless, the ALJ held that the District's February 10, 2017 IEP offered C.W. a FAPE. *Id*. at 536. As a result of the various violations in the time periods identified, but understanding that C.W. was unable to receive an education in any other environment, the ALJ held that all

compensatory education should be delivered to C.W. in a residential treatment setting. *Id*., Vol. III at 556. The ALJ further found that the District had not yet identified a suitable residential treatment facility. *Id*., Vol. II at 548. The ALJ acknowledged that the District's standard process is to identify a number of potentially appropriate facilities and discuss the child's needs with the parents in order to make the final selection. *Id*. at 547–48.

C.W. did not present any Section 504, ADA, or Equal Protection claims in the due process complaint or at the hearing. *Id*. at 380–409.

V. C.W.'s Parents File a Civil Action in United States District Court.

C.W., through his parents, filed suit against DPS on October 13, 2017, claiming a denial of FAPE in violation of the IDEA and disability discrimination in violation of Section 504. *Id*., Vol. I at 16–17. Two weeks later, C.W. filed an amended complaint adding ADA and Equal Protection claims. *Id*. at 39–46. Both sides moved for summary judgment.

The district court issued a written order on September 25, 2019, reversing the ALJ's decision, granting C.W.'s motion in part, and granting the District's motion in part. Specifically, the district court dismissed C.W.'s Section 504, ADA, and Equal Protection claims for failure to exhaust administrative remedies. *Id*., Vol. II at 367–369. The district court reversed the ALJ regarding the February 10, 2017 IEP,

holding that although there could be an appropriate residential treatment center for C.W., none was identified. *Id*. at 367–369, 375. On remand, the district court directed the ALJ to determine "what relief [C.W.] is due given that the 2017 IEP has not provided a FAPE at all times it was operative. *Id*. at 367, 369.

Neither the order nor the final judgment awarded costs or attorney's fees to either party. *Id.* at 367–70. In both, "[t]he Clerk [wa]s directed to close th[e] case." *Id*. On October 4, 2019, C.W. filed a bill of costs, and on October 9, 2020, he moved for an award of attorney's fees. *Id.*, Vol. 1, p. 8. Costs in the amount of $1,973.59 were taxed against DPS on October 16, 2020. *Id.* Both sides then filed notices of appeal, seeking review of the district court's September 25, 2019 order on the merits. *Id.*, Vol. II, pp. 376–79. While the appeals have been pending, DPS requested review of the taxed costs and opposed C.W.'s request for attorney's fees. *Id.*, Vol. 1, pp. 8–9. On July 29, 2020, the district court issued a written order awarding C.W. $75,485 in attorney fees and costs.

SUMMARY OF THE ARGUMENTS

I. Opening Argument.

The district court erred in holding that the District substantively violated the IDEA by documenting a change in C.W.'s placement to residential treatment without identifying a specific facility. Because C.W. and his parents never presented

this argument in the state administrative proceeding, the district court had no subject matter jurisdiction to consider it. Even so, the IDEA only requires that an IEP list the type of location in which a student will receive services—not the specific brick-and-mortar location. Ultimately, DPS cannot be faulted for what is at most a procedural shortcoming that was caused by C.W.'s parents' categorical refusal to engage. It was not feasible for the District to determine a specific residential treatment facility without their input.[1]

II. Answer Argument.

The district court correctly determined C.W.'s Section 504, ADA, and Equal Protection claims were barred because they were not exhausted through the state administrative process. C.W.'s various attempts to evade the IDEA's plain exhaustion requirement are, in several instances, unpreserved for appeal and completely unavailing. It is not enough that C.W. pursued due process to seek redress under the IDEA for a denial of FAPE. Similarly exhausting his other federal claims would not have been futile, and his subsequent prayer for money damages

[1] The finality of the district court's order remanding C.W.'s IDEA claim to the ALJ is also disputed. DPS stands on its previously submitted memorandum briefs explaining that the district court's remand order is not final because remedies have not been determined and the practical finality rule does not apply. *See generally* Appellee's Mem. Re: Finality of Dist. Ct.'s Decision (Dec. 4, 2019); Appellee's Resp. to Appellant's Mem. Re: Jurisdiction (Dec. 23, 2019).

cannot excuse his need to exhaust. Alternatively, DPS was entitled to summary judgment on C.W.'s non-IDEA claims because there is no set of facts that could establish the District discriminated against him because of his disabilities.

OPENING ARGUMENT

I. The District Court Erred in Faulting the District for Not Identifying a Specific Residential Treatment Center in the February 2017 IEP.

On cross appeal, DPS seeks review of the district court's determination that C.W. was denied FAPE because no specific residential treatment facility was identified in his IEP. That holding was wrong and should be reversed, along with the district court's subsequent collateral award of attorney's fees and taxation of costs.

A. The District Court lacked jurisdiction to consider the location of residential treatment because it was not raised in the due process proceeding.

