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

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

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Oral Argument Requested

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INTRODUCTION

In its cross-appeal in this special education case, Appellee/Cross-Appellant Denver County School District No. 1 ("DPS" or "the District") asks, did it violate the Individuals with Disabilities Education Act ("IDEA") when documenting a change in Appellant/Cross-Appellee C.W.'s placement to residential treatment without identifying a specific facility? The answer is no. The issue was not exhausted, and it fails on the merits both as a matter of law and of fact.

DPS continues to respect C.W.'s parents' support of their son and their commitment to doing what they believe is right for him, but their choices do not alter the IDEA. The District was entitled to have an opportunity to attempt to remedy C.W.'s parents concerns in the administrative process before having to face the prospect of significant money damages, attorney's fees, and costs. C.W.'s parents had ample opportunity to engage with the District on the selection of a specific facility. While the IDEA does not require such documentation in an individualized education program ("IEP"), had C.W.'s parents cooperated, the District could have identified one. In ignoring this reality and the IDEA, the district court effectively gave C.W.'s parents a veto over the District's offer of private residential treatment. Its erroneous ruling must be reversed.

ARGUMENT

I. The District Court Should Not Have Considered the Lack of a Specific Residential Treatment Facility in the 2017 IEP Because the Issue Had Not Been Exhausted in the Administrative Process.

C.W. suggests in a footnote that "IDEA exhaustion likely is not jurisdictional." Aplt.'s Resp. Br. (Doc. No. 10110423954), p. 32 n.4. While this Court has questioned its prior rulings, it repeatedly has left the jurisdictional nature of IDEA exhaustion for another day. *Muskrat v. Deer Creek Pub. Schs.*, 715 F.3d 775, 783–84 (10th Cir. 2013) (citing *McQueen v. Colo. Springs Sch. Dist. No. 11*, 488 F.3d 868, 873 (10th Cir. 2007)). Notwithstanding the concerns expressed by this Court, the District maintains IDEA exhaustion is jurisdictional for the reasons thoroughly explained in *Smith v. Cheyenne Mountain School District 12*, No. CV 15-00881-PAB-CBS, 2017 WL 2791415, at *17 (D. Colo. May 11, 2017), *report & recommendation adopted,* No. 15-CV-00881-PAB-CBS, 2017 WL 2778556 (D. Colo. June 26, 2017). The issue, however, need not be reached here either because the District asserted C.W.'s failure to exhaust below. *See, e.g., McQueen*, 488 F.3d at 873 ("In this case we need not decide whether exhaustion is jurisdictional because there is no question of waiver or forfeiture by the District.").

According to C.W., the District never raised its exhaustion argument below. DPS did and at the earliest opportunity. In its answer to C.W.'s first amended

complaint, the District generally asserted his failure to exhaust administrative remedies as an affirmative defense. Aplt. App. Vol. I, p. 59. Then, for the first time in his motion for summary judgment, C.W. contended the 2017 IEP was invalid because the District had not ***identified*** a specific residential treatment facility. *Id.* at 135–39. In its response, the District explained this was a new argument, as "[a]t due process, [the] Parents challenged the District's decision to ***place*** C.W. in a residential treatment facility. *Id.* at 283 (emphasis added). To limit judicial review to what had been before the Administrative Law Judge ("ALJ"), the District expressly invoked the IDEA's exhaustion rule, citing 34 C.F.R. § 300.516(e) and *Fry v. Napoleon Community Schools*, 137 S.Ct. 743, 752 (2017). Aplt. App. Vol. I, p. 283. No more magic words were required to preserve the issue for appeal—jurisdictional or not.

It is C.W., rather than DPS, who relies on a forfeited issue. He cites to various portions of the administrative process, Aplt.'s Resp. Br., p. 33 n.5, but at no point did C.W.'s parents contend there as he did on summary judgment that the February 10, 2017 IEP categorically failed to offer a free appropriate education ("FAPE") because no specific residential treatment center had been identified. Rather, the challenge was to the underlying change in placement from homebound services to residential treatment. Aplt. App., Vol. II, pp. 380–95, 430–36, 498–500; *see also id.*, Vol. I, p. 28 (summarizing position in amended complaint); *id.*, Vol. II, pp. 550–51

(ALJ's order stating "Complainants[']allegation that the District failed to make an offer of FAPE when it ***offered residential treatment*** during the February 2017 IEP meeting was also considered") (emphasis added). C.W.'s parents did argue in the administrative process that the facilities verbally suggested by DPS during the IEP meeting would not meet their son's needs. Yet, that is a far cry from claiming the IEP itself is invalid for not listing a specific facility, and it is clear C.W.'s parents criticized the two identified illustrative facilities to support their contention that residential placement was wrong. *Id.* at 435 (characterizing DPS's offer "to send C[.W.] to a full-time residential treatment facilities [sic], Tennyson and Savio" as "extraordinarily misguided and offensive"); *accord id.*, Vol. IV, p. 848.

