Oral argument requested

Nos. 19-1407 and 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.,
Plaintiff-Appellant/Cross-Appellee,

v.

Denver County School District No. 1,

Defendant-Appellee/Cross-Appellant.

On appeal from a final judgment of the United States District Court
for the District of Colorado, Judge Marcia S. Krieger
No. 1:17-cv-02462

OPENING BRIEF OF APPELLANT C.W.

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Table of Contents

Table of Authorities

Cases **Page(s)**

Statutes

Regulations

Legislative Materials

Other Authorities

Statement of Related Cases

No current or earlier appeals are related to these cross-appeals.

Glossary

ALJ	Administrative Law Judge
ADA	Americans with Disabilities Act
FAPE	Free Appropriate Public Education
IDEA	Individuals with Disabilities Education Act
IEP	Individualized Education Program

Introduction

C.W. is a fourteen-year-old child whose disabilities require his public school to provide him with educational services to ensure he receives the free appropriate public education (FAPE) required by the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*. Because C.W.'s parents believed that the Denver County School District had not provided C.W. with a FAPE, acting pro se, they filed what the IDEA calls a due-process complaint. Due-process complaints are used administratively to try to resolve disputes between parents and school officials over whether a child has been provided a FAPE. *See* 20 U.S.C. § 1415(f)(1)(A); App. Vol. 2 at 380-82. In this case, an Administrative Law Judge (ALJ) considering C.W.'s due-process complaint ruled that the School District had failed to provide C.W. with a FAPE for part, but not all, of the relevant period.

C.W. then sued the School District in district court challenging the ALJ's decision not to grant full relief under the IDEA, *see* App. Vol. 1 at 30-32, which authorizes suit in federal or state court by any party aggrieved by an administrative decision. 20 U.S.C. § 1415(i)(2)(A). C.W. also pleaded federal claims for relief that the IDEA does not provide: claims for monetary damages under the federal Rehabilitation Act, the Americans with Disabilities Act, and 42 U.S.C. § 1983 for violations of the Constitution's Equal Protection Clause. App. Vol. 1 at 32-46.

On C.W.'s motion for summary judgment, the district court agreed with C.W. on his IDEA claim, holding that the School District's educational program for 2017-2018 did not provide C.W. with a FAPE, thus reversing in part the ALJ's decision under the IDEA. App. Vol. 2 at 361-62 (Dist. Ct. Op. 11-12).

But the district court granted the School District's motion for summary judgment on C.W.'s non-IDEA claims. App. Vol. 2 at 367 (Dist. Ct. Op. 17). It did not reject C.W.'s non-IDEA claims on their merits but, rather, on the ground that those claims had not been exhausted before the ALJ, which, the district court maintained, was required by 20 U.S.C. § 1415(*l*). *Id.* This ruling—the subject of this appeal—was wrong for two independent reasons.

First, C.W.'s parents did, in fact, complete the administrative process demanded by the IDEA—which is all that the IDEA requires for exhaustion of any claim later brought in federal court. Second, though C.W.'s parents did exhaust the administrative process, Section 1415(*l*) did not require them to do so on their non-IDEA claims because they seek relief—monetary damages—that is unavailable under the IDEA. This Court should therefore reverse and remand for proceedings on the merits of C.W.'s non-IDEA claims.

Statement of Jurisdiction

The district court had jurisdiction under 28 U.S.C. § 1331 and 20 U.S.C. § 1415(i)(3)(A). That court granted in part and denied in part the parties' cross-motions

for summary judgment on September 25, 2019, disposing of all claims of all parties and directing the clerk to close the case. App. Vol. 2 at 367-68 (Dist. Ct. Op. 17-18). The court issued a Final Judgment to the same effect on the same date. App. Vol. 2 at 369-70. The notice of appeal was filed on October 23, 2019. App. Vol. 2 at 376. This Court has jurisdiction under 28 U.S.C. § 1291.[1]

Statement of the Issues

Believing that he was denied a free appropriate public education, C.W. filed a due-process complaint and completed the administrative-complaint procedures established by the Individuals with Disabilities Education Act (IDEA) to challenge that denial. 20 U.S.C. § 1415(b)(6), (7)(A); *see* App. Vol. 2 at 380-82. The School District does not dispute that C.W. exhausted the administrative process on his IDEA claims, nor that the IDEA cannot provide C.W. the compensatory damages remedies available to him under the other federal statutes—the federal Rehabilitation Act, the Americans with Disabilities Act, and 42 U.S.C. § 1983—under which he also sued. Yet when C.W. filed suit in the district court, that court held that he failed to exhaust his non-IDEA claims through the IDEA's administrative process and therefore could not pursue them in court.

[1] The finality of the district court's decision is disputed. This Court has carried that question with the case. *See* Order (Feb. 4, 2020). This brief concerns only the district court's holding regarding whether C.W. exhausted his remedies, and we rely on our prior briefs on the finality question. *See* Appellant's Mem. Re: Jurisdiction (Dec. 4, 2019); Appellant's Resp. Mem. Re: Jurisdiction (Dec. 23, 2019).

The issues presented are (1) whether C.W. exhausted his non-IDEA claims, and (2) whether C.W. was required to exhaust his non-IDEA claims, which seek only compensatory damages, a remedy not available under the IDEA.

Statement of the Case

This appeal concerns whether the district court erred in holding that appellant C.W., acting pro se, adequately exhausted the administrative procedures under the Individuals with Disabilities Education Act (IDEA) before filing suit in district court under that Act and under the Rehabilitation Act, the Americans with Disabilities Act, and 42 U.S.C. § 1983 to enforce the Equal Protection Clause.

I. Legal background

A. Basic IDEA principles. Under the IDEA, school districts must provide students with disabilities a free appropriate public education (FAPE). 20 U.S.C. § 1412(a)(1); *see* App. Vol. 2 at 352 (Dist. Ct. Op. 2 nn.1, 3). The IDEA defines a FAPE as "special education and related services" that (A) are provided without charge; "(B) meet the standards of the State educational agency;" (C) include an appropriate education in the State involved; and "(D) are provided in conformity with the individualized education program required" by the Act. 20 U.S.C. § 1401(9).

The IDEA seeks to "ensur[e] that children with disabilities receive a quality public education." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239 (2009) (quoting S. Rep. No. 105-17, at 3 (1997)). Congress insisted that school districts abandon the "low

expectations" historically set for students with disabilities and instead strive to "ensur[e] equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1), (4).

To receive a FAPE, students need services and instruction tailored to their disabilities and particular needs. Therefore, the Act requires school districts to create an individualized education program (IEP) outlining the education services each qualifying student with a disability will receive in the coming academic year. 20 U.S.C. § 1414; *see* App. Vol. 2 at 352 (Dist. Ct. Op. 2 n.3). Each IEP is created by an "IEP team" composed of the child's parents or guardians, the child's teachers, and other qualified personnel able to "provide, or supervise the provision of, specially designed instruction to meet the unique needs of" the child. 20 U.S.C. § 1414(d)(1)(B)(iv)(I). The "IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (citing 20 U.S.C. § 1414(d)(1)(A)).

B. IDEA dispute resolution. Built into the IDEA are procedures for challenging a school district's actions when parents believe that the district has not provided their child with a FAPE. *See* 20 U.S.C. § 1415. These procedures are called "due process proceedings." *Id.* § 1415(d)(2)(F). Parents initiate these proceedings by filing a "due process complaint" that must describe only the "the nature of the problem … including

facts relating to such problem" and "a proposed resolution." *Id.* § 1415(b)(6)-(7). The next step is for the parents to participate in a preliminary meeting with the child's IEP team. *Id.* § 1415(f)(1)(B)(i). Most requests for due-process hearings are withdrawn, dismissed, or resolved at this stage. *See* Ctr. for Appropriate Dispute Resolution in Special Educ., *IDEA Dispute Resolution Data Summary for: Colorado 2008-09 to 2017-18*, at 3 (2019).[2] If the FAPE dispute remains unresolved, parents then have a right to an impartial due-process hearing. 20 U.S.C. § 1415(f)(1)(B)(ii).

This due-process hearing is conducted by a "hearing officer"—often, as in Colorado, called an administrative law judge (ALJ)—who must be impartial and knowledgeable about the subject matter. *See* 20 U.S.C. § 1415(f)(3)(A). The ALJ decides whether the school district has met the statute's requirement to provide the student with a FAPE. *Id.* § 1415(f)(3)(E). The ALJ can order a school district to comply with procedural requirements outlined in the IDEA, *id.* § 1415(f)(3)(E)(iii), and can order compensatory educational services after finding the district denied the student a FAPE, *see* App. Vol. 3 at 556. But, as the district court here noted, monetary damages are "unavailable under the IDEA," App. Vol. 2 at 366-67 (Dist. Ct. Op. 16-17), so the ALJ cannot award them. *See Carroll v. Lawton Indep. Sch. Dist. No. 8*, 805 F.3d 1222, 1227

[2] https://www.cadreworks.org/resources/cadre-materials/2017-18-dr-data-summary-colorado.

(10th Cir. 2015); *Padilla ex rel. Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1274 (10th Cir. 2000).

C. Access to court. If parents are dissatisfied with an ALJ's decision, they may sue the school district in federal district court (or in state court) under the IDEA and under other laws that protect children with disabilities, such as the federal Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*. *See* 20 U.S.C. § 1415(i)(2)-(3), (*l*).

Under 20 U.S.C. § 1415(*l*), before "the filing of a civil action under [other] laws seeking relief that is also available under [the IDEA]," "the [due-process] procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under" the IDEA. This provision expressly expanded rights and remedies to ensure that "[n]othing" in the IDEA "shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities." *Id.* (citations omitted).

Congress adopted Section 1415(*l*) to overrule *Smith v. Robinson*, 468 U.S. 992 (1984), which held that the IDEA is the only law, and its administrative procedures the only route, for parents to challenge a school district's denial of a FAPE. *See* H.R. Rep. No. 99-296, at 4 (1985). In doing so, Congress sought to "reestablish … the viability of [the

Rehabilitation Act], 42 U.S.C. 1983, and other statutes as separate vehicles for ensuring the rights of handicapped children." *Id.* at 4.

Preserving these non-IDEA claims was necessary, Congress believed, because as "[i]mportant as the IDEA is for children with disabilities, it is not the only federal statute protecting their interests." *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 749 (2017). In *Fry*, the Supreme Court held that Section 1415(*l*) requires exhaustion of the IDEA's administrative procedures only when the "gravamen" of a plaintiff's complaint is the denial of a FAPE. *Id.* at 752. But if a suit is "brought under a different statute" and the "remedy sought is not for the denial of a FAPE, then exhaustion of the IDEA's procedures is not required" even when the "same conduct might violate all three statutes"—the IDEA, the Rehabilitation Act, and the Americans with Disabilities Act. *Id.* at 754, 756. And of particular relevance here, the Court expressly left open the question whether a complainant must exhaust when she complains of a FAPE denial but also seeks a remedy, such as compensatory damages, not available under the IDEA. *Id.* at 752 n.4.

II. Facts[3]

C.W. is a fourteen-year-old, highly gifted boy with a "very high" IQ, who has been diagnosed with several physical and developmental disabilities, among them autism, an

[3] Although the merits of C.W.'s claims are not at issue in this appeal (No. 19-1407), C.W. sets out some of the factual background to provide context for understanding the

eating disorder, a sleep disorder, and generalized anxiety. App. Vol. 2 at 537 (¶¶ 1-4). C.W. began attending Teller Elementary in 2011 when he was in first grade, and by third grade, Teller provided him with an individualized education program (IEP) under the IDEA. App. Vol. 2 at 537-38 (¶¶ 5, 13). Teller employed different types of at-home and at-school educational opportunities to address C.W.'s disabilities, with minimal success. App. Vol. 2 at 538 (¶¶ 8, 13-15).

After two meetings in the fall of C.W.'s fourth-grade year, the IEP team concluded that C.W.'s instruction should occur at home because of the severity and complexity of his disabilities. App. Vol. 2 at 538, 539-40 (¶¶ 19, 30-31). But the School District provided no home instruction at all until months later, in March of that school year. App. Vol. 2 at 541 (¶¶ 45, 47). Even then, the School District limited C.W.'s instruction to two hours of math and language arts each day. App. Vol. 3 at 626-28, 630. And it was not until April that the School District provided C.W. with a school psychologist to work on his social skills and anxiety, and with a speech therapist to improve C.W.'s language. App. Vol. 2 at 541-43 (¶¶ 48-49, 54, 56, 58-59); App. Vol. 5 at 1161-63.