The IDEA provides a comprehensive administrative process for parents to enforce their child's right to a FAPE, including a placement decision. 20 U.S.C. § 1415(k)(3)(A); *see generally* 34 C.F.R. § 300.507. If a parent is dissatisfied with the outcome, he or she may "bring a civil action with respect to the [due process] complaint." 20 U.S.C. § 1415(i)(2)(A). Exhaustion of an IDEA claim has long been regarded as a matter of subject matter jurisdiction in this Circuit that can be raised for the first time on appeal. *Muskrat v. Deer Creek Pub. Schs.*, 715 F.3d 775, 783

(10th Cir. 2013) (citing cases); *see also Smith v. Cheyenne Mountain Sch. Dist. 12*, No. CV 15-00881-PAB-CBS, 2017 WL 2791415, at *17 (D. Colo. May 11, 2017) (analyzing issue post-*Muskrat* and concluding "a parent's failure to exhaust remedies during the administrative proceeding removes a federal court's subject matter jurisdiction), *report & recommendation adopted*, No. 15-CV-00881-PAB-CBS, 2017 WL 2778556 (D. Colo. June 26, 2017).[2]

This longstanding rule makes sense. The IDEA ensures "[a]n opportunity for any party to present a complaint . . . which sets forth an alleged violation." 20 U.S.C. § 1415(b)(6)(B). A school district is also entitled to know "the facts that form the basis of the complaint" before a due process hearing. *Id.*, § 1415(f)(1)(B)(4). Implementing regulations similarly afford an aggrieved party "the right to bring a civil action ***with respect to the due process complaint notice***." 34 C.F.R. § 300.516(a) (emphasis added). Once in district court, only "supplemental" evidence may be heard because review is limited to the administrative record. *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 974 (10th Cir. 2004) (citing authority); *see also R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 186 (2d Cir. 2012) (adopting

[2] In its answer to C.W.'s first amended complaint, DPS generally asserted his failure to exhaust administrative remedies as an affirmative defense. Aplt. App. Vol. I at 11. After C.W. first challenged the lack of a specific residential treatment facility in his motion for summary judgment, the District invoked the exhaustion rule in response. *Id.* at 283.

"majority view that the IEP must be evaluated prospectively as of the time of its drafting").

Moreover, the IDEA leaves the "primary responsibility for formulating the education to be accorded a handicapped child . . . to state and local educational agencies in cooperation with the parents or guardian of the child." *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 207 (1982). "[C]ourts," therefore, "must be careful to avoid imposing their view of preferable educational methods upon the States." *Id.* It follows that the purposes and requirements of the IDEA would be frustrated if a parent could raise new issues once in district court. In that case, a school district would not have had a full and fair opportunity to defend its decisions or ensure a complete administrative record was made. As the Supreme Court recently explained in *Endrew F. v. Douglas County School District RE-1*, "By the time any dispute reaches court, school authorities will have had a ***complete opportunity*** to bring their expertise and judgment to bear on areas of disagreement." 137 S. Ct. 988, 1001–02 (2017) (emphasis added).

Here, the district court lacked jurisdiction to consider the absence of a specific location for residential treatment because C.W. did not challenge his IEP on that ground in the administrative proceeding. The first time C.W. argued the IEP was automatically invalid was in his motion for summary judgment. Aplt. App. Vol. I at

134–38. In the due process complaint, C.W. alleged multiple procedural and substantive violations of the IDEA, including the change from homebound services to residential treatment generally. *Id*., Vol. II at 380–95, 430–36, 498–500. His complaint was that placement in ***any*** residential treatment facility denied FAPE because, in his view, it was not the least restrictive environment. *Id*., Vol. I at 28. He argued that "the serious, lifelong, negative effects of residential care on children—especially those with multiple needs—are well known" and such a placement would be detrimental to him. *Id*., Vol. II at 493. Consequently, the only issue before the district court was whether residential treatment was the appropriate placement for C.W. It was reversible error to entertain the belatedly raised concern about identification of a specific facility.

B. Alternatively, the IDEA does not require that an IEP include a specific service location, and any deficiency here was caused by C.W.'s parents.

In addition to its jurisdictional error, the district court wrongly concluded C.W.'s IEP had to identify a specific residential treatment facility.

The IDEA states that an IEP "includes," among other things, "the anticipated frequency, ***location***, and duration of . . . services and modifications." 20 U.S.C. §1414(d)(1)(A)(i)(VII) (emphasis added). The Second Circuit has held "the term 'location' does not mean the specific school location, but the general environment

of the overall program." *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009); *accord Deer Valley Unified Sch. Dist. v. L.P. ex rel. Schripsema*, 942 F. Supp. 2d 880, 887 (D. Ariz. 2013); *Brad K. v. Bd. of Educ. of City of Chicago*, 787 F.Supp.2d 734, 740 (N.D. Ill. 2001) ("[T]he physical location for implementing an IEP need not be included in the IEP."). More recently, the Ninth Circuit reached the same conclusion, holding "an educational agency does not commit a per se violation of the IDEA by not specifying the anticipated school where special education services will be delivered within a child's IEP." *Rachel H. v. Dep't of Educ. Hawaii*, 868 F.3d 1085, 1092 (9th Cir. 2017).

Both the Second and Ninth Circuit decisions found persuasive the United States Department of Education ("DOE")'s guidance that "[t]he location of services in the context of an IEP generally refers to the ***type*** of environment that is the appropriate place for provision of the service," such as the "regular classroom" or "a resource room." *Assistance to States for Educ. of Children with Disabilities*, 64 Fed. Reg. 12406, 12594 (Mar. 12, 1999) (emphasis added). Similarly, the Senate Labor and Human Resources Committee explained the term "location" was added because "where special education and related services will be provided to a child influences decisions about the nature and amount of these services and when they should be provided to a child. For example, the appropriate place for the related service may

be the regular classroom . . . .” S. Rep. 105-17, 21. Had Congress intended IEPs to specify the physical, brick-and-mortar location for services—rather than just the type of location, it would have said so. Indeed, the IDEA’s rules of construction state, “Nothing in this section shall be construed to require . . . additional information be included in the child’s IEP beyond what is ***explicitly*** required in this section.” 20 U.S.C. §1414(d)(1)(A)(ii) (emphasis added).