After failing to persuade the ALJ that the placement should be changed, C.W.'s parents proceeded to federal court. The challenge to the 2017 IEP remained the same in their amended complaint, focusing on the District's offer of residential treatment generally. *Id.*, Vol. I, p. 28 ("[A] 'residential facility' is not an appropriate educational placement for C.W. and is not the least restrictive environment for C.W."). Remarkably, at the eleventh hour, C.W. recast his claim completely, arguing "[t]he School District's Failure to Make a ***Specific*** Offer of an Educational Placement in the 02/10/2017 IEP Violated the IDEA and Resulted in a Denial of FAPE." *Id.* at 135 (emphasis changed).

Although the district court ultimately agreed, it declined to give C.W. the holding his parents long sought. Demonstrating their true position, C.W. moved to alter the final order on the merits, requesting that the district court award relief "from February 10, 2017 until the School District offers Plaintiff an IEP that is reasonably calculated to provide Plaintiff a FAPE." *Id.*, Vol. II, p. 373. The district court denied the motion, pointing out that it "presuppose[d] that 'there is no residential setting through which the compensatory relief can be provided', but the Court did not make this finding." *Id.* at 374. The difference between challenging a placement decision and the identification of a specific facility is stark and beyond reasonable dispute. Because C.W.'s new contention was not exhausted in the administrative process, the district court should not have considered it.

II. Implementation of the 2017 IEP Is Similarly Outside the Scope of this Case and Cannot Be Considered on Appeal.

C.W. works hard to delay addressing the underlying merits of DPS's issue on appeal—whether the IDEA required it to document a change in his placement to residential treatment without identifying a specific facility. For nearly ten pages, C.W. argues instead that "regardless of whether the 2017 IEP named a location," he was denied a FAPE because he has never received "any education." Aplt.'s Resp.

Br., p. 43. C.W. tried this same approach below, but the district court rejected it. So must this Court.

Implementing the 2017 IEP was never at issue in the administrative process. Aplt. App., Vol. II, pp. 435–36, 493–94, 498–500; *see also id.*, Vol. I, p. 28 (summarizing position in amended complaint). The focus on the residential treatment placement generally, and the need for compensatory services before the 2017 IEP, is obvious from the "Decision" paragraphs at the end of the ALJ's order. Aplt. App., Vol. III, p. 556. The ALJ determined "[t]he February 10, 2017 IEP [wa]s reasonably calculated to provide C.W. with FAPE in the L[east] R[estrictive] E[vironment]" of residential treatment. *Id.* The only implementation issues concerned prior IEPs. *Id.* Indeed, the ALJ expressly recognized that compensatory services and the FAPE embodied in the 2017 IEP could not be provided until an appropriate facility for C.W. was found. *Id.*

In the amended complaint in this case, C.W. included allegations that the District had not provided any services since the 2017 IEP meeting. *Id.*, Vol. I, p. 29. Although "[a] significant portion of the Parents' briefing [wa]s devoted to events that postdate the ALJ's determination, particularly the failure of the District to designate a residential facility for C.W.," the district court concluded it could not address their complaints. *Id.*, Vol. II, p. 358. The ruling was correct. Under 34 C.F.R.

§ 300.516(a), an aggrieved party may "bring a civil action with respect to the due process complaint notice." A district court "[r]eceives the records of the administrative proceedings" and "[h]ears additional evidence at the request of a party." *Id.*, § 300.516(c)(1)–(2). Because jurisdiction in an IDEA action is in an appellate capacity, reviewing the ALJ's factual findings and conclusions of law under a modified *de novo* standard, neither the district court nor this Court can consider new issues not presented in the administrative process. *E.g.*, *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 974 (10th Cir. 2004) (citing authority).

For any determination on the implementation of the 2017 IEP, there needs to be a record of evidence from an administrative hearing based on a due process complaint encompassing the issue. 34 C.F.R. § 300.511(d) ("The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint . . . unless the other party agrees otherwise."). C.W.'s remedy is plain. If his parents want to challenge the implementation of the 2017 IEP, including any alleged failure to identify a specific residential treatment facility in the intervening time, they have the right to file another due process complaint. 34 C.F.R. § 300.513(c) ("Nothing in [this section] shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed."). Circumventing the administrative

process is not an option, even as an alternative basis on appeal to defend a lower court's ruling.

III. The Only Reasonable Reading of the IDEA Is that It Does Not Require Identification of a Specific Residential Treatment Facility in an IEP.