In the fall of fifth grade, C.W.'s primary teacher stopped instructing him entirely for approximately six months due to an accident. App. Vol. 2 at 543 (¶ 64); App. Vol.

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exhaustion issues. An additional statement of the facts will be set out in C.W.'s answering brief in the School District's cross-appeal (No. 19-1429), which challenges the merits of the district court's FAPE decision in C.W.'s favor.

5 at 1164. During this time, the School District provided C.W. no educational services at all. App. Vol. 2 at 543 (¶ 64).

In an IEP meeting before sixth grade (2016-2017), C.W.'s IEP team determined that C.W. should receive homebound services with a later transition to a new school, Morey Middle School. App. Vol. 2 at 544 (¶ 71). By November 2016, an evaluation showed that C.W. was regressing, so the School District scheduled another IEP meeting for February 2017. App. Vol. 2 at 546-47 (¶¶ 95-96). Prior to this meeting, the School District sent the parents new guidelines for home instruction that required C.W. to be dressed in pants or shorts, that the instruction occur at a work table, and that if C.W. was not appropriately prepared for instruction within fifteen minutes of the scheduled start time, he would be marked as a "No Show" and would lose out on instruction for the day. App. Vol. 3 at 585.

At the February 2017 meeting, the School District determined that C.W.'s instruction should take place not at home but at a residential treatment facility. App. Vol. 3 at 730. Yet C.W. never actually received residential services. App. Vol. 2 at 548 (¶ 108). Despite recommending residential services, the School District had not found an appropriate facility for C.W. as of the due-process hearing in June 2017. App. Vol. 2 at 548 (¶ 108). Indeed, C.W. has not received any instructional services from the School District since February 2017.

III. Procedural history

A. Administrative proceedings. In September 2016, C.W.'s parents filed a pro se due-process complaint under the IDEA. App. Vol. 2 at 536. They alleged that appellee-cross-appellant Denver County School District had denied C.W. a FAPE by failing to provide "core curriculum services, related services, assistive technology," and highly gifted and talented opportunities, and by not "design[ing] a program to meet [C.W.'s] unique needs." App. Vol. 2 at 381. After several IEP meetings, summarized above (at 9-10), an ALJ held two days of hearings in which C.W.'s parents proffered over 200 exhibits and examined seven witnesses. App. Vol. 2 at 536.

Among other things, C.W.'s parents alleged four substantive violations of the IDEA, contending that each resulted in the denial of a FAPE: that the School District (1) did not provide C.W. with highly gifted and talented educational services; (2) did not provide adequate technology, therapy, and instructional services to comply with C.W.'s IEP; (3) did not offer C.W. instruction in core subjects aside from mathematics and English; and (4) offered C.W. residential education for the 2017-2018 school year without actually identifying a facility capable of addressing C.W.'s disabilities. App. Vol. 2 at 430, 550-51.

The ALJ did not vindicate all of C.W.'s claims, including that the School District failed to provide him with a FAPE for the entire 2016-2017 school year. App. Vol. 2 at 551-52, App. Vol. 3 at 556. She did hold, however, that the School District had failed

to provide C.W. with a FAPE and thus had to provide C.W. with compensatory educational services for four periods: between September and November 2014, March and May 2015, October 2015 to March 2016, and the end of January and the beginning of February 2017. App. Vol. 3 at 554-55.

B. District-court proceedings. C.W.'s parents then sued the School District on C.W.'s behalf in federal district court under the IDEA, App. Vol. 1 at 30-32, challenging the ALJ's decision that the School District's IEP for 2016-2017 was reasonably calculated to provide C.W. a FAPE. App. Vol. 2 at 352, 355 (Dist. Ct. Op. 2 nn.2, 5); App. Vol. 1 at 17-18 (¶¶ 39, 47-48). In separate counts, they also sought damages for what they maintained were the School District's violations of Section 504 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, and (under 42 U.S.C. § 1983) the Fourteenth Amendment's Equal Protection Clause. App. Vol. 2 at 355 (Dist. Ct. Op. 5).

The district court reversed the ALJ's finding that the School District's 2016-2017 IEP was reasonably calculated to provide a FAPE under the IDEA, holding that the School District never actually provided C.W. the educational services to which he was entitled based on his IEP for that school year. *See* App. Vol. 2 at 361 (Dist. Ct. Op. 11).[4]

[4] This holding is challenged in the School District's cross-appeal, No. 19-1429.

The district court then held that C.W.'s non-IDEA claims were barred on the ground that C.W. had not adequately exhausted the IDEA's administrative procedures under 20 U.S.C. § 1415(*l*). App. Vol. 2 at 362 (Dist. Ct. Op. 12). C.W.'s Rehabilitation Act, ADA, and equal-protection claims concern many of the facts that give rise to his FAPE-based claim under the IDEA, but they seek a different remedy—compensatory damages. App. Vol. 2 at 365, 367 (Dist. Ct. Op. 15, 17). Nonetheless, the district court maintained that these "non-IDEA claims are the exact sort" of claims subject to Section 1415(*l*)'s exhaustion requirement for "civil action[s]" that seek relief that is also available under the IDEA. App. Vol. 2 at 367 (Dist. Ct. Op. 17). The court also stated, without further elaboration, that requiring complainants to first present their non-IDEA claims in due-process proceedings would "increase[] judicial efficiency, and best provide[] for comprehensive and consistent determinations." App. Vol. 2 at 367 (Dist. Ct. Op. 17). It did not acknowledge that the IDEA does not authorize the administrative adjudication of non-IDEA claims or a damages remedy of any kind.

Summary of Argument

The district court erred in determining that it could not hear C.W.'s claims for compensatory damages under the Rehabilitation Act, the Americans with Disabilities Act, and 42 U.S.C. § 1983 because, in its view, C.W. did not exhaust them in the IDEA's administrative process. This Court should reverse for two independent reasons.

I. C.W. exhausted the IDEA's administrative process.

A. C.W. exhausted under the IDEA because he completed the procedures in 20 U.S.C. § 1415(f) and (g), which lay out the IDEA's only exhaustion requirements. By presenting the facts related to his FAPE violations and completing a due-process hearing, he fully exhausted the IDEA's administrative procedures. C.W. was not, as the district court held, required by the IDEA to explicitly name his non-IDEA legal theories in the administrative process. The IDEA and its regulations did not require him to do so. Nor would naming legal theories to an ALJ promote judicial efficiency or minimize costs. To the contrary, a legal-theory-naming requirement would hinder pro se complainants' ability to complete the IDEA's administrative procedures, creating a trap for the unwary with no countervailing benefit.

B. The text and purpose of the IDEA's Section 1415(*l*) supports this conclusion. When a plaintiff seeks non-IDEA relief also available under the IDEA, Section 1415(*l*) requires exhaustion of the IDEA's administrative procedures "to the same extent as would be required" if the complainant sought relief under the IDEA alone. Complainants must, therefore, complete the IDEA due-process-hearing procedures for their IDEA claims, and doing so constitutes exhaustion of both their IDEA and non-IDEA claims. Section 1415(*l*)'s purpose was to preserve plaintiffs' ability to bring education-based claims under laws other than the IDEA, such as the Rehabilitation Act, the ADA, and 42 U.S.C. § 1983, so long as plaintiffs complaining of a FAPE denial

under the IDEA exhausted the IDEA's administrative process. That is exactly what C.W. did.

C. IDEA hearing officers lack the power to adjudicate non-IDEA claims and to grant compensatory damages. Requiring a child to bring his non-IDEA claims for damages in the IDEA's administrative process would therefore be a pointless, futile exercise that would do nothing to remedy the child's injuries. This reality underscores why Congress determined that a complainant exhausts his non-IDEA claims whenever he has presented his IDEA claims in a due-process complaint and obtained an administrative decision on those claims, as C.W. did here.

D. Federal pleading principles do not require plaintiffs to name legal theories in their complaints, and the IDEA does not either. C.W.'s pro se due-process complaint, which stated the facts of his claims as required by 20 U.S.C. § 1415(b), was sufficient for the district court to match the facts to his legal claims. Therefore, even if the IDEA required C.W. to state his non-IDEA claims before the ALJ, C.W. did so, and this Court may reverse for that reason as well.

II. C.W. did not have to exhaust his claims for compensatory damages.

The IDEA's text states that plaintiffs who allege FAPE violations must exhaust the IDEA's administrative process if they seek "relief that is also available under" the IDEA. 20 U.S.C. § 1415(*l*). Because C.W.'s non-IDEA claims seek only compensatory damages, a type of relief *not* available under the IDEA, he was not required to exhaust

the administrative process for those claims. This conclusion is supported not only by Section 1415(*l*)'s text but also by its enactment history, which shows that Congress did not intend to require complainants to exhaust the IDEA's administrative procedures when the IDEA could not provide the relief they sought.

Standard of Review

This Court reviews de novo the district court's grant of summary judgment. *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1062 (10th Cir. 2002). When reviewing a grant of summary judgment, this Court must "consider[] all evidence in the light most favorable to the nonmoving party." *D.L. v. Unified Sch. Dist. No. 497*, 596 F.3d 768, 772 (10th Cir. 2010).

Argument

The district court erred for two independent reasons. First, C.W. met the IDEA's exhaustion requirement, 20 U.S.C. § 1415(*l*), when he complied with the procedural steps laid out in 20 U.S.C. § 1415(f) and (g), and completed the ALJ hearing before bringing his Rehabilitation Act, ADA, and equal-protection claims to the district court. Second, because C.W.'s non-IDEA claims seek only compensatory damages—remedies not available under the IDEA—those claims fall outside the scope of Section 1415(*l*), so he was not required to exhaust them.

I. C.W. exhausted his claims by completing all of the IDEA's administrative procedures.

C.W. fulfilled the IDEA's exhaustion requirements, described in 20 U.S.C. § 1415(f) and (g), by filing a complaint explaining the facts relevant to his IDEA claims and by completing the hearing process before an ALJ. The procedures laid out in those provisions are the only requirements complainants must satisfy to exhaust their claims; those provisions do not require the enumeration of legal claims, nor do they require complainants to litigate non-IDEA claims through the due-process-hearing procedures.

A. To exhaust claims through the IDEA's administrative procedures, complainants need only present facts pertaining to their due-process complaint and propose a resolution, and are not required to raise legal theories.

1. The district court wrongly held that C.W. failed to exhaust his non-IDEA claims because he did not bring his "non-IDEA theories" before the ALJ. App. Vol. 2 at 367 (Dist. Ct. Op. 17). To the contrary, C.W. fully exhausted all his claims—IDEA and non-IDEA claims alike—by presenting the facts relating to his FAPE denial and by completing the due-process-hearing procedures.

a. Statutory text. The IDEA's text does not require what the district court demanded—that due-process complainants name their legal claims to satisfy the Act's procedural requirements. Rather, the text requires a complainant to submit only a due-process complaint, which should describe "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate

public education to such child," 20 U.S.C. § 1415(b)(6)(A), and a due-process-complaint notice, which must provide only a "description of the nature of the problem of the child," the facts "relating to such proposed initiation or change," and a "proposed resolution of the problem to the extent known and available to the party at the time," *id.* § 1415(b)(7)(A)(ii)(III)-(IV).[5]

As discussed above (at 5-6), after parents file their due-process complaint and notice, they then proceed to "an impartial due process hearing," 20 U.S.C. § 1415(f)(1)(A), on the issues raised by the complaint, *id.* § 1415(f)(3)(B). Once the hearing officer decides whether "the child received a free appropriate public education," *id.* § 1415(f)(3)(E), any party aggrieved by that decision may bring a civil action, *id.* § 1415(i)(2)(A).

What Congress termed the IDEA's "rule of construction," set forth in 20 U.S.C. § 1415(*l*), points to other subsections of Section 1415 to define what exhaustion entails. Thus, Section 1415(*l*) draws its meaning from Section 1415(b), which describes "[t]he procedures required by" the IDEA, including the due-process complaint and notice, and from Section 1415(f) and (g), which describe the hearing process. *See id.* § 1415(*l*) (stating that "the procedures under subsections (f) and (g) shall be exhausted").