The District Court relied on *A.K v. Alexandria City School Board*, 484 F.3d 672 (4th Cir. 2007), which invalidated an IEP for failing to specify a brick and mortar location of service. Yet, *A.K.* was a split decision, in which the panel failed to consider the IDEA’s rules of construction, the Senate’s commentary, or the DOE’s guidance. In addition, the majority’s reasoning was very fact specific; it expressly disclaimed any holding that a school district could never offer FAPE without identifying a particular location at which the special education services are expected to be provided. *Id.* at 682. A.K.’s parents “agree[d] that an appropriate private day school could provide a FAPE.” *Id.* at 681. However, at least two of five potential private schools in the area determined “they could not provide A.K. a FAPE,” and his parents “had tried in vain to find a local private day school that could meet A.K.’s specialized needs.” *Id.* at 676, 682. Under these facts, the majority felt the school district’s “offer of an unspecified ‘private day school’ was essentially no offer at

all." *Id.* at 682.

The administrative record establishes a very different situation here. At the February 2017 IEP meeting, DPS presented two facilities it believed could implement C.W.'s IEP, but his father left the meeting without discussing whether an appropriate facility exists. Aplt. App. Vol. VI at 1257–58. The issue was not disagreement about any specific facility as in *A.K.*; C.W.'s parents disagreed with placement in any residential treatment facility. *Id*., Vol. II at 435, 493; *id.*, Vol VI at 1262. The District nonetheless began its process of making referrals to private placements and continued to invite C.W.'s parents to participate, but they simply refused to cooperate. *Id*., Vol. III at 734; *id.* Vol. VI at 1257–61. Even at the due process hearing, DPS officials maintained a specific residential treatment center that could implement C.W's IEP had been identified. *Id*., Vol. VI at 1260. His parents were not, as the district court suggested, left "to fend for themselves." *Id*., Vol. II at 361.

Identifying a private residential treatment facility requires parent involvement. 34 C.F.R. § 300.325(a)(1). Residential treatment centers are private facilities and typically will not admit students without parent engagement, and such placements can be traumatic and are rarely successful unless parents are supportive. *See, e.g.*, Aplt. App. Vol. VI at 1259–60, 1302. DPS's standard process is to identify

a number of potentially appropriate facilities, then discuss the child's needs with the parents in order to make the final selection. *Id*., Vol. II at 548, 549. Without the participation of C.W.'s parents, a specific facility could not be identified. *Id*., Vol. V at 1302. Invalidating the IEP as the district court did ignores that reality and would encourage school districts to undermine the collaborative purpose of the IDEA by dictating a specific residential treatment center without parent input.

Even if not naming a specific facility could be characterized as a procedural shortcoming, the district court was wrong to conclude the IEP impaired C.W.'s receipt of educational services and prevented his parents from exercising procedural and substantive rights on his behalf. *See* 20 U.S.C. § 1415(f)(3)(E)(ii)(II) (listing limited circumstances when procedural inadequacies amount to denial of FAPE). As just discussed, the parents rejected any residential placement including the facilities suggested at the February 10, 2017 IEP meeting. *Id*., Vol. II at 435; *id.* Vol VI at 1259. By the time of the due process hearing, the District had made referrals to other residential treatment facilities; yet without participation from C.W.'s parents, DPS could not secure his enrollment in a facility. *See id*., Vol. VI at 1258–59. Ultimately, the parents were afforded ample opportunity to participate in the decision making process, and so long as the school district is able to make an offer of placement that can materially implement the IEP, which it did, the school district has offered FAPE.

34 C.F.R. § 300.323(c); *see Couture v. Bd. of Educ. of Albuquerque Pub. Schs.*, 535 F.3d 1243, 1252 (10th Cir. 2008) (citing cases) (only material failures to implement an IEP raise to a level of a FAPE violation).

It was not the District's fault C.W. was never served in a residential treatment facility. The cause was his parents' absolute refusal to work with the District on selecting a specific brick-and-mortar location. *Cf. K.L.A. v. Windham Se. Supervisory Union*, 371 F. App'x 151, 154 (2d Cir. 2010) ("[I]t was the parents themselves who, by categorically opposing any placement at BUHS . . . and developing a competing IEP, rendered impossible a fully collaborative experience.") Federal law excuses school districts when a student is unavailable or parents act unreasonably. 34 C.F.R. § 300.301(d)(1); 34 C.F.R. § 300.148(d)(2)–(3). To hold otherwise—particularly now that C.W. waited until after the administrative record was closed to recast his claim—would be fundamentally unfair. *Cf. Kimble v. Douglas Cty. Sch. Dist.*, 925 F. Supp. 2d 1176, 1184–85 (D. Colo. 2013) ("Plaintiffs cannot hold Defendant liable for failing to provide accommodations that they rejected.").

ANSWER ARGUMENT

I. C.W.'s Section 504, ADA, and Equal Protection Claims Are Barred Because He Did Not Exhaust Them in the Due Process Proceeding.

On appeal, C.W. acknowledges he did not assert any non-IDEA claims in the due process proceeding. He argues he did not need to and doing so would have been futile. He also argues he was not required to present legal theories, and he should be deemed to have satisfied IDEA's exhaustion requirement by presenting the facts relating to his alleged FAPE denial. C.W. is wrong.