Beyond exhaustion, DPS's narrow issue on appeal turns on what the IDEA requires. C.W.'s brief responsive analysis fails to counter the District's position that the term "location" in 20 U.S.C. §1414(d)(1)(A)(i)(VII) did not require identification of a specific residential treatment facility in the 2017 IEP. Congress made clear that no "additional information" must "be included in the child's IEP beyond what is ***explicitly*** required" in the IDEA. 20 U.S.C. §1414(d)(1)(A)(ii) (emphasis added). Applying its own rule of construction, 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.

C.W. cites the United States Department of Education ("DOE")'s 2006 guidance, which states that "[h]istorically, [the DOE] ha[s] referred to . . . 'location' as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services." *Assistance to States for Educ. of Children with Disabilities*, 71 Fed. Reg. 46540, 46588 (Aug. 14, 2006). That statement is fully consistent with the DOE's 1999 guidance quoted in the District's

opening brief, which states 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). The 2017 IEP satisfied the statutory requirement, as interpreted by the agency charged with implementing the IDEA, by listing the location of services as a residential facility. Aplt. App., Vol. III, p. 730.

The 2006 guidance goes on to emphasize that "school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement." 71 Fed. Reg. at 46588. This statement makes no sense if, as C.W. suggests, the "location" listed in an IEP must be specific. Administrators then would never have flexibility to assign a child. Nor would such a reading of the IDEA fit with the DOE's implementing regulation regarding private school placements. 34 C.F.R. § 300.325(a)(1) requires a school district to hold an IEP meeting to determine placement ***before*** a specific facility is identified. Also, under 34 C.F.R. § 300.503(a)(1), a school district must provide a child's parents prior written notice "a reasonable time before" it "[p]roposes to initiate or change" the placement of the child. To comply with these regulations, an IEP team must determine that residential

treatment is appropriate, next give notice of that decision, and then work to identify a specific facility—in that order. C.W. does not even acknowledge these regulations, let alone explain how a district could comply with them by assigning a child to a particular facility at the IEP meeting in which placement was determined before prior written notice of the change had been provided.

C.W. points to no authority holding his 2017 IEP was necessarily invalid because no specific facility was identified. As discussed in the District's opening brief, the Second, Fourth, and Ninth Circuits reject such a mechanistic and textually unsupported reading of the IDEA and the DOE's implementing regulations. *Rachel H. v. Dep't of Educ. Hawaii*, 868 F.3d 1085, 1092 (9th Cir. 2017); *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009); *A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 682 (4th Cir. 2007).

IV. The Facts of this Case Demonstrate DPS—Not C.W.'s Parents—Was Left to Fend for Itself.

Instead, C.W. stakes his defense of the district court's error on its conclusion that the "significance of the failure to designate a specific location depends upon the facts of each case." Aplt.'s Resp. Br., p. 42 (quoting district court's order, Aplt. App., Vol. II, p. 360). While he does not offer much in the way of a workable standard, C.W. unsurprisingly feels his facts fit the bill, arguing, in short, that the District

failed to identify a residential treatment facility at the February 10, 2017 IEP meeting, which could meet his needs, leaving his parents to fend for themselves. He is wrong.

The District has a standard process for selecting residential treatment facilities that follows 34 C.F.R. § 300.325(a)(1) and 34 C.F.R. § 300.503(a)(1), discussed above. As the ALJ found, "when it is determined that residential services are appropriate for a student, the District's procedure is to send the referral to out of District placement to find an appropriate facility." Aplt. App. Vol. II, p. 548. "Once a residential facility is identified as a possible placement, the student's IEP is sent to the facility," and "[i]f the facility determines it can meet the student's needs, the facility's staff members will discuss the child's needs with the family to see if facility is appropriate for the child." *Id.* DPS's Associate Director of Special Education Gene Bamesberger testified at the administrative hearing that the IEP team "only decides whether [placement is] residential. They don't decide where." *Id.*, Vol. VI, p. 1258. Indeed, the ALJ found that DPS did not enter the IEP meeting with a predetermined decision for residential treatment, and it had not selected any particular facility. *Id.*, Vol. II, p. 547. As IEP team members discussed C.W.'s lack of progress—even regression—with homebound instruction, they considered day treatment; concerned "it would be too stressful and difficult for C.W. and his parents to get him to a day

treatment program every day," IEP team members turned to consideration of residential treatment. *Id.*