[5] Though the IDEA draws a distinction between the due-process complaint and the due-process-complaint notice, as described in 20 U.S.C. § 1415(b)(6) and (b)(7), respectively, the implementing regulations combine the two and adopt the requirements discussed in Section 1415(b)(7) as required components of the due-process complaint. *See* 34 C.F.R. § 300.508(b).

None of these provisions—20 U.S.C. § 1415(b), (f), and (g)—requires anything more than the presentation of the facts of the complainant's alleged FAPE denial and a proposed solution. Therefore, to exhaust, a due-process complainant need only present the facts related to his complaint and to complete the due-process-hearing procedures. There is no question that C.W. complied with these requirements by including the relevant facts and a proposed solution in his due-process complaint, App. Vol. 2 at 380-95, and so he exhausted his claims. Not surprisingly, this Circuit has never held that a due-process complainant who has stated the facts in his due-process complaint (as C.W.'s parents did) and completed the hearing process (as C.W.'s parents did), has failed to exhaust his claims.[6]

b. Regulations. Department of Education regulations implementing the IDEA's due-process-complaint procedures reflect the statutory requirements and thus do not require complainants to present legal theories in the due-process complaint. *See generally*

[6] This Court's decisions that have addressed the IDEA's exhaustion requirement concerned circumstances different from those presented here. That is, they do not address whether complainants in the administrative process must explicitly name their non-IDEA claims, as the district court held is required. Rather, each involved complainants who were held not to have exhausted their IDEA claims because they never completed the due-process-hearing procedures. *See, e.g.*, *Carroll v. Lawton Ind. Sch. Dist.*, 805 F.3d 1222, 1225-26 (10th Cir. 2015); *A.F. ex rel. Christine B. v. Espanola Pub. Schs.*, 801 F.3d 1245, 1246, 1248 (10th Cir. 2015). Unlike the plaintiffs in *Carroll* and *A.F.*, C.W. completed the IDEA administrative process and obtained an administrative decision, App. Vols. 2 and 3 at 536-558, and thus exhausted his IDEA claims under Section 1415(*l*).

34 C.F.R. § 300.508. To the contrary, the provision that describes the required content of a due-process complaint demands only "[a] description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and [a] proposed resolution of the problem to the extent known and available to the party at the time." 34 C.F.R. § 300.508(b).[7]

The regulation governing school districts' responses to due-process complaints is to the same effect. It requires only that school districts make factual responses to due-process complaints, including providing "[a]n explanation of why the agency proposed or refused to take the action," "[a] description of other options that the IEP Team considered and the reasons why those options were rejected," "[a] description of each evaluation procedure, assessment, record, or report the agency used," and "[a]

[7] Section 300.508(b) states in full:

> Content of complaint. The due process complaint required in paragraph (a)(1) of this section must include—
> (1) The name of the child;
> (2) The address of the residence of the child;
> (3) The name of the school the child is attending;
> (4) In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the school the child is attending;
> (5) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and
> (6) A proposed resolution of the problem to the extent known and available to the party at the time.

description of the other factors that are relevant to the agency's proposed or refused action." 34 C.F.R. § 300.508(e).

And as if to drive home these points, the regulations note that a due-process complaint "must be deemed sufficient"—and therefore satisfies the IDEA's administrative pleading requirements—unless the party receiving the complaint notifies the hearing officer that the complaint fails to meet the requirements of Section 300.508(b). 34 C.F.R. § 300.508(d)(1).

In sum, under Section 300.508(b), any due-process complaint that describes the facts of the student's problem and provides a proposed solution is sufficient because complainants need not state a legal theory.

c. Model form. The IDEA requires states to "develop a model form to assist parents in filing a complaint and due process complaint notice in accordance with" 20 U.S.C. § 1415(b)(6) and (b)(7). 20 U.S.C. § 1415(b)(8). The model form is intended "to assist parents and public agencies in filing a due process complaint in accordance" with the relevant statutory and regulatory requirements. 34 C.F.R. § 300.509(a). As the Department of Education has put it, the form's purpose is to "make the process of filing such complaints much easier for parents and others." Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities, 71 Fed. Reg. 46,540, 46,607 (Aug. 14, 2006).

Colorado's implementation of this requirement underscores the conclusion that legal theories need not be raised at the due-process-hearing stage. The relevant Colorado regulation encourages parents to use a model due-process-complaint form provided by the Colorado Department of Education. 1 Colo. Code Regs. § 301-8:2220-R-6.02(7)(a)(ii). Following federal requirements, Colorado requires complainants to use either its form or another form that also "meets the due process complaint content requirements as set forth in 34 CFR § 300.508(b)." *Id.*

The Colorado form first asks complainants to "describe a) the nature of the problem, b) the specific date the problem began, and c) the relevant facts relating to the problem." Colo. of Dep't Educ., *Due Process Complaint* (July 2016), https://www.cde.state.co.us/spedlaw/dpmodelform. It then asks complainants to "describe how this problem could be resolved." *Id.* Aside from seeking information about the complainant's name, address, and whether he is proceeding pro se or seeks mediation, these are the only two questions on the form. Neither requires the parents to present legal theories of any kind.

d. C.W.'s due-process complaint. C.W.'s parents completed this model form, App. Vol. 2 at 381, and presented all the facts relevant to the School District's alleged failures to provide C.W. with appropriate educational services. They also proposed solutions for C.W.'s education going forward. App. Vol. 2 at 381-82.

Bait-and-switch is too kind a term for what has occurred here. In their due-process complaint, C.W.'s parents included the information required by statute and regulation, and included it on Colorado's official due-process-complaint form developed to help parents present their complaints under federal and state law. These requirements were "explicit and unequivocal, leaving no uncertainty as to the information that is required." *Bausman v. Interstate Brands Corp.*, 252 F.3d 1111, 1122 (10th Cir. 2001). Yet the district court added something new, unexpected, and extra-legal—the naming of non-IDEA legal theories—"a trap for the unwary" if ever there was one. *Id.*

2.a. Requiring parents to present their non-IDEA legal theories in the administrative proceedings would not, as the district court maintained, aid the court in making "comprehensive and consistent decisions," promote judicial efficiency, or minimize costs. App. Vol. 2 at 367 (Dist. Ct. Op. 17). Recall in this regard that *Fry*'s gravamen rule requires a complainant to exhaust when the core issue, whether later pleaded in court under the IDEA or under some other federal statute, is an alleged FAPE denial. *See Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 752, 754-55 (2017). These types of non-IDEA gravamen claims, like C.W.'s, will have significant factual overlap with IDEA claims seeking relief for a FAPE denial. *See, e.g.*, *Robert F. v. N. Syracuse Cent. Sch. Dist.*, No. 5:18-CV-0594, 2019 WL 1173457, at *9 (N.D.N.Y. Mar. 13, 2019) (finding Rehabilitation Act claim exhausted even though not expressly pleaded because "Plaintiffs alleged in their Impartial Hearing Requests the FAPE-related facts that

support their Rehabilitation Act claim now before this Court" and "therefore abided by 1415(*l*)"). Therefore, formally stating the non-IDEA claims in a due-process complaint would do nothing to supplement the record. Expounding non-IDEA legal theories would not add efficiency to ALJs' due-process-hearing decisions because those theories do not contain information that would aid ALJs in deciding whether there was a FAPE denial.

The IDEA recognizes as much. ALJs are directed by the IDEA to make decisions only "on substantive grounds based on a determination of whether the child received a free appropriate public education." 20 U.S.C. § 1415(f)(3)(E)(i). Demanding that a complainant add a sentence or two to a due-process complaint asserting, for instance, a claim under the ADA would have no bearing on an ALJ's decision regarding whether the complainant was denied a FAPE under the IDEA.

b. The ALJ's decision in C.W.'s case illustrates this point. The ALJ examined the questions whether (1) C.W.'s parents were allowed meaningful participation in the IEP team meetings, App. Vol. 2 at 550, (2) the School District failed to consider C.W.'s unique needs, App. Vols. 2 and 3 at 550-56, and (3) the School District failed to provide C.W. with the assistive technology, occupational therapy, and cognitive behavioral therapy identified as necessary in C.W.'s IEPs, App. Vols. 2 and 3 at 550-56. Each of these questions is overwhelmingly factual. In deciding that C.W. was denied a FAPE for certain periods, the ALJ examined the record before her, App. Vols. 2 and 3 at 551-

56, and made decisions about which factual circumstances resulted in a FAPE denial and which did not, App. Vol. 3 at 556. None of these decisions would have been aided by a section in C.W.'s due-process complaint stating his non-IDEA legal theories—which would be irrelevant to the ALJ's decision.

3. Because many complainants proceed pro se—nearly 35% in Colorado—it makes sense that the IDEA does not require complainants to present legal theories.[8]

For pro se parents, presenting legal theories, even if in just a few sentences, would be baffling and onerous, especially as compared to simply presenting the facts of their child's educational problems and a proposed resolution—which, as already explained (at 17-23), is all the statute, regulations, and model form require. As one court has observed, "[p]arents sometimes engage the due process hearing procedures to resolve their concerns without hiring legal counsel. At that stage, the focus of all parties is

[8] *See* Colo. Dep't of Educ., *Dispute Resolution: Decisions*, https://www.cde.state.co.us/spedlaw/decisions (last visited April 28, 2020) (setting out ALJ decisions from the last ten years, which indicate whether the complainant was pro se or represented). The 35% figure almost certainly understates the percentage of pro se parents who file due-process complaints because it is drawn from final ALJ decisions alone. As explained earlier (at 6), the vast majority of due-process complainants reach settlements or simply drop out of the process before obtaining a final hearing-officer determination. *See* Ctr. for Dispute Resolution in Special Educ., *IDEA Dispute Resolution Data Summary for: Colorado 2008-09 to 2017-18*, at 3 (2019), https://www.cadreworks.org/resources/cadre-materials/2017-18-dr-data-summary-colorado. The percentage of all parents who file due-process complaints pro se logically would be higher than the percentage that obtain a final hearing decision, given the difficulties that parents without representation would face in navigating the hearing process.

supposed to be on the educational needs, not legal technicalities." *Mr. I v. Me. Sch. Admin. Dist. 55*, 416 F. Supp. 2d 147, 174 (D. Me. 2006). The administrative proceedings are focused on the facts of the FAPE denial, and those facts are relatively easy for pro se parents to present, given their knowledge of their child's experiences and their participation on the IEP team.

Congress enacted the IDEA "to ensure that the rights of children with disabilities and parents of such children are protected" and "to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities." 20 U.S.C. § 1400(d)(1)(B), (d)(3). Reading into the IDEA an atextual requirement to present legal theories, as the district court did—a requirement, as noted (at 21-23), at odds with the form parents use to submit their complaints—would hinder pro se parents' ability to vindicate their FAPE-denial claims, running headlong into Congress's intent that children with disabilities get the special-education services they deserve and need to flourish.

In sum, because there is no requirement to present legal theories in due-process complaints, and because C.W. presented all of the information required under the IDEA and pursued his due-process hearing to completion, he exhausted all of his claims, whether premised on the IDEA or on other laws.

B. Section 1415(*l*) further demonstrates that non-IDEA claims need not be expressly invoked during the administrative process to preserve them for judicial resolution.

1. Section 1415(*l*)'s text. Section 1415(*l*)'s text confirms the proper understanding of the IDEA's exhaustion requirement set out above. When a complainant suffers a FAPE denial and seeks non-IDEA "relief that is also available under" the IDEA, Section 1415(*l*) requires that the IDEA's administrative "procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under [the IDEA]." 20 U.S.C. § 1415(*l*). This means just what it says: that complainants must complete the IDEA's due-process-hearing procedures for their IDEA claims, nothing more. For non-IDEA claims, then, complainants satisfy the exhaustion requirement by bringing their IDEA claim through the administrative process. In other words, "[w]hether a school denied [a] FAPE because of intentional discrimination, bad faith, or innocent mistake does not matter in an IDEA claim, and Plaintiffs would not have to allege" any of these non-IDEA elements "to exhaust if this action 'had been brought under the IDEA.'" *Robert F. v. N. Syracuse Cent. Sch. Dist.*, No. 5:18-CV-0594, 2019 WL 1173457, at *7 (N.D.N.Y. Mar. 13, 2019) (quoting 20 U.S.C. § 1415(*l*)).