A. The IDEA requires exhaustion of any federal claim when an IDEA remedy is sought.

It is well established that "[t]he IDEA requires persons with IDEA claims to proceed through a series of administrative steps before they may file a suit in court." *A.P., IV by Porco v. Lewis Palmer Sch. Dist. No. 38*, 728 F. App'x 835, 838 (10th Cir. 2018) (citing *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 749 (2017)). "The same exhaustion requirement applies to claims under the ADA or the Rehabilitation Act if those claims are 'seeking relief that is also available under' the IDEA." *A.P.*, 728 F. App'x at 838 (quoting 20 U.S.C. § 1415(l)). The relevant provision in the IDEA provides in full:

"Nothing in this chapter shall be construed to restrict or

> limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], Title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter."

20 U.S.C. § 1415(l).

C.W. argues he satisfied this provision by exhausting his IDEA claim; he contends that because he exhausted his administrative remedies for ***that*** claim, he was free to assert ***other*** federal claims based on the same facts. He also devotes a large portion of his brief to policy arguments for why he should not have to exhaust. But that is not what the statute says, and it is not the role of the courts to second-guess Congress's policy judgments.[3] Section 1415(l) plainly requires exhaustion of

[3] C.W. forfeited his futility argument by not raising it below, and he presents no unusual circumstances why it should not be disregarded. *See, e.g.*, *Ave. Capital Mgmt. II, L.P. v. Schaden*, 843 F.3d 876, 886 (10th Cir. 2016); *Lyons v. Jefferson Bank & Tr.*, 994 F.2d 716, 721 (10th Cir. 1993). Even so, the path to avoiding exhaustion in this Circuit for futility is narrow and C.W. does not follow it here. *See Urban ex rel. Urban v. Jefferson Cty. Sch. Dist. R–1*, 89 F.3d 720, 724 (10th Cir. 1996) ("Administrative remedies are generally futile or inadequate when plaintiffs allege 'structural or systemic failure and seek systemwide reforms.'"). Moreover, the Memorandum of Understanding C.W. cites between CDE and the Colorado Office of Administrative Courts is outside the administrative record, and in any event, it does not preclude ALJs from addressing non-IDEA federal claims.

every federal claim seeking the same relief as an IDEA claim would. There is no special rule, as C.W. seems to suggest, for claimants like him who want to assert multiple claims, including one under the IDEA, to obtain FAPE.

Indeed, in *Fry*, the Supreme Court held that whenever an IDEA remedy is sought, regardless of what federal statute underlies the claim, the "plaintiff must first submit ***her case*** to an IDEA hearing officer, experienced in addressing exactly the issues she raises." *Fry*, 137 S. Ct. at 754. The Supreme Court notably did not say a plaintiff could exhaust all federal claims by pursuing just an IDEA claim.

The Eleventh Circuit reached the same conclusion in *Durbrow v. Cobb County School District*, 887 F.3d 1182, 1191 (11th Cir. 2018). There, a family commenced due process to redress allegations of a denial of FAPE, claiming violations of both the IDEA and Section 504 (their hearing request also referenced the ADA). *Id.* at 1188. The family subsequently withdrew the Section 504 claim, and the ALJ set a hearing for the IDEA claim. *Id.* Ultimately dissatisfied, the family filed a civil action, appealing the ALJ's determination and raising Section 504 and ADA claims. *Id.* at 1189. The district court then dismissed the Section 504 and ADA claims. *Id.*

On appeal, the family made the same argument as C.W. that because they pursued due process for their IDEA claim, they were not required to pursue an

additional administrative hearing with respect to their Section 504 and ADA claims. *Id.* The Eleventh Circuit disagreed. "The exhaustion of an IDEA claim before an administrative body does not relieve a plaintiff of the concomitant obligation to exhaust related Section 504, ADA, or any other claims that allege the deprivation of a FAPE." *Id.* at 1191 (citing *Reyes v. Manor Indep. Sch. Dist.*, 850 F.3d 251, 256 (5th Cir. 2017); *M.T.V. v. DeKalb Cty. Sch. Dist.*, 446 F.3d 1153, 1158 (11th Cir. 2006)). While C.W. tries to characterize *Durbrow* as an outlier, the Fifth Circuit concurs. *Reyes*, 850 F.3d at 256 ("The IDEA requires administrative exhaustion not just of claims arising under it, but also of Rehabilitation Act claims that overlap with the IDEA.") (citing 20 U.S.C. § 1415(l)).

C.W. cites *Doucette v. Georgetown Public Schools*, 936 F.3d 16 (1st Cir. 2019), but that case does not interpret the IDEA's exhaustion requirement any differently. In *Doucette*, parents unsuccessfully pursued due process in 2010 to obtain an alternative placement for their young child. *Id.* at 30. They requested an alternative placement again in 2012, and the IEP team changed the placement. *Id.* at 22, 30. In 2015, the parents filed suit alleging state law tort claims, as well as claims under Section 504 and 42 U.S.C. § 1983. *Id.* at 22. The court started with a careful analysis of the Section 504 claim; because it involved denial of a service dog, the "crux" of the claim was "simple discrimination, irrespective of the school district's

FAPE obligation"; accordingly, the court held the claim did not have to be exhausted. *Id.* at 28.[4] If, as C.W. suggests, the parents' prior exhaustion of an IDEA claim was dispositive, then there would have been no need for the court to examine the gravamen of the Section 504 claim.