With the exception of C.W.'s father, the IEP team ultimately determined residential treatment was appropriate. *Id.* C.W.'s father asked Mr. Bamesberger for "examples" of facilities, and he identified two. *Id.*, Vol. II, p. 539; *id.*, Vol. VI, pp. 1257–58, 1260. C.W.'s father then became angry and left the meeting without discussing next steps in locating a specific facility. *Id.* at 1255–57, 1262. C.W.'s parents already had a due process complaint pending, and at a status conference just a few weeks later, they informed the ALJ that they disagreed with the District's February 10, 2017 offer of FAPE. *Id.*, Vol. II at 426–27. They made clear they did not agree placement in ***any*** residential treatment facility, which they considered "a very detrimental alternative" for their son. *Id.* at 493; *see also id.*, Vol. IV, p. 866 (recognizing in opening statement that DPS understood "family is vehemently opposed"). Even so, consistent with its standard procedure, the District began its process of making referrals to private placements and issued written notice to C.W.'s parents, inviting them to participate cooperatively in the selection process so that it could move forward. *Id.*, Vol. III, at 734–36; *id.*, Vol. VI, pp. 1258–61. While DPS would be glad to highlight its efforts since the due process hearing to work

cooperatively with C.W.'s parents in the identification of a specific residential treatment facility, it respects the IDEA's limits on judicial review.

C.W., in contrast, goes to great length to blame the District, but, again, many of his complaints concern the last three years, which fall outside the scope of the due process complaint and administrative record that cabin this case. 34 C.F.R. § 300.516(a), (c)(1)–(2); *e.g.*, *L.B.*, 379 F.3d at 974. C.W. also spends several pages criticizing Tennyson and Savio as residential treatment facilities, but as Mr. Bamesberger testified, Tennyson and Savio were just examples, and he maintained at the hearing that one may be able to meet C.W.'s needs. Aplt. App., Vol. VI, pp. 1258, 1260. Regardless, what matters is the written IEP, *Sytsema ex rel. Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1316 (10th Cir. 2008) (citing cases), and the complaints about these two facilities also are based on his parents' unconfirmed hearsay and opinions—not any evidence received by the ALJ. *See, e.g.*, Aplt. App., Vol. II pp. 435, 492–93; *id.*, Vol. IV, pp. 960–66. It therefore is no wonder the ALJ made no findings of fact or conclusions of law about any specific facility. Not only was the parents' challenge focused on the decision in the 2017 IEP to place C.W. in residential treatment as already discussed, neither side presented admissible evidence about the efficacy of any particular facility.

The record reveals that the only party left to fend for itself was DPS. As explained in the District's opening brief, residential treatment centers are private facilities and typically will not admit students without parent engagement; such placements can be traumatic and are rarely successful unless parents are supportive. *See, e.g.*, *id.*, Vol. VI, pp. 1259–60, 1302. When C.W.'s father left the February 10, 2017 IEP meeting and both parents subsequently decided to categorically oppose placement in any residential treatment facility, they rejected a critical opportunity to provide input to the District about whether specific facilities could meet their son's needs.

Doing so was the parents' prerogative, but their decision came with consequences. Because of the unique nature of a residential treatment placement, the District could not, as a practical matter, move forward in the selection process without C.W.'s parents' input. That the IEP lists no specific facility does not make it "an empty procedural formality." Aplt. Resp. Br., p. 34. DPS included as much substance as possible at the time. C.W.'s repeated citation to *Endrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017), is ultimately hollow, as that case was about the FAPE standard and said nothing about identifying specific facilities in IEPs. The few cases that do are of no help to C.W. As explained in the District's opening brief, the dispute in *A.K.* centered on which private school in the area, if

any, could meet the child's needs. 484 F.3d at 681–82. Unlike C.W.'s parents, A.K.'s parents agreed with the placement. *Id.* at 681. In *Rachel H.*, 868 F.3d 1085, and *T.Y.*, 584 F.3d 412, the placements at issue were not in any private day or residential setting.

C.W. additionally cites *Union School District v. Smith*, 15 F.3d 1519 (9th Cir. 1994), suggesting the District cannot stand on its offer of FAPE. *Smith* offers no persuasive value, however, because the offer there was verbal. 15 F.3d at 1525–26. DPS's offer of residential treatment was written in the IEP. Congress did not give parents "veto power over IEP teams' site selection decisions." *White ex rel. White v. Ascension Par. Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003) (citing cases). Parents may disagree and even object, but the law does not allow them to hold a school district liable for a placement decision they absolutely rejected. The district court effectively ruled otherwise, and its holding that the 2017 IEP was invalid cannot stand.

CONCLUSION

For the foregoing reasons and those stated in its opening brief, FAPE was not denied simply because C.W.'s 2017 IEP did not identify a specific residential treatment facility. The issue was not exhausted, and it fails on the merits both as a matter of law and of fact. DPS therefore requests that this Court reverse the district

court's erroneous holding and its collateral award of attorney's fees and costs.

Respectfully submitted this 17th day of November, 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 3,538 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.

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Certificate of Privacy Redactions and Digital Submission

I certify that with respect to this brief:

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I hereby certify that on November 17, 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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