The district court erred in holding that C.W. needed to expressly raise his "non-IDEA theories" during the due-process hearing for the court to later hear those claims. App. Vol. 2 at 367 (Dist. Ct. Opp. 17). The district court partially quoted Section 1415(*l*)

for the proposition that complainants with non-IDEA claims must exhaust "before the filing of a civil action *under such laws*." App. Vol. 2 at 367 (Dist. Ct. Opp. 17) (emphasis in original). But the court failed to engage with the key statutory language, which directs IDEA complainants with non-IDEA claims to exhaust "to the same extent as would be required had the action been brought under [the IDEA]"—that is, to exhaust IDEA claims in accordance with the procedures set out in Section 1415(f) and (g). And neither the School District nor the district court disputed that C.W. exhausted his IDEA claims.

To satisfy the IDEA's exhaustion requirement, then, "a plaintiff must raise all alleged violations of the IDEA" in the due-process hearing. *Mr. I*, 416 F. Supp. 2d at 174. But a court may consider a plaintiff's other claims that share the IDEA claims' factual predicates—such as claims under the Rehabilitation Act, the ADA, or the Constitution—so long as the plaintiff "requested and attended an IDEA due process hearing regarding" the denial of a FAPE, regardless of whether he expressly named the non-IDEA claims in the hearing. *Id.* The "point" of the IDEA's exhaustion requirement is "to ensure that the plaintiff seeks, and the school district provides, all the IDEA relief to which [the plaintiff] is entitled." *Id.* C.W. thus exhausted the IDEA administrative process fully when he completed the due-process hearing on his IDEA claims.

2. Section 1415(*l*)'s purpose. Congress's purpose in adopting Section 1415(*l*) supports this conclusion. Overruling *Smith v. Robinson*, 468 U.S. 992 (1984), Congress adopted Section 1415(*l*) principally to ensure that students with disabilities can obtain

relief under both the IDEA and all other laws that protect the rights of children with disabilities. Consistent with that purpose, Section 1415(*l*) reaffirmed the exhaustion requirement in Section 1415(f) and (g) that existed pre-*Smith* while confirming that students with FAPE-denial claims cannot avoid the exhaustion requirement, whatever it might entail, simply by bringing FAPE-related claims under non-IDEA laws.

Section 1415(*l*) thus requires complainants to exhaust the IDEA's administrative process if they seek—under the IDEA or other laws—the equitable relief that the IDEA provides, such as compensatory educational services, *see* App. Vol. 3 at 556, placement in a "mainstream" general-education classroom, *see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 202-03 (1982), or private-school-tuition reimbursement, *see Sch. Comm. of Town of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369-70 (1985). In reaffirming the exhaustion requirements of Section 1415(f) and (g), Congress sought only to prevent plaintiffs with FAPE-denial claims from making an end run around the IDEA's administrative procedures when those procedures could have redressed their injuries. *See* S. Rep. No. 99-112, at 15 (1985). But it would make no sense—and turn Section 1415(*l*)'s purpose in preserving non-IDEA remedies on its head—for C.W.'s non-IDEA claims to be deemed unpreserved for judicial resolution when he completed the IDEA's administrative procedures and was left, as he maintains here, with unredressed injuries.

3. *Fry* and post-*Fry* circuit precedent. This text-driven understanding of Section 1415(*l*) is consistent with *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017). The district court held that the gravamen of C.W.'s complaint is a FAPE denial, App. Vol. 2 at 367 (Dist. Ct. Op. 17 (citing *Fry*, 127 S. Ct. at 758)), and so, under *Fry*, C.W. had to exhaust. App. Vol. 2 at 367 (Dist. Ct. Opp. 17).

The district court then took a turn that has no basis in *Fry*, holding that C.W. had not exhausted his non-IDEA claims because he failed to present them before the ALJ. App. Vol. 2 at 367 (Dist. Ct. Op. 17). In *Fry*, the plaintiff had not filed a due-process complaint (as did C.W.), let alone completed a due-process hearing (as did C.W.), and so *Fry* did not address what, exactly, exhaustion entails. As just noted, *Fry* held only that, when the gravamen of a complaint relates to the denial of a FAPE, a plaintiff must exhaust the IDEA's administrative procedures. 137 S. Ct. at 752, 754-55. That is exactly what C.W. did. He fully exhausted his FAPE-based IDEA claim in a due-process hearing before bringing non-IDEA claims premised on similar facts in the district court.

The Eleventh Circuit arrived at a contrary understanding of Section 1415(*l*) in *Durbrow v. Cobb County School District*, 887 F.3d 1182, 1191 (11th Cir. 2018), determining that a plaintiff who exhausted his IDEA claim through the due-process-hearing procedures still had to run his FAPE-related Rehabilitation Act and ADA claims through those procedures before filing them in federal court. But the facts in *Durbrow* are muddled and quite different from those here.

The *Durbrow* plaintiffs first raised IDEA and Rehabilitation Act claims in a due-process-hearing complaint and a Rehabilitation Act administrative proceeding, respectively. *Id.* at 1188. After the school district requested consolidation of the claims, the plaintiffs withdrew their Rehabilitation Act claims, so the hearing officer heard only their IDEA claims. *Id.* The ALJ determined that the plaintiff did not qualify for special-education services under the IDEA because he was not a "child with a disability." *Id.* The Durbrows then challenged that decision and raised their Rehabilitation Act and ADA claims in federal court, *id.* at 1189, a situation quite different from what occurred here. C.W. indisputably is a child with a disability and qualifies for special-education services, and he never abandoned his non-IDEA claims prior to filing suit.

Though distinguishable, to be sure, *Durbrow* also misunderstood Section 1415(*l*), holding that because the plaintiffs sought relief for denial of a FAPE, they were required to exhaust the IDEA's administrative procedures for both their IDEA and non-IDEA claims. *Id.* at 1190-91. *Durbrow* used *Fry*'s gravamen rule to support the proposition that any claim for the denial of a FAPE "must undergo an administrative hearing before proceeding to state or federal court, whether the claim arises under the IDEA, § 504, the ADA, or any other federal law." *Id.* at 1190. But, as noted earlier, *Fry* concerned only *when* a complainant must exhaust, not what exhaustion *entails*. More importantly, *Durbrow* did not grapple with the words of Section 1415(*l*), which, as explained above, state that once a child with a disability has exhausted the administrative proceeding "to

the same extent as would be required had the action been brought under [the IDEA]," the child has satisfied the exhaustion requirement. 20 U.S.C. § 1415(*l*).

The next year, in *Doucette v. Georgetown Public Schools*, 936 F.3d 16, 29 (1st Cir. 2019), the First Circuit conducted the analysis that the IDEA's text demands. The court held that plaintiffs complaining of a FAPE denial but seeking relief under 42 U.S.C. § 1983 in district court "met the exhaustion requirement" because they had previously brought IDEA claims through the administrative process. The court, therefore, did not require the plaintiffs to bring their Section 1983 claim through that process.

The *Doucette* plaintiffs had "engaged in the administrative process until they received the [IDEA] relief that they sought," which was an alternative placement and compensatory educational services. *Id.* at 30. Because they had previously exhausted the IDEA's administrative procedures and produced an administrative record with findings based on the ALJ's educational expertise, the district court could properly adjudicate their claims. *Id.* at 32. That being the case, raising the Section 1983 claims in the IDEA's administrative process would be an "empty formality," so the court considered those claims. *Id.* at 33. And particularly pertinent here, the court expressly rejected the notion

that plaintiffs must present non-IDEA claims before an IDEA hearing officer when they have already obtained the relief they sought for their IDEA claims. *Id.* at 30 n.20.[9]

C. Requiring complainants to name non-IDEA legal theories during the due-process hearing would be pointless because IDEA ALJs cannot address non-IDEA claims.

1. It makes no sense to ascribe to Congress an atextual requirement that IDEA due-process complainants name their non-IDEA claims, as did the district court, because IDEA due-process hearing officers are powerless to address non-IDEA claims.

Under the IDEA, hearing officers are required only to have "knowledge of, and the ability to understand, the provisions of [the IDEA], Federal and State regulations pertaining to [the IDEA], and legal interpretations of [the IDEA] by Federal and State courts." 20 U.S.C. § 1415(f)(3)(A)(ii); 34 C.F.R. § 300.511(c)(1). Thus, these hearing officers are exclusively creatures of the IDEA and are not required to have knowledge of laws other than the IDEA.

This point is demonstrated by the on-the-ground reality in Colorado regarding adjudication of IDEA claims. In a memorandum of understanding between the

[9] Both pre- and post-*Fry*, several district courts have come to the same conclusion as the First Circuit in *Doucette*, holding that so long as the complainant has brought her IDEA claims through the due-process-hearing process, both her IDEA and non-IDEA claims have been exhausted, consistent with Section 1415(*l*). *See Rutherford ex rel. P.R. v. Fla. Union Free Dist.*, No. 16-CV-9778, 2019 WL 1437823, at *25 n.14 (S.D.N.Y. Mar. 29, 2019); *Robert F*, 2019 WL 1173457, at *7-9; *Alston v. District of Columbia*, No. 07-0682, 2010 WL 11667917, at *7-9 (D.D.C. Mar. 30, 2010); *Wiles v. Dep't of Educ.*, 555 F. Supp. 2d 1143, 1161-63 (D. Haw. 2008); *Mr. I*, 416 F. Supp. 2d at 174-75.

Colorado Department of Education and the Colorado Office of Administrative Courts—the division of state government that employs the ALJs—the ALJs' responsibilities are limited to hearing and resolving IDEA claims. Colo. Dep't of Educ. Mem. of Understanding with Colo. Dep't of Pers. & Admin., Office of Admin. Courts, at 1 (June 2019), https://perma.cc/S7B3-4CKD.

Not surprisingly, then, over the last ten years, Colorado ALJs have issued forty-three final due-process decisions, and not a single one considered non-IDEA claims, indicating that an IDEA due-process hearing is not an appropriate forum for adjudicating non-IDEA claims. *See* Colo. Dep't of Educ., *Dispute Resolution: Decisions*, https://www.cde.state.co.us/spedlaw/decisions (last visited Apr. 28, 2020). In one case, an ALJ dismissed a claim under the Rehabilitation Act because he was "without jurisdiction" to conduct proceedings on the non-IDEA claim. *Kimble v. Douglas Cty. Sch. Dist. RE1*, EA 2011-0005 (Order Dismissing Complaint for Lack of Jurisdiction), *available at* https://perma.cc/ZU8T-RG2H; *see also Doe v. Dallas Indep. Sch. Dist.*, 941 F.3d 224, 226 (5th Cir. 2019) (observing that an IDEA hearing officer had dismissed a Title IX claim because he lacked jurisdiction to hear that claim).

ALJs also lack authority to grant compensatory damages because that relief is not available under the IDEA, as the district court acknowledged below. App. Vol. 2 at 367 (Dist. Ct. Op. at 16-17); *see, e.g.*, *Somberg ex rel. Somberg v. Utica Cmty. Schs.*, 908 F.3d 162, 176 (6th Cir. 2018); *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440, 454 (2nd Cir. 2015).

Because the IDEA does not authorize an award of damages, ALJs working under that statute cannot (of course) award damages. Thus, one Colorado ALJ observed that "[t]ort-like remedies for damages or 'pain and suffering' are not available under the IDEA" and that therefore ALJs have only the "discretion to grant equitable relief in the form of reimbursement for the expenses of compensatory education." *Does v. Jefferson Cty. Sch. Dist. R-1*, EA 20180019, at 14 (Colo. Off. of Admin. Cts. 2018), https://www.cde.state.co.us/spedlaw/ea2018-0019.

Requiring complainants to present their non-IDEA claims for damages before due-process hearing officers would thus be an "arid ritual of meaningless form." *See Staub v. City of Baxley*, 355 U.S. 313, 320 (1958). Because an ALJ cannot act on non-IDEA claims—a fact doubly true for non-IDEA claims *for damages*, like C.W.'s—presentation of those claims to an ALJ would be pointless. Put another way, our text-based reading of the IDEA's exhaustion requirement is also the most logical one: When a complainant fully exhausts his non-IDEA claims, as C.W. did here, no further exhaustion is required because those claims are the only claims that fall within the hearing officer's authority.

2.a. The conclusion that a complainant who complies with Section 1415(b), (f), and (g), and receives an ALJ decision on her IDEA claims, has exhausted is further supported by futility-doctrine principles.