Although the court in *Doucette* then allowed the Section 1983 claim to proceed, its holding was not based on the parents' prior exhaustion. Indeed, the court emphasized that after acquiring FAPE, the parents sought compensation for the harm their child suffered during the lengthy delay in receiving administrative relief. *Id.* at 31. Expressing uncertainty about whether such a claim seeking money damages based on a denial of FAPE had to be exhausted, the court held that "enforcing" the requirement was unnecessary because additional administrative proceedings would be futile, in part due to the outstanding "issues of medical causation" outside a school

[4] Claims involving service dogs rarely require exhaustion because the dog is not alleged to be a necessary component of a student's education. *See, e.g., Alboniga v. Sch. Bd. of Broward Cty. Fla.*, 87 F. Supp. 3d 1319 (S.D. Fla. 2015); *Sullivan v. Vallejo City Unified Sch. Dist.*, 731 F. Supp. 947, 951 (E.D. Cal. 1990). *Amici* the Council of Parent Attorneys and Advocates and the Arc of the United States argue that upholding the district court's ruling "would require every public student with a disability to exhaust administrative remedies in every case, regardless of the merits of such an IDEA case." (*Amici's* Br. p. 21). Such hyperbole is plainly refuted by *Doucette* and many other cases. *See also Padilla ex rel. Padilla v. Sch. Dist. No. 1 in City & Cty. of Denver, Colo.*, 233 F.3d 1268, 1274 (10th Cir. 2000) (holding child's ADA claim arising from fractured skull while locked restrained in stroller without supervision did not have to be exhausted under "narrow circumstances" in which child had "no complaints regarding her current educational situation").

district or ALJ's expertise. *Id.* at 31–32.[5] Again, if, as C.W. argues, the parents' prior exhaustion of their IDEA claim meant they could file other federal claims, the court would not have examined the basis and remedy of the Section 1983 claim.

B. C.W. did not exhaust his non-IDEA claims in the due process proceeding.

C.W. next argues that even if he was required to exhaust his Section 504, ADA, and Equal Protection claims, he did so under a liberal standard by pleading the underlying facts. Labeling legal theories, according to C.W., also was unnecessary. These are just more unpreserved attempts to evade the exhaustion requirement and should not be considered. *See, e.g.*, *Schaden*, 843 F.3d at 886; *Lyons*, 994 F.2d at 721. As the district court noted, C.W. never suggested below that he presented his non-IDEA theories to the ALJ. Aplt. App. Vol. II at 367. He argued, as addressed above, that he did not have to separately exhaust those claims. *Id.* at 329.

Even so, the issue is not whether C.W. ***imperfectly*** pled Section 504, ADA, and Equal Protection claims, like the police officers in *Johnson v. City of Shelby*,

[5] The First Circuit's fact-specific inquiry into futility further demonstrates why C.W.'s forfeited futility argument should not be addressed here for the first time on appeal.

Mississippi, 574 U.S. 10, 10 (2014), who "[c]harg[ed] violations of their Fourteenth Amendment due process rights" but did not explicitly invoke Section 1983. Here, even with the benefit of liberal construction, C.W. did not plead non-IDEA claims ***at all*** in his due process complaint. Aplt. App. Vol II at 381 (alleging a "[c]ontinuous and egregious violation for many years by Denver Public Schools of C.F.R. 300, IDEA and ECEA rules concerning a disabled and highly gifted child with an IEP").

Any notion that such claims could have been reasonably inferred from his factual allegations is absurd. *Cf. Greer v. Dowling*, 947 F.3d 1297, 1302 (10th Cir. 2020) (holding inmate exhausted statutory and constitutional religious freedom claims by "alert[ing] prison officials as to the nature of the alleged wrong"). For example, "[t]he IDEA and § 504 differ, and a denial under the IDEA does not ineluctably establish a violation of § 504." *Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Schs.*, 565 F.3d 1232, 1246 (10th Cir. 2009). Additionally, C.W. in no way alleged or presented evidence that the District has a policy of limiting the amount of education a home school student with a disability receives, *compare* Aplt. App. Vol. III at 536–57, *with id.* Vol. II at 227–28, as required for an equal protection claim, *see, e.g.*, *Ebonie S. ex rel. Mary S. v. Pueblo Sch. Dist. 60*, 819 F. Supp. 2d 1179, 1189 (D. Colo. 2011). C.W. nonetheless argues that in his position statement to the ALJ, he stated the District engaged in "blatant discrimination" by requiring

him to wear pants to receive instruction. Aplt. App. Vol. II at 435. His position statement, however, was not the due process complaint, and in any event, using the term "discrimination" is hollow without an allegation that the rule was unique to C.W. and imposed on him because of his disability. *See, e.g.*, *Miller*, 565 F.3d at 1246 (reciting elements of Section 504 and ADA claims); *cf. Durbrow*, 887 F.3d at 1188 (mentioning ADA in hearing request was insufficient to exhaust).

The difference between pleading and exhausting claims, particularly in the IDEA context, further defeats C.W.'s position. As the Fifth Circuit explained in *Reyes*, "[e]xhaustion requires more than pleading a claim, however; it requires 'findings and decision' by the administrative body." 850 F.3d at 256 (citing 20 U.S.C. § 1415(g); *see also Fry*, 137 S. Ct. at 755 ("Section 1415(l) is not merely a pleading hurdle. It requires exhaustion . . . ."). This Court has similarly recognized that "[d]iscrimination claims may not be tacked on . . . to IDEA claims, but must be ***litigated*** in their own right." *Miller*, 565 F.3d at 1246 (emphasis added). Accordingly, it is not enough to merely plead non-IDEA claims in a due process proceeding; they must be pursued to the end. *Cf. Durbrow*, 887 F.3d at 1188 ("Since the Durbrows' § 504 and ADA claims neither received an administrative hearing nor a decision from the administrative officer, they were not exhausted."); *see also Greer*, 947 F.3d at 1303 (recognizing *pro se* inmate still must "properly complete

the administrative process" unless prevented by prison officials). Here, the due process hearing was limited to C.W.'s IDEA arguments, and the ALJ made no findings whatsoever on any alleged Section 504, ADA, or Section 1983 claims. As a result, even if such claims had been asserted, they were not exhausted.