Exhaustion is futile—and therefore not required—where an agency "lack[s] authority to grant the type of relief requested." *McCarthy v. Madigan*, 503 U.S. 140, 148

(1992). In other words, "[e]xhaustion is excused when administrative remedies would be futile [or] when they would fail to provide relief." *Gilmore v. Weatherford*, 694 F.3d 1160, 1169 (10th Cir. 2012) (citation omitted).

Decisions under the Prison Litigation Reform Act's express exhaustion requirement, 42 U.S.C. § 1997e(a), illustrate this point. The requirement is deemed satisfied when the administrative process is either incapable of providing the requested relief or acts as a practical "dead end" for grievances because of an administrator's refusal to provide relief. *Ross v. Blake*, 136 S. Ct. 1850, 1859 (2016); *see also Greer v. Dowling*, 947 F.3d 1297, 1301-02 (10th Cir. 2020) (an inmate need not pursue an "unavailable" administrative channel). Put otherwise, exhaustion of a claim is not necessary where the plaintiff can show that "resort to the administrative process would be clearly useless." *Gilmore*, 694 F.3d at 1169 (cleaned up). Because ALJs lack power to decide non-IDEA claims and to award compensatory damages, it would be senseless to force complainants to bring non-IDEA claims through the hearing process.

b. A futility exception to exhaustion applies in IDEA cases. *Honig v. Doe*, 484 U.S. 305, 327 (1988) (considering the Education of the Handicapped Act, the IDEA's earlier name). In *Honig*, the Supreme Court acknowledged that the Act generally requires administrative exhaustion, but that a failure to exhaust should be excused "where exhaustion would be futile or inadequate." *Id.* Here, as explained, exhaustion would be futile for the non-IDEA claims. After all, "[w]hat is gained by telling the Hearing

Officer that there may also be [Rehabilitation Act] claims, claims that the Hearing Officer cannot resolve?" *Mr. I*, 416 F. Supp. 2d at 175.

This Court may rule in C.W.'s favor by finding that exhaustion would be futile, and therefore not required, to the extent that it would otherwise require pleading non-IDEA claims before IDEA hearing officers. But the Court need not make a formal futility finding nor opine on the parameters of the futility doctrine under the IDEA to rule in C.W.'s favor. Rather, the limited scope of hearing officers' expertise and authority, understood with futility principles in mind, simply illustrate the illogic of ascribing to Congress an intent to require IDEA complainants to present their non-IDEA claims for damages to IDEA hearing officers. That is, futility principles dovetail with what the IDEA's text demands: All C.W. needed to do to exhaust his claims was to file a due-process complaint presenting his IDEA claims and pursue those claims to completion, just as he did.

D. Even if naming legal theories in the administrative process is required, this Court should hold that C.W. adequately stated his non-IDEA legal theories and reverse.

Even if the district court were correct to require IDEA complainants to present legal theories in the administrative process, this Court should find that C.W. adequately presented his non-IDEA claims in that process. No one disputes that C.W. adequately pleaded the *facts* that would give rise to his non-IDEA claims. As explained above, the district court held only that C.W. failed to articulate his *legal theories*. But even in court,

pleadings need not name specific statutes to state a claim; they need only allege facts that make the plaintiff's legal claims plausible. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (per curiam) (complaints should not be dismissed "for imperfect statement[s] of the legal theory supporting the claim asserted.").

1. Following these basic principles, this Court has held that a complaint sufficiently stated a claim when a plaintiff alleged "facts that might amount to a denial of procedural due process," even though she "did not cite 42 U.S.C. § 1983 or the Due Process Clause in her complaint," because "she did not need to." *Pledger v. Russell*, 702 F. App'x 683, 684 (10th Cir. 2017) (citing *King v. Rubenstein*, 825 F.3d 206, 222 (4th Cir. 2016) ("Simply because [plaintiff] did not specifically label a claim under a due process heading does not mean that he did not raise one.")).

In his administrative complaint and at the due-process hearing, C.W. included language that supports his non-IDEA claims under the Rehabilitation Act, the ADA, and the Equal Protection Clause. For example, C.W.'s due-process complaint stated that the school principal's insistence that he go to school "despite evidence that [C.W.] could not … is discrimination," and that the principal at another potential placement school was also "illegally discriminating" against C.W. when she discouraged C.W. from attending her school. App. Vol. 2 at 407, 409. These allegations concern discrimination,

exactly what the Rehabilitation Act, the ADA, and the Equal Protection Clause are meant to cure.[10]

C.W.'s parents made further allegations of discrimination in their due-process-hearing position statement, including that it was "blatant discrimination" to require C.W. to wear pants given that his sensory disorder prevented him from doing so. App. Vol. 2 at 435. The position statement also repeated the allegation that the School District's insistence that C.W. attend school despite his disabilities was "an offensive act of discrimination against our disabled son." App. Vol. 2 at 434. C.W.'s due-process-hearing exhibits also make multiple references to discrimination. App. Vol. 3 at 587, 589, 592, 593, 594, 598, 600. During the hearing, C.W.'s parents again referred to the School District's discrimination against their son. App. Vol. 4 at 952, 959. The parents' closing statement did the same. App. Vol. 2 at 495.

C.W.'s allegations of discrimination in his due-process complaint and proceedings are important here because the IDEA is not itself an anti-discrimination statute, and so, as this Court has observed, an "anti-discrimination claim" is not "legally cognizable" under it. *Ellenberg v. N.M. Military Inst.*, 478 F.3d 1262, 1275 (10th Cir. 2007); *see Endrew*

[10] The Rehabilitation Act and the ADA are anti-discrimination statutes. *See* 29 U.S.C. § 794 ("No otherwise qualified individual with a disability in the United States … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination."); 42 U.S.C. § 12182 ("No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation.").

F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, 137 S. Ct. 988, 1001 (2017). C.W.'s allegations concerning the School District's discrimination, then, can only be construed as invocations of laws and constitutional provisions that prohibit discrimination against children with disabilities, such as the Rehabilitation Act, the ADA, and the Equal Protection Clause.

2. These pleading principles—which require the pleading of sufficient facts, but not the naming of legal theories—are particularly salient in this case because C.W.'s due-process complaint was filed pro se and should have been "liberally construed." *See, e.g.*, *Greer v. Dowling*, 947 F.3d 1297, 1302 (10th Cir. 2020).

In cases governed by the Prison Litigation Reform Act's exhaustion requirement, this Court has imputed legal theories to pro se administrative complaints that described only the facts. That is, pro se administrative complainants who adequately present the facts necessary to support a legal claim, but who have not named the relevant statute or stated the legal theory for that claim, have nonetheless sufficiently presented that claim. *Greer*, 947 F.3d at 1302.

In *Greer*, a prisoner brought in court a Religious Land Use and Institutionalized Persons Act (RLUIPA) claim and constitutional claims alleging that he was denied kosher food by the prison as a punishment. 947 F.3d at 1302. Before filing suit, he had filed several claims in the prison's administrative grievance process but had referred to the denial only generally as a constitutional violation. *Id.* The district court dismissed

his RLUIPA claim, holding that Greer had not exhausted the claim under the PLRA because he had not named it in his grievances. *Id.* This Court reversed, holding that because Greer was pro se, and because the facts alleged in the grievance supported both the RLUIPA and constitutional claims, he had exhausted both sets of claims. *Id.* at 1302.

Similarly, in *Williams v. Wilkinson*, though the complainant did "not clearly sort out his grievances and match them to his claims," this Court still construed the purely factual accounts in his complaints to correspond to allegations under particular laws. 659 F. App'x 512, 518 (10th Cir. 2016). For example, in one of his grievances, the prisoner alleged "Nurse Misconduct," after a nurse failed to treat him when he had allegedly been injured by an officer and requested medical help. *Id.* at 515-16. This Court construed this allegation as a First Amendment retaliation claim and an Eighth Amendment claim. *Id.* at 518.

* * *

Under this Court's precedents, then, C.W.'s due-process complaint provided all the facts necessary to support both his IDEA and non-IDEA claims, and his express references to discrimination easily allow this Court to match the facts C.W. presented to his non-IDEA claims. C.W. therefore exhausted those claims.

II. C.W.'s claims for compensatory damages fall outside the scope of the IDEA's exhaustion requirement.

C.W. may pursue his non-IDEA claims in federal court for another, independent reason. Because C.W. seeks compensatory damages—a remedy unavailable under the

IDEA—his Rehabilitation Act, ADA, and equal-protection claims fall outside the scope of Section 1415(*l*). Put otherwise, a plaintiff who claims that he has been denied a FAPE and seeks compensatory damages under statutes other than the IDEA is not required to exhaust the IDEA's administrative process for his non-IDEA damages claims. As noted earlier (at 8), this issue was left open in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 752 n.4 (2017).

1. The IDEA's text. The IDEA's text requires exhaustion based on the type of relief the plaintiff seeks, not the type of injury the plaintiff suffers. It says that "before the filing of a civil action under [other] laws seeking *relief* that is also available under [the IDEA]," a plaintiff must exhaust the IDEA's administrative process. 20 U.S.C. § 1415(*l*) (emphasis added). "Relief that is also available under the IDEA," as explained earlier (at 29), includes equitable relief such as compensatory educational services, *see* App. Vol. 3 at 556, placement in a "mainstream" general-education classroom, *see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 202-03 (1982), or private-school-tuition reimbursement, *see Sch. Comm. of Town of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369-70 (1985). This provision ensures that the IDEA is not "construed to restrict or limit the rights, procedures, and remedies available under the Constitution," the ADA, the Rehabilitation Act, or any other federal law "protecting the rights of children with disabilities." § 1415(*l*). And when, as indicated, plaintiffs use those laws

to seek relief that "is also available under [the IDEA]" they generally must exhaust the IDEA's administrative procedures. *Id.*

But when a plaintiff seeks relief that is *not* also available under the IDEA, such as compensatory damages, the IDEA's text simply does not require exhaustion. Thus, holding that C.W. is required to exhaust the IDEA's procedures even though the IDEA could not possibly provide him the compensatory-damages relief he seeks would "directly contravene[] the statutory language." Br. for the United States as Amicus Curiae at 23, *Fry*, 137 S. Ct. 743, 2016 WL 4524537. "When the words of a statute are unambiguous," as they are here, "judicial inquiry is complete." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (citation and quotation marks omitted); *see also Rotkiske v. Klemm*, 140 S. Ct. 355, 360 (2019); *United States v. Manning*, 526 F.3d 611, 614 (10th Cir. 2008). C.W. therefore was not required to exhaust his non-IDEA claims for damages.

2. The IDEA's enactment record. The record of Section 1415(*l*)'s enactment confirms that Congress meant what it said and never intended plaintiffs like C.W., who seek relief not available under the IDEA, to exhaust the IDEA's administrative process. As explained above (at 7-8), Congress amended the Act to add Section 1415(*l*) in response to *Smith v. Robinson*, 468 U.S. 992 (1984), which held that the Act was the sole avenue for students with disabilities seeking judicial relief for education-related injuries. Just nineteen days after *Smith* came down, both houses of Congress introduced a bill to

overturn it. *See* 130 Cong. Rec. H7687-88 (daily ed. July 24, 1984); 130 Cong. Rec. S9078 (daily ed. July 24, 1984).

Lowell Weicker, the bill's Senate sponsor, explained that Congress intended that students with disabilities would be protected by other federal laws, including the Rehabilitation Act and 42 U.S.C. § 1983—not just the IDEA. 130 Cong. Rec. 20,597 (1984). He noted that Congress meant to require students with disabilities to exhaust the IDEA's administrative procedures when their "suit could have been filed under the [IDEA]." S. Rep. No. 99-112, at 15 (1985). He also explained that "there are certain situations in which it is not appropriate to require the use of [the IDEA's] due process and review procedures," such as when "it is improbable that adequate relief can be obtained by pursuing administrative remedies," for instance when, as with C.W.'s non-IDEA claims, "the hearing officer lacks the authority to grant the relief sought." H.R. Rep. No. 99-296, at 7 (1985); *see also* Br. of Amicus Curiae Hon. Lowell P. Weicker, Jr. in Support of Petitioners at 17, *Fry*, 137 S. Ct. 743, 2016 WL 4578836.