C. C.W.'s pursuit of monetary damages does not excuse his need to exhaust.

C.W. alternatively argues he was exempt from the IDEA's exhaustion requirement because he seeks monetary damages. This is just another unpreserved attempt to evade the exhaustion requirement that should not be considered. *See, e.g.*, *Schaden*, 843 F.3d at 886; *Lyons*, 994 F.2d at 721. Regardless, the pursuit of damages does not save C.W.'s Section 504, ADA, and Equal Protection claims.

As C.W. acknowledges, this Court has repeatedly held "the IDEA's exhaustion requirement will not be excused simply because . . . a plaintiff requests damages." *Carroll v. Lawton Ind. Sch. Dist. No. 8*, 805 F.3d 1222 (10th Cir. 2015) (quoting *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10th Cir. 2002)). C.W. seems to argue he is different from the plaintiff in *Carroll* because he exhausted his IDEA claim and, therefore, already has obtained all the relief available to him through the administrative process. That is a distinction of his own making. Had C.W. included his other federal claims as the IDEA requires, the District would

have had an opportunity to provide other relief for his educational injuries. *See Fry*, 137 S. Ct. at 754 ("There might be good reasons, unrelated to a FAPE, for the school to make the requested accommodation. Indeed, another federal law (like the ADA or Rehabilitation Act) might require the accommodation . . . ."). Allowing him to evade exhaustion now would not just be fundamentally unfair; it would frustrate Congress's legislative purpose.[6]

II. Alternatively, this Court Should Affirm Summary Judgment on the Merits of C.W.'s Section 504, ADA, and Equal Protection Claims.

There are alternative grounds on which to affirm the district court's grant of summary judgment in favor of DPS. The undisputed facts demonstrate that the District did not discriminate against C.W., nor did it violate his rights to Equal Protection. *See, e.g.*, *Mallinson-Montague v. Pocrnick*, 224 F.3d 1224, 1233 (10th Cir. 2000) ("[T]his court can affirm the district court for any reason that finds support in the record.").

A. DPS is entitled to summary judgment on C.W.'s Section 504 and ADA claims.

[6] *Amici* argue C.W. did not bring his Section 504 and ADA claims to seek relief for a denial of FAPE. Yet, as the district court correctly explained, "C.W. concede[d] that the facts underlying the IDEA claim and the non-IDEA claims are the same," and "[t]he gravamen of [his] Amended Complaint s[ought] relief for the denial of a FAPE," as "[n]o allegation concern[ed] facts unrelated to educational services." Aplt. App. Vol. II at 365–66.

To establish a claim for discrimination pursuant to Section 504 or the ADA, a plaintiff must prove, *inter alia*, that: he or she was discriminated against because of a disability. *Miller*, 565 F.3d at 1245 (citing cases).[7] Intentional discrimination must be proven to obtain damages. *Barber ex rel. Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1228 (10th Cir. 2009), *accord Hans v. Bd. of Shawnee Cty. Comm'rs*, 775 F. App'x 953, 956 (10th Cir. 2019) (citing other circuit decisions holding same for ADA claims).

C.W. claimed the District discriminated against him by failing to provide equal access to the District's educational program, including: (i) refusing instruction in the District's core curriculum; (ii) gifted and talented instruction; and (iii) implementation of the services outlined in the IEP. Aplt. App. Vol. I at 145. As detailed below and argued at length in the District's motion for summary judgment, *Id*. at 144–150, C.W. cannot demonstrate a triable issue of fact. Indeed, there is no set of facts that could establish the District was deliberately indifferent with regard to C.W.'s federally protected rights.

First, the facts establish that the District made every effort to allow C.W. to benefit from the District's core curriculum. Homebound services are meant to be

[7] Since Section 504 and the ADA utilize the same substantive standard, they are analyzed together. *Id.*

temporary. *Id*. at 262. When a student is placed in a home setting, the District provides services until the student can return to school. *Id*. at 262–63. For C.W., every IEP included a plan to help him transition back to school. *See id*. Vol. IV at 634, 650–651, 681–683, 699–700. Yet, in addition to time restrictions, the parties agreed that C.W. was unable to participate in certain content areas like physical education. *Id*. at 737. As a result, his homebound teachers focused primarily on his IEP goals and incorporated as many core subjects as possible into the very limited time for which C.W. was available for instruction. *Id*., Vol. II at 542; *id.*, Vol. V at 1155. Ultimately, C.W.'s deteriorating condition meant that he was unable to receive any appreciable amount of instruction at home, and the District determined a change in placement to a residential treatment center was necessary. *Id*., Vol. III at 730.

Second, C.W. was not denied gifted and talented services because he has a disability. Consistent with state law, *see generally* C.R.S. § 22-20-204, no DPS students receiving homebound services receive formal gifted and talented instruction, *id*., Vol. II at 263. A homebound teacher is expected to differentiate instruction for the specific student based upon that student's needs; for a gifted student, that may include design of higher-level lessons. *Id*. The record is clear that is how C.W. was served. Ms. Kromrey consulted with the District's gifted and talented coordinator, as well as the gifted coordinator at Teller Elementary, to

develop lessons unique to C.W.'s capabilities. *Id*., Vol. II at 542; *id.*, Vol. V at 1155–56. Ms. Kromrey also used grade level standards two years above C.W.'s level to develop lessons appropriate for him. *Id*. These practices were in line with the District's procedures for all homebound students, and C.W. was not excluded from gifted and talented services because he is a student with a disability. *Cf. K.K. v. Pittsburgh Pub. Schs.*, 590 F. App'x 148, 153-54 (3d Cir. 2014) (holding school district did not discriminate against homebound student because district's homebound policy was never intended to fully substitute for in-class learning, and personnel worked to provide approximation of high-caliber instruction student had received in class).