3. Circuit precedent. We acknowledge that this Court in its pre-*Fry* decision in *Carroll v. Lawton Independent School District No. 8*, 805 F.3d 1222 (10th Cir. 2015), held that the plaintiff there, who was seeking compensatory damages, had to exhaust the IDEA's administrative process. But, as we now explain, *Carroll* does not control here.

The student in *Carroll* had autism and had been physically abused by a teacher. 805 F.3d at 1225. Her parents brought Rehabilitation Act, ADA, and Section 1983 claims

against the school district directly in federal district court instead of pursuing administrative procedures. *Id.* This Court held that exhaustion of the IDEA's administrative procedures should be required to allow the school district an opportunity to remedy the alleged injury. *Id.* at 1227. Because the plaintiff's claims were "educational in nature," this Court explained that the school district might be able to provide "other relief" even though "damages are normally unavailable through the administrative process." *Id.* at 1227-29 (citing *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10th Cir. 2002)).

Although the plaintiffs in *Carroll* sought only compensatory damages, like C.W. does in his non-IDEA claims, their claims were different. They argued that exhaustion was not required for solely physical injuries, 805 F.3d at 1228, that exhaustion was not required for claims without an "education[al] source and an adverse education[al] consequence," *id.* at 1229 (quotation marks omitted), and that exhaustion was not required where the IDEA's administrative remedies could not provide the relief sought, *id.* at 1228-29. The Supreme Court in *Fry*, two years later, resolved the first two arguments, by holding that plaintiffs must exhaust the IDEA's administrative process only when the gravamen of their complaint is the denial of a FAPE. 137 S. Ct. 743, 752. And as noted (at 8, 42), *Fry* left open the third question. *Id.* at 752 n.4.

More importantly, this Court acknowledged in *Carroll* that the school district, through the IDEA administrative process—a process that, again, the parents had

skipped entirely—might have been able to provide the plaintiffs relief to remedy their injuries and was "entitled to make that effort before being exposed to a lawsuit for damages." 805 F.3d at 1229. But here, the administrative process cannot provide C.W. any relief to remedy his injuries. Indeed, C.W. went through the IDEA's administrative process and received equitable relief, App. Vol. 3 at 554-55, but it was not sufficient to redress his alleged non-IDEA injuries, for which he now seeks damages. (And no post-*Fry* decision of this Court has addressed the issue whether students with non-IDEA damages claims must exhaust the IDEA's administrative procedures.) In any case, because the IDEA administrative process could not possibly remedy C.W.'s injuries, he properly brought his non-IDEA damages claims in federal court.

Just last year, the First Circuit in *Doucette v. Georgetown Public Schools*, 936 F.3d 16, 31 (1st Cir. 2019), issued an opinion right on point, holding that a student who complained of a FAPE denial, but also sought an in-court remedy unavailable under the IDEA, did not have to exhaust the IDEA's administrative process as to that remedy. The student in *Doucette* suffered FAPE violations over several years and earlier had completed the IDEA's administrative process, obtaining relief in the form of an alternative placement and compensatory educational services. *Id.* at 30. After completing the administrative process, he brought in federal court a Rehabilitation Act claim (for his school district's refusal to allow his service dog) and a due-process claim under 42 U.S.C. § 1983 (for

the school district's threat to charge him with truancy related to his disabilities). *Id.* at 20-22.

The school district argued that the student could not maintain his Rehabilitation Act and Section 1983 claims because his earlier exhaustion of the IDEA's administrative procedures had not encompassed those claims. *See Doucette*, 936 F.3d at 22. The First Circuit disagreed, holding that the student was not required to exhaust the IDEA's administrative process for his Rehabilitation Act claim because the gravamen of that claim was not the denial of a FAPE, *id.* at 27 (citing *Fry*, 137 U.S. at 756-57).

But because the student's Section 1983 claim *was* related to the denial of a FAPE, under *Fry*, the First Circuit had to decide whether the student was required to exhaust that claim. *Doucette*, 936 F.3d at 29 (citing *Fry*, 137 U.S. at 756). The court noted that "by its terms, § 1415(*l*) does not appear to require exhaustion of the Doucettes' constitutional claim because that claim does not 'seek[ ] relief that is also available under [the IDEA.]'" *Id.* at 31 (quoting 20 U.S.C. § 1415(*l*)). Because the student had already completed the IDEA's administrative process and now sought only compensatory damages, the First Circuit held that he was not required to re-exhaust the IDEA's administrative procedures because he "had no further 'remedies under the IDEA.'" *Id.* at 31 (citation omitted).

As in *Doucette*, C.W. brings claims related to the denial of a FAPE but that seek a remedy unavailable under the IDEA, and he has no further remedies under the IDEA

to exhaust. Because the IDEA cannot provide C.W. the compensatory damages he seeks, he was not required to exhaust the IDEA's administrative process for his non-IDEA claims.

Conclusion

This Court should reverse the district court's decision and remand for proceedings on the merits of C.W.'s non-IDEA claims.

Respectfully submitted,[*]

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[*] Counsel gratefully acknowledge the work of Ana Builes, Erin O'Neill, Grace Paras, Rachel Scholz-Bright, and Rachel Schwartz, students in Georgetown Law's Appellate Courts Immersion Clinic, who played key roles in researching and writing this brief.

Statement Regarding Oral Argument

Appellant C.W. requests oral argument. Oral argument would aid the Court in clarifying what exhaustion under the IDEA requires, as well as resolving the extent to which the IDEA demands that plaintiffs seeking remedies unavailable under the IDEA must exhaust the IDEA's administrative procedures, a question explicitly left open by the Supreme Court in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743, 752 n.4 (2017).

Certificate of Compliance

1. I certify that this document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 11,835 words.

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April 30, 2020

/s/ Brian Wolfman
Brian Wolfman

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I certify that this document complies with all privacy redactions required by 10th Cir. R. 25.5, is an exact copy of the paper copies submitted to the U.S. Court of Appeals for the Tenth Circuit, and has been scanned with Symantec Endpoint Protection and is virus free.

April 30, 2020

/s/ Brian Wolfman
Brian Wolfman

Certificate of Service

I certify that, on April 30, 2020, I electronically filed this Opening Brief of Appellant C.W. using the Court's CM/ECF system, which will send notification of its filing to the following people: Michael Brent Case (bcase@semplelaw.com), Darryl Farrington (dfarrington@smmpc.com), and Robert P. Montgomery, IV (montgomery@semplelaw.com).

/s/ Brian Wolfman
Brian Wolfman

Statutory and Regulatory Addendum

Table of Contents

Statutes

Regulations

20 U.S.C. § 1415(b) - Types of Procedures

* * *

The procedures required by this section shall include the following:

* * *

(6) An opportunity for any party to present a complaint—

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;

* * *

(7)

(A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential)—

(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and (ii) that shall include—

(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

(II) in the case of a homeless child or youth (within the meaning of section 11434a(2) of title 42), available contact information for the child and the name of the school the child is attending;

(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

* * *

(8) Procedures that require the State educational agency to develop a model form to assist parents in filing a complaint and due process complaint notice in accordance with paragraphs (6) and (7), respectively.

20 U.S.C. § 1415 (f) - Impartial Due Process Hearing

(1) In General

(A) Hearing

Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

* * *

(3) Limitations on Hearing

(A) Person conducting hearing A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum—

(i) not be—

(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) possess knowledge of, and the ability to understand, the provisions of this chapter, Federal and State regulations pertaining to this chapter, and legal interpretations of this chapter by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(B) Subject matter of hearing

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

* * *

(E) Decision of hearing officer

(i) In general

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

(I) impeded the child's right to a free appropriate public education;
(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
(III) caused a deprivation of educational benefits.

(iii) Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

(F) Rule of construction

Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

20 U.S.C. § 1415(g) - Appeal

(1) In General

If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

(2) Impartial Review and Independent Decision

The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

20 U.S.C § 1415(*l*) - Rule of Construction

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.

34 C.F.R. § 300.508 - Due Process Complaint

(a) General.

(1) The public agency must have procedures that require either party, or the attorney representing a party, to provide to the other party a due process complaint (which must remain confidential).

(2) The party filing a due process complaint must forward a copy of the due process complaint to the SEA.

(b) Content of complaint. The due process complaint required in paragraph (a)(1) of this section must include -

(1) The name of the child;

(2) The address of the residence of the child;

(3) The name of the school the child is attending;

(4) In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the school the child is attending;

(5) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and

(6) A proposed resolution of the problem to the extent known and available to the party at the time.

(c) Notice required before a hearing on a due process complaint. A party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements of paragraph (b) of this section.

(d) Sufficiency of complaint.

(1) The due process complaint required by this section must be deemed sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not meet the requirements in paragraph (b) of this section.

(2) Within five days of receipt of notification under paragraph (d)(1) of this section, the hearing officer must make a determination on the face of the due process complaint of whether the due process complaint meets the requirements of paragraph (b) of this section, and must immediately notify the parties in writing of that determination.

(3) A party may amend its due process complaint only if -

(i) The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to § 300.510; or

(ii) The hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins.

(4) If a party files an amended due process complaint, the timelines for the resolution meeting in § 300.510(a) and the time period to resolve in § 300.510(b) begin again with the filing of the amended due process complaint.

(e) LEA response to a due process complaint.

(1) If the LEA has not sent a prior written notice under § 300.503 to the parent regarding the subject matter contained in the parent's due process complaint, the LEA must, within 10 days of receiving the due process complaint, send to the parent a response that includes -

(i) An explanation of why the agency proposed or refused to take the action raised in the due process complaint;

(ii) A description of other options that the IEP Team considered and the reasons why those options were rejected;

(iii) A description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(iv) A description of the other factors that are relevant to the agency's proposed or refused action.

(2) A response by an LEA under paragraph (e)(1) of this section shall not be construed to preclude the LEA from asserting that the parent's due process complaint was insufficient, where appropriate.

(f) Other party response to a due process complaint. Except as provided in paragraph (e) of this section, the party receiving a due process complaint must, within 10 days of receiving the due process complaint, send to the other party a response that specifically addresses the issues raised in the due process complaint.

30 C.F.R. § 300.509 - Model forms

(a) Each SEA must develop model forms to assist parents and public agencies in filing a due process complaint in accordance with §§ 300.507(a) and 300.508(a) through (c) and to assist parents and other parties in filing a State complaint under §§ 300.151 through 300.153. However, the SEA or LEA may not require the use of the model forms.

(b) Parents, public agencies, and other parties may use the appropriate model form described in paragraph (a) of this section, or another form or other document, so long as the form or document that is used meets, as appropriate, the content requirements in § 300.508(b) for filing a due process complaint, or the requirements in § 300.153(b) for filing a State complaint.

1 Colo. Code Regs. § 301-8:2220-R-6.02(7.5)(a)(ii)

Consistent with 34 CFR §300.509, a parent or the administrative unit or state-operated program may use the model due process complaint form developed by the Department, or another form or other document, so long as the form or document that is used meets the due process complaint content requirements as set forth in 34 CFR §300.508(b).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Marcia S. Krieger

Civil Action No. 17-CV-2462-MSK- SKC

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

Plaintiff,

v.

DENVER COUNTY SCHOOL DISTRICT NO. 1,

Defendant.

OPINION AND ORDER ON ADMINISTRATIVE APPEAL
AND ON MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the Court on the parties' Cross Motion for Summary Judgment (**## 56**, **57**), their Responses (**# 58**, **59**), and their Replies (**# 60**, **61**). Upon consideration of the arguments presented in light of the Administrative Record **(# 29)**, the Administrative Law Judge's decision is reversed, the Plaintiff's Motion is granted, in part, and the Defendant's Motion is granted, in part.

I. JURISDICTION

The Court has jurisdiction over an appeal from a final decision of the Colorado Office of Administrative Courts under 20 U.S.C. § 1415(i)(2)(A) and over claims presenting a federal question under 28 U.S.C. § 1331.

II. BACKGROUND[1]

Though the parties have a lengthy history of disputes over the educational services at issue in this case, the Court only recounts the facts relevant to the limited issue on appeal.[2]

Plaintiff C.W. is a minor child enrolled in the Defendant Denver County School District (the District). He has tested as a highly gifted and talented student, but suffers from a number of disabilities, including an autism spectrum disorder, obsessive compulsive disorder, generalized anxiety disorder, Ehlers-Danlos Syndrome, Tourette's disorder, an eating disorder, encopresis, and a sleep disorder, all of which entitle him to special education and related services.