Third, the District did not deny services during various time frames on the basis of disability. Rather, the evidence is clear that the District made extraordinary efforts to implement C.W.'s IEP in his home. For each period of time during which the District was unable to provide services, it offered to compensate C.W. Aplt. App. Vol. II at 544. From November of 2014 through March of 2015, the District conducted a diligent search for a teacher. *See id*., Vol. II at 540–41; *id.*, Vol. III at 741–44. The District made an offer to the parents' choice, but he declined. *Id*. The District then identified two District employees, whom C.W.'s parents rejected. *Id.* After the District required an administrator, Ms. Kromrey, to instruct C.W. in March

2015, it continued to look for another teacher who could provide additional instruction, as Ms. Kromrey's schedule only allowed for her to provide one hour of instruction per day through May 2015. *Id*., Vol. III at 553; *id.*, Vol. VI at 1222–23. In October 2015, Ms. Kromrey was in a terrible accident while on vacation, requiring her to take an extended leave of absence. *Id*., Vol. III at 543. C.W. continued to receive services from his school psychologist and speech language pathologist while the District unsuccessfully sought a substitute homebound teacher until Ms. Kromrey returned in March 2016. *Id*., Vol. IV at 779–81.

From January 31, 2017 through February 10, 2017, the District temporarily discontinued special education services because C.W. was unable to receive instruction at home. The record is clear that C.W.'s ability to engage in instruction had declined significantly. For example, C.W. often stayed in his bedroom rather than come downstairs to meet his providers, he did not wear pants and required instruction while covered by a blanket on the living room couch, and he refused to engage unless his providers engaged with a preferred activity. *Id*., Vol. II at 545–46. On several occasions, C.W.'s providers would arrive to provide services, but C.W. was not prepared for instruction. *Id*. at 545. C.W.'s providers waited upwards of 30 minutes at a time before C.W. would engage. *Id*. For homebound students, the District requires that the student be ready to receive instruction at the appointed time

in an educationally appropriate setting. *Id*., Vol. I at 263; *id.*, Vol II at 546; *id.*, Vol. III at 739–40. The District explained to the parents that "prepared for instruction" meant C.W. should be prepared to sit with his instructors at a table and be fully clothed; the District also explained providers would wait for 30 minutes before marking C.W. absent. *Id*., Vol. II at 546. These expectations were implemented to ensure C.W. received the education to which he was entitled. *Id*. When C.W. did not meet them, he did not receive educational services. *Id*. As the ALJ recognized, DPS followed the same practice with C.W. as it does with all its students. *Id.*

B. DPS is entitled to summary judgment on C.W.'s Equal Protection claim.

The Equal Protection Clause requires that all similarly situated persons be treated equally under the law. *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Because "the disabled do not constitute a 'suspect class' for purpose of equal protection analysis," the rational basis test applies, and a policy will be upheld "if there is 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Davoll v. Webb*, 194 F.3d 1116, 1145 (10th Cir. 1999) (citing and quoting cases). To establish municipal liability in this context, a plaintiff must show either: (1) an official policy limiting the amount of educational services a disabled student placed in the home may receive; or (2) the student's constitutional

rights were violated by one of the District's final policymakers. *See, e.g.*, *Milligan-Hitt v. Bd. of Trustees of Sheridan Cty. Sch. Dist.*, 523 F.3d 1219, 1223 (10th Cir. 2008).

C.W. claimed the District deprived him of equal protection under the law by limiting the instruction a special education student on homebound services receives to two hours per day. Aplt. App. Vol. I at 148. As explained below and argued fully in the District's motion for summary judgment, *id*. at 206–215, C.W. did not demonstrate a triable issue of fact. Indeed, there is no set of facts that could establish the District is liable for violating C.W.'s constitutional right to equal protection on the basis of his disabilities.

First, C.W. could not have established he is similarly situated to all DPS students with IEPs. The concept of being similarly situated derives from common factual circumstances and characteristics, not from the fact that a person enjoys certain legal rights in common with others. Both the IDEA and the ADA require that individuals with disabilities be accommodated based upon their ***unique*** circumstances. *See Endrew F.*, 137 S. Ct. at 994 ("A focus on the particular child is at the core of the IDEA."); *Doe v. Okla. City Univ.*, 406 F. App'x 248, 250 (10th Cir. 2010) (reciting accommodation requirements under ADA and Section 504). Accordingly, courts in this district have recognized that individuals with different

needs and different disabilities are not similarly situated to one another because their individual disabilities require different supports. *See, e.g., Warrington v. Bd. of Cty. Commr's of Mineral Cty.*, 4 F. Supp. 1243, 1247 (D. Colo. 2013) (holding two employees of Sherriff's department were not similarly situated because one had broken leg and one had traumatic brain injury); *A.B. v. Adams-Arapahoe 28J*, 831 F. Supp. 1226, 1254 (D. Colo. 2011) (holding plaintiff was not similarly situated to other students with disabilities in her Life Skills class because "all of the students operated under their own IEPs").

The nature of C.W.'s disabilities limited his availability for instruction to two hours per day at home. Aplt. App. Vol. II at 544. Other disabled students, in contrast, are able to receive specialized instruction pursuant to their IEPs and attend school for a full day. These differences are inherent to the individual students and result in varied needs. To the extent there may be other DPS students with disabilities and IEPs that are substantially the same as C.W., his parents have never identified them, and any such students are not disclosed in the administrative record. *Id*., Vol. I at 261.

Second, C.W. could not have demonstrated that DPS had no rational basis for limiting his instructional time. An IEP team places a student with a disability in a homebound setting when it determines the student cannot receive an education in a

less restrictive environment. *Id*. at 271; 34 C.F.R. § 300.114(a)(2)(i). Homebound students receive the services identified in their IEP just like students with disabilities placed in other environments. *Id*. C.W.'s IEPs recognized, and his parents agreed, that he was only available for instruction for two hours per day (in addition to 30 minutes per week of school psychology and speech language services). *See id*., Vol. III at 613, 631–32, 647, 665, 672, 678, 694, 701, 737. There is no other reason why he was provided two hours of direct instruction daily. Another student's IEP may provide for only one hour of instruction per day, while another may provide for three hours of instruction per day. *See, e.g., id*., Vol. I at 271.

Courts have recognized that tailoring benefits to an individual's disability is a rational basis for different treatment. For example, in *Spragens v. Shalala*, a plaintiff challenged a social security regulation that cut off benefits once he was able to earn $300.00 per month, whereas a person suffering from blindness did not lose social security benefits until he or she earned $650.00 per month. 36 F.3d 947, 949 (10th Cir. 1994). This Court emphasized that "[g]overnmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the courts.' The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Id*. at 950 (quoting *Mathews v. De Castro*, 429 U.S. 181, 185 (1976)). Finding the latter, this Court held

"it is reasonable to conclude that blind persons are in a less favorable position than others who, though suffering from disabilities, nonetheless still have their eyesight." *Id.* at 950–51. It did not matter that the plaintiff may have had "'more disability' than some blind persons." *Id*.

Similarly, in the special education context, this Court has considered the question of whether a school district has a rational basis utilizing wrap around desks only for students with disabilities. In *Ebonie S. v. Pueblo School District 60*, this Court explained that the student's "disabilities presented unique pedagogical challenges, and it is certainly conceivable that requiring [the student] to sit in a special desk was a rational response to those challenges." 695 F.3d 1051, 1059 (10th Cir. 2012). Although the plaintiff "hypothesize[d] that non-disabled students in mainstream classrooms might also have presented similar challenges," this Court noted there was no evidence in the record to support that claim. *Id.*

Third, C.W. could not demonstrate a triable issue of fact as to whether the District has a policy of limiting the amount of service a homebound student with a disability receives or whether C.W.'s constitutional rights were violated by a District final policymaker. Contrary to C.W.'s contention below, the ALJ did not make any findings of fact or conclusions of law related to an alleged District policy restricting the amount of services for homebound students, *see* Aplt. App. Vol. II at 536 – Vol.

III at 557, and there is no such policy, *id*., Vol. I at 271. The record is clear that decisions regarding students with disabilities are individualized. Decisions are not made based on discriminatory classifications. Students receiving homebound services like C.W. are afforded the level of service identified in his or her IEP. *See id*., Vol. I at 270–71; *id.*, Vol. III at 739–40. Such services are determined through the same process and under the same criteria for all District students with disabilities. *Id.* A student is only placed in a homebound setting when there is a valid and individualized reason why he or she cannot attend school. *Id*., Vol. I at 271. When an IEP team determines a homebound student has made sufficient progress, it will change the placement and gradually integrate the student back into the school setting. *Id.* at 258.

A "widespread practice" can constitute a custom for municipal liability, but there must be more than "isolated and sporadic acts." *Starrett v. Wadley*, 876 F.2d 808, 819 (10th Cir. 1989) (citing *Monell v. Dept. of Social Services*, 436 U.S. 658, 697 & n.56 (1978)). In discovery, C.W.'s parents were asked if another DPS student had been limited to a specific number of service hours based upon his or her status as a homebound student with a disability, and they could not identify a single example. Aplt. App. pp. 260–61. *See Watson v. City of Kansas City*, 857 F.2d 690, 694 (10th Cir. 1988) ("[T]o survive summary judgment, the plaintiff must go beyond

her pleadings and show that she has evidence of specific facts that demonstrate that it is the policy or custom of the defendants to provide less police protection to victims of domestic assault than to other assault victims.").

In addition, C.W.'s IEP was developed and implemented by DPS employees without final policymaking authority. *See, e.g.* Aplt. App. Vol. I at 253–57. Colorado law vests policymaking authority with a Board of Education. C.R.S. § 22-32-103. Even the District's special education administrators, who were not on C.W.'s IEP team and only oversaw implementation, are several steps below the Board of Education. *See, e.g.* Aplt. App. Vol. 1 at 253–57; *Cf. Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1250 (10th Cir. 1999) (holding in equal protection sexual harassment case that DPS principal and teachers were not final policymakers).

CONCLUSION

For the foregoing reasons, DPS requests that this Court reverse the district court's erroneous holding that FAPE was denied because C.W.'s IEP did not identify a specific residential treatment facility and vacate the collateral award of attorney's fees and taxation of costs. DPS further requests that this Court otherwise affirm the district court's correct determination that C.W. failed to exhaust administrative remedies for his Section 504, ADA, and Section 1983 claims.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument should be permitted because this case involves at least one novel issue of law, and discussion may materially assist the Court.

Respectfully submitted this 31st day of July, 2020.

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I certify that with respect to this brief:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,965 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Times New Roman 14-point font.

Date: July 31, 2020

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I certify that with respect to this brief:

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2020, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following, with copies to follow in the United States mail and electronic mail:

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