In conformance with the Individuals with Disabilities Education Act (IDEA),[3] a team comprised of C.W.'s parents and District personnel assessed C.W.'s needs. Due to the severity and complexity of his disabilities, beginning in 2012, they determined that the least restrictive environment for his public education was at his home. Consequently, his October 2012 Individual Educational Plan (IEP) recommended educational placement at his home. By the

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[1] The Court recounts the facts as stated in the administrative decision (**# 29 at 226–47**), giving due weight to factual findings, and supplementing them by references to the record. *See L.B. v. Nebo Sch. Dist*., 379 F.3d 966, 974 (10th Cir. 2004). For ease of reference, common acronyms are used by the parties and the Court. The IDEA is the Individuals with Disabilities in Education Act. A FAPE is a Free Appropriate Public Education. An IEP is an Independent Education Plan.

[2] Because C.W.'s parents prevailed on claims pertinent to school years 2014–2015, 2015–2016, and 2016–2017, the Court understands that this challenge is limited to a single adverse ruling made by the ALJ — that the 2017 IEP was reasonably calculated to provide C.W. with a FAPE.

[3] It is undisputed the IDEA requires that Colorado provide a free appropriate public education (FAPE) to all eligible children. 20 U.S.C. § 1412(a)(1). A FAPE includes both special-education instruction and related services to assist in the child's benefit from instruction. 20 U.S.C. § 1401(9), (26), & (29). Such instruction and services are memorialized in the child's IEP, developed in a collaborative process involving both parents and educators. 20 U.S.C. §§ 1401(9)(D), 1414.

end of the 2015–2016 academic year, however, after the extended medical absence of his in-home teacher, C.W. could only maintain focus for 10 to 15 minutes and could not tolerate 20 hours of instruction per week.[4]

C.W.'s IEP team convened an IEP meeting in July 2016. It proposed home instruction to start, transitioning to attendance at Morey Middle School, a magnet school for gifted students. District personnel expressed concerns at the meeting that C.W. was not progressing in home instruction such that a "more clinical approach such as day treatment" might be warranted, after which C.W. could return to home instruction. (**# 29 at 234**.) The Parents opposed this suggestion.

Bryan Sanchez was assigned as C.W.'s home teacher in August 2016. Things started out positively; C.W. attended two extracurricular clubs at Morey. But C.W. only went a few times and by October, he refused to go. Mr. Sanchez tried various instruction techniques to get C.W. to focus, but he had a difficult time getting C.W. off his iPad to engage in instruction.

In October, the IEP team met to discuss C.W.'s planned transition into school-based instruction. The Parents stated they were having difficulty getting C.W. to come out of his room or wear pants, and that they did not think he could attend school. At the meeting, the District received authorization from the Parents to conduct social, emotional, motor, and health evaluations, as well as occupational and physical therapy evaluations, but apparently they were never performed.

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[4] Also in 2016, the Parents filed a complaint with the Department of Education's Office for Civil Rights. The District acknowledged that it owed C.W. 150 hours of compensatory services due to personnel difficulties it had staffing C.W.'s home instruction. The ALJ found that the District still had not provided these compensatory services but was willing. With C.W.'s "limited ability to focus for more than an hour or two per day, it has been difficult, if not impossible, for the District to provide the agreed upon compensatory services in a homebound placement." (**# 29 at 234**.)

As the year went on, C.W. began refusing to come downstairs for instruction, and even when he did, he refused to work at the table, could not wear pants, shut down if he was not interested, or complained of hunger, headaches, or fatigue. Of 67 visits by Mr. Sanchez to C.W.'s home, C.W. was not ready 58 times. As a result, Mr. Sanchez was not able to engage C.W. for 10 hours of home instruction even though his work schedule allowed for it. C.W.'s willingness to engage in anything academic declined in his estimation. Another teacher who had worked with C.W. in previous years noticed the same resistance to instruction, noting that C.W. appeared to act like a different child. Multiple teachers had to leave the house without working with C.W. because he took so long to come downstairs.

When faced with these challenges, the District modified the rules governing home instruction to include a requirement that C.W. sit at a table and wear shorts or pants. The modified rules also provided that a teacher was to leave and mark C.W. as a No Show if he took longer than 15 minutes to come downstairs. The rules were sent to the Parents on February 6, 2017, with a note that the modifications were not meant as punishment, but to ensure C.W. was able to receive instruction.

The District ultimately convened an IEP meeting on February 10 to address the foregoing challenges. At the meeting, all of C.W.'s providers agreed he was regressing. District personnel expressed concern that C.W.'s disabilities were so severe that instruction at his home was no longer tenable. The team initially discussed day treatment as an option, but decided against it because it would be too stressful for C.W. on top of logistical difficulties getting him to treatment. Over the Parents' objection, the team determined that C.W.'s designated placement should not be his home and instead should be a residential-treatment facility.

Upon consideration of C.W.'s parents' complaint and evidence presented at a hearing, an

Administrative Law Judge (ALJ) held that the District had violated the IDEA during the 2014–2015, 2015–2016, and 2016–2017 academic years, and awarded unspecified compensatory relief. But the ALJ found that the 2017 IEP was reasonably calculated to provide C.W. with a free appropriate public education (FAPE). The ALJ agreed with the IEP team because C.W. could not attend public school and was regressing in his abilities while receiving home instruction. The ALJ noted that day treatment was not an option because of stress and logistics, but also that it had become virtually impossible for the District to provide home instruction to C.W. The District having considered and tried multiple options to fulfill its obligation to C.W., the ALJ held that a residential facility was the most appropriate placement to receive the services he needs. Because the District had yet to find an appropriate residential facility for C.W., the ALJ also held that the District would owe C.W. additional compensatory services for the time spent finding an appropriate facility.

C.W.'s parents now bring several claims. In its first claim for relief, the Amended Complaint (**# 16**) seeks review and reversal of the ALJ's determination pursuant to 20 U.S.C. §1415(C). The second claim alleges that the District's past and present actions violate § 504 of the Rehabilitation Act of 1973. The third claim alleges that the District's past and present actions violate Title II of the Americans with Disabilities Act. The fourth claim alleges that the District's actions (not circumscribed by time or otherwise described) violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution. The parties have filed cross motions for summary judgment on all claims (**## 56**, **57**).

III. ADMINISTRATIVE APPEAL

The Court's standard of review in IDEA cases is less deferential than it is to other administrative decisions. *See Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th

Cir. 2008). The Court applies a "modified *de novo*" standard, independently reviewing the administrative record and rendering a decision by a preponderance of the evidence. *See id*.; *Murray v. Montrose Cty. Sch. Dist. RE-1J*, 51 F.3d 921, 927 (10th Cir. 1995). The Court must, however, give "due weight" to the administrative decision's findings of fact, "which are considered *prima facie* correct." *L.B. v. Nebo Sch. Dist*., 379 F.3d 966, 974 (10th Cir. 2004).

States receiving federal funds for education must, among other things, provide a free appropriate public education (FAPE) to all eligible children. 20 U.S.C. § 1412(a)(1). A FAPE includes special-education instruction and related services to assist in the child's benefit from instruction. 20 U.S.C. § 1401(9), (26), & (29). Such instruction and services are memorialized in the child's individualized education program (IEP), which is to be developed in a collaborative process involving both parents and educators. 20 U.S.C. §§ 1401(9)(D), 1414. "The IEP is a written statement that sets forth the child's present performance level, goals and objectives, specific services that will enable the child to meet those goals, and evaluation criteria and procedures to determine whether the child has met the goals." *Ass'n for Cmty Living v. Romer*, 992 F.2d 1040, 1043 (10th Cir. 1993). The IEP is the means through which special education and related services are "tailored to the unique needs" and circumstances of a particular child — "the centerpiece of the statute's education delivery system for disabled children." *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1 (Endrew II)*, 137 S. Ct. 988, 999 (2017).

A FAPE has both substantive and procedural components. The Court determines whether the district complied with the IDEA's procedural requirements and whether the IEP developed by those procedures is substantively adequate. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206–07 (1982). If a district meets both substantive and procedural requirements, it "has

complied with the obligations imposed by Congress and the courts can require no more." *Id*. at 207. To "meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew II*, 137 S. Ct. at 999.

For children not "fully integrated in the regular classroom and not able to achieve on grade level", the IEP "must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom." To be *reasonably calculated* to accomplish a particular objective requires "a prospective judgment by school officials [and] contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians." Review of an IEP considers the question of whether the IEP is reasonable, not whether it is ideal. *Id*. at 999–1000.

The IDEA does not require that an IEP "provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded to children without disabilities." The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. *Id*. at 1001.

As noted above, C.W.'s 2017 IEP provided for education in a residential facility, but none was designated. This conclusion was based on findings that C.W. had failed to make progress with home instruction despite numerous efforts made by District personnel. The ALJ agreed with the District concluding that day treatment was not an option because of stress and logistics, and that it had become impossible for the District to provide home instruction to C.W. Because the District had not found an appropriate residential facility for C.W., the ALJ also held that the District would owe C.W. compensatory services for the time spent finding one.

A significant portion of the Parents' briefing is devoted to events that postdate the ALJ's determination, particularly the failure of the District to designate a residential facility for C.W. As significant as those complaints are,[5] however, this Court cannot address them. Its jurisdiction is in an appellate capacity; it reviews the ALJ's factual findings and conclusions of law. *See L.B.*, 379 F.3d at 974. Although it applies a modified *de novo* review standard, the Court is not free to consider entirely new issues not presented to the ALJ. *Id.* Thus, the only issue presented here is whether the ALJ erred in concluding that C.W.'s 2017 IEP provided him a FAPE.

C.W.'s Parents argue that the 2017 IEP failed to provide him with a FAPE because it did not specifically identify the residential facility where C.W. would be educated. Specifically, the Parents contend that an IEP automatically violates the IDEA and denies C.W. a FAPE if it does not name the *location* that is ready, willing, and able to implement an IEP.[6] They cite to a Fourth Circuit case holding that "because it failed to identify a particular school, the IEP was not reasonably calculated to enable [the student] to receive educational benefits." *See A.K. v. Alexandria City Sch. Bd.*, 484 F.3d 672, 681 (4th Cir. 2007).

It is undisputed that the 2017 IEP did not identify a specific residential facility where C.W. would receive educational services. (**# 29 at 238**.) And the IDEA clearly requires an IEP to specify "the anticipated frequency, *location*, and duration of those services" to be provided. 20 U.S.C. § 1414(d)(1)(A)(i)(VII) (emphasis added). The Tenth Circuit, however, has not interpreted the word *location*, and there is authority indicating that *location* does not mean the

[5] To the extent the Parents are aggrieved in any way by the District's conduct as it relates to the implementation of this IEP, they need to bring those issues before the ALJ. Accordingly, the Court will proceed to discuss the alleged errors in the ALJ's decision.

[6] This alleged error is, in essence, a procedural violation of the IDEA because it challenges the form of the IEP, rather than the notion of a residential facility itself.

actual, physical location of services such that an IEP is automatically deficient without such specification. The Department of Education has issued commentary on a related regulation that indicates the meaning of location is broader than the mere physical location of services — "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. For example, is the related service to be provided in the child's regular classroom or resource room?" *T.Y. v. N.Y. City Dep't of Educ*., 584 F.3d 412, 419–20 (2d Cir. 2009) (quoting *Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities*, 64 Fed. Reg. 12,406, 12,594 (March 12, 1999)); *accord Brad K. v. Bd. of Educ. of City of Chicago*, 787 F. Supp. 2d 734, 740 (N.D. Ill. 2011) ("The physical location for implementing an IEP need not be included in the IEP."); *cf. Rachel H. v. Dep't of Educ. of Hawaii*, 868 F.3d 1085, 1092–93 (9th Cir. 2017) (holding that the IEP sufficiently identified the location of the student's services by stating that she would attend "a public high school").

The Parents rely on the Fourth Circuit's decision in *A.K.*, in which a divided panel reasoned "that the school at which special education services are expected to be provided can determine the appropriateness of an education plan," making location "a critical element for the IEP to address." 484 F.3d at 680. That court focused upon the information available to the Parents, noting that they required sufficiently specific information to effectively evaluate the IEP, and that in the situation they faced[7] without identification of the location for special education services, they lacked sufficient information to evaluate the school district's offer. The court emphasized that its holding did not mean a district could *never* offer a FAPE without identifying a particular location, but when "parents express doubt concerning the existence of a

[7] The Parents contended that there were few or no schools that could accommodate the Plaintiff due the complexity of his disabilities.

particular school that can satisfactorily provide the level of services that the IEP describes, the IEP must identify such a school to offer a FAPE." *Id*. at 680–82. Thus, by not identifying a location, the district placed an undue burden on the parents to eliminate inappropriate placements, making it more difficult to decide whether to accept or challenge the IEP.

Actually, *A.K.'s* reasoning and conclusion is not inconsistent with that in *T.Y.* and *Rachel H.* because all these courts agree that the failure to include a specific location is not a *per se* violation of the IDEA. *See Rachel H.*, 868 F.3d at 1092–93; *T.Y.*, 584 F.3d at 420; *A.K.*, 484 F.3d at 682. Rather, the significance of the failure to designate a specific location depends upon the facts of each case.[8] Indeed, both *T.Y.* and *Rachel H.* recognize that in more demanding circumstances, the failure to include a specific location may rise to the denial of a FAPE. *See Rachel H.*, 868 F.3d at 1093 ("This does not mean . . . that not identifying a school can never result in a denial of a FAPE, especially when a child's disability *demands delivery of special education services at a particular facility*." (emphasis added)); *T.Y.*, 584 F.3d at 420 ("We emphasize that we are not holding that school districts have carte blanche to assign a child to a school that cannot satisfy the IEP's requirements.").

Thus, the question becomes whether a specific location was required in C.W.'s IEP. There is no dispute that the severity and complexity of C.W.'s disabilities were increasing by 2017, and that there appeared to be no educational option for him outside of a residential facility. Indeed, the ALJ found that "the District had been unable to find an appropriate facility for C.W."

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[8] The Court notes that the facts of this case are a lot closer to *A.K.* than the other cases. A.K., like C.W., was diagnosed with numerous disorders, including semantic pragmatic language disorder, Aspergers Syndrome, and obsessive compulsive disorder, all requiring specialized instruction. 484 F.3d at 675. Though no disability is trivial, C.W. presents a more severe case than many other students with disabilities, including those addressed by other courts in connection with this issue. *See Rachel H.*, 868 F.3d at 1087; *T.Y.*, 584 F.3d at 416; *Brad K.*, 787 F. Supp. 2d at 737.

(**# 29 at 238**.) This changed the question before the ALJ from the District's failure to specify a particular facility chosen among several options to a failure to designate *any* facility. Such decision is akin to an IEP stating that a student cannot attend any school in the District but providing no other alternative. The effect is to assign the student to a school that cannot satisfy the IDEA's requirements. *See T.Y.*, 584 F.3d at 420. Here, the IEP did not apprise the parents of any facility where C.W. would receive educational services. As a result, it did not designate a facility that could provide needed services and it did not provide critical information to C.W.'s parents that there was no facility available.[9] *See A.K.*, 484 F.3d at 681. In essence, the IEP did not offer any means by which to provide services.

The deficient IEP left C.W.'s parents "to fend for themselves"; C.W. had been without instruction for four months at the time of the decision. *See A.K.*, 484 F.3d at 681. As in *A.K.*, where the record reflected that at least two of five placement options said they could not satisfy his special needs without even meeting him, the District's failure to find a suitable residential facility in four months' time highlighted the need for the IEP team and the IEP to identify a particular school. This case therefore presents an excellent example of the circumstances under which inclusion of a particular school in an IEP can be determinative of whether a FAPE has been offered — the offer of an unspecified residential facility that may not even exist is no offer at all.

The Court has no difficulty in concluding that the deficient IEP rises to the level of a substantive violation. The Supreme Court has explained that IDEA's procedural safeguards are important. *Rowley*, 458 U.S. at 205. But merely identifying a procedural deficiency does not automatically entitle a family to relief. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*

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[9] This required, in the District's estimation, another IEP meeting "to determine what services for C.W. are appropriate." (**# 29 at 238**.) But it is hard to understand based on this record what was left to discuss in light of the District's inability to find any facility that could meet C.W.'s needs.

RE-1 (Endrew I), 798 F.3d 1329, 1338 (10th Cir. 2015), *overruled on other grounds by Endrew II*, 137 S. Ct. 988. A procedural failure that significantly impedes parents' opportunity to participate in the FAPE decisionmaking process or causes a deprivation of educational benefits, impedes the child's right to a FAPE. *Id*. (quoting 20 U.S.C. § 1415(f)(3)(E)). Here, the District's failure to designate a facility to meet C.W.'s needs was the equivalent of providing none and failing to admit that it could not provide required services. The ambiguity in the IEP impaired C.W.'s receipt of educational services and prevented his parents from exercising procedural and substantive rights on his behalf. As a result, he was denied a FAPE. Accordingly, the Court reverses the determination by the ALJ, and directs upon remand that the ALJ determine the relief to which C.W. is entitled during the period the 2017 IEP was operative.

IV. MOTION FOR SUMMARY JUDGMENT

C.W. also bring claims under other federal statutes: the Rehabilitation Act, Americans with Disabilities Act (ADA), and Equal Protection Clause of the Constitution. Invoking Federal Rule of Procedure 56, the District contends that C.W. has not exhausted administrative remedies required for these claims, and thus they must be dismissed.

A. Legal Standard

Rule 56 of the Federal Rules of Civil Procedure facilitates the entry of a judgment or dismissal only if no trial is necessary. *See White v. York Int'l Corp.*, 45 F.3d 357, 360 (10th Cir. 1995). Summary adjudication is authorized when there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Substantive law governs what facts are material and what issues must be determined. It also specifies the elements that must be proved for a given claim or defense, sets the standard of proof, and identifies the party with the burden of proof. *See Anderson v. Liberty Lobby Inc.*,

477 U.S. 242, 248 (1986); *Kaiser-Francis Oil Co. v. Producer's Gas Co.*, 870 F.2d 563, 565 (10th Cir. 1989).

If the movant has the burden of proof on a claim or defense, the movant must establish every element of its claim or defense by sufficient, competent evidence. *See* Fed. R. Civ. P. 56(c)(1)(A). Once the moving party has met its burden, to avoid summary judgment the responding party must present sufficient, competent, contradictory evidence to establish a genuine factual dispute. *See Bacchus Indus. Inc. v. Arvin Indus. Inc.*, 939 F.2d 887, 891 (10th Cir. 1991); *Perry v. Woodward*, 199 F.3d 1126, 1131 (10th Cir. 1999). If there is a genuine dispute as to a material fact, a trial is required. If there is no genuine dispute as to any material fact, no trial is required. The court then applies the law to the undisputed facts and enters judgment.

This case nominally involves cross motions for summary judgment. However, because C.W.'s motion really requests a determination based on the appellate record, it is not a true motion for summary judgment nor does it address all of the claims asserted. The District's Motion actually seeks a partial summary judgment only as to the non-IDEA claims. Thus, the Court deals with the motions separately.

B. Discussion

With regard to his claims under the Rehabilitation Act, ADA, and Equal Protection Clause, the District argues that C.W. failed to exhaust his administrative remedies. Although the IDEA offers no procedural guidance, the Court approaches this in the same manner as it would in ordinary civil cases, treating the argument as an affirmative defense on which the District has the burden of proof.

There are no material facts in dispute. C.W. did not respond to this argument in his Response (**# 59**), but briefly addressed the issue in the Reply (**# 60**) to his own Motion, stating that the facts that form the basis of the non-IDEA claims were fully presented to and considered by the ALJ, thus exhausting his remedies with regard to these claims. (**# 60 at 9**.) This gives rise to a legal issue — does presentation of evidence in the IDEA administrative process that could establish facts upon which non-IDEA claims could be based satisfy exhaustion requirements?

The IDEA anticipates that an aggrieved person may have claims arising under other federal statutes. As to non-IDEA claims it provides:

> 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, title V of the Rehabilitation Act of 1973, 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*) (emphasis added).

The concept of exhaustion is somewhat oblique in this context, necessitating a clarification by the Supreme Court in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017). The Court explained that, though the IDEA anticipates that an aggrieved person may also be protected by other statutes and may seek remedies under them, if the remedy sought by the aggrieved person under the non-IDEA statute relates to a FAPE, and the request for relief is based on the same facts relevant to a FAPE, then the non-IDEA claim must be asserted pursuant to the IDEA's formal procedures for resolving disputes, bringing a complaint and obtaining a due-process hearing before an impartial hearing officer — an ALJ. 20 U.S.C. § 1415(b)(6), (f)(1)(A). Failure to do so prevents the aggrieved person from bringing the non-IDEA claim in

federal court after the administrative procedure has concluded. 20 U.S.C. § 1415(*l*).

To determine whether a non-IDEA claim seeks relief for the denial of a FAPE, the Supreme Court directs the Court to look to the substance, or gravamen, of the Complaint. It further directs the Court to note the diverse means and ends of the statutes covering persons with disabilities — *e.g.*, the IDEA providing meaningful access to education and the Rehabilitation Act and ADA rooting out disability-based discrimination.[10] *Fry*, 137 S. Ct. at 755–56.

As noted, C.W. concedes that the facts underlying the IDEA claim and the non-IDEA claims are the same. And as stated, C.W.'s complaint alleges three additional causes of action beyond the IDEA: violations of the Rehabilitation Act, ADA, and Equal Protection Clause. The sum total of the District's actions or omissions underlying these claims is:

- As to the Rehabilitation Act claim, District denied the full benefits of public education, failed to provide an opportunity to participate in the public education afforded to others, failed to provide a public education as effective as that provided to others, provided educational services that were substantially different than those provided to other students, limited C.W.'s enjoyment of the rights enjoyed by other students, and

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[10] The Court provided hypothetical questions to assist the inquiry.

> First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school — say, a public theater or library? And second, could an *adult* at the school — say, an employee or visitor — have pressed essentially the same grievance? When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject; after all, in those other situations there is no FAPE obligation and yet the same basic suit could go forward. But when the answer is no, then the complaint probably does concern a FAPE, even if it does not explicitly say so; for the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim.

Id. at 756.

decided to place C.W. in a residential facility. (**# 16 ¶ 70**.)

- As to the ADA claim, the District denied the opportunity to benefit from educational services equal to that afforded to others, denied educational services that are as effective in affording equal opportunity to gain the same benefit as other students, denied the opportunity to participate in educational services appropriate to C.W.'s needs, failed to make reasonable modifications to its services, used methods of administration that had the effect of defeating the objectives of the District's educational programs, and decided to place C.W. in a residential facility. (**# 16 ¶ 85**.)
- Finally, as to the Equal Protection claim, the District denied access to a public education on the basis of his disability and treated C.W. differently in home-based placement than it treats other students. (**# 16 ¶¶ 95–96**.)

The gravamen of the Amended Complaint seeks relief for the denial of a FAPE. No allegation concerns facts unrelated to educational services. Both the Rehabilitation Act and ADA claims are based on the result of the 2017 IEP. (**# 16 ¶¶ 70(f)**, **85(f)**.) Though some allegations strike at the District's different treatment of other students, these allegations receive no factual enhancement — the rest of the Amended Complaint is silent on any discrimination suffered by C.W. Indeed, the entire factual recitation preceding the claims for relief expressly relates to the IDEA, the District's handling of C.W.'s education, and how egregious placement in a residential facility is. (# **16 ¶¶ 7–54**.) Notably, the Amended Complaint states that its factual recitation is not intended to be complete and incorporates the administrative record, though the record — devoid of any reference to the federal claims brought here — relates exclusively to the provision of educational services. The only real difference between the IDEA appeal and federal claims is not in their substance, but in C.W.'s procedural request for monetary damages (**# 16 ¶ 101**), which are

unavailable under the IDEA. The non-IDEA claims are simply alternative legal theories seeking to redress the same conduct — the District's failure to offer C.W. a free appropriate public education.

Unlike the plaintiff in *Fry*, where nothing in the nature of the complaint suggested any implicit focus on the adequacy of education, all of C.W.'s allegations relate to educational services. *See* 137 S. Ct. at 758. If C.W. were to file the same complaint against another place of public accommodation, such as a library or theater, it would make no sense. Thus, C.W.'s non-IDEA claims are the exact sort that Congress contemplated in enacting the IDEA exhaustion provision.

There is no suggestion that the non-IDEA theories were brought before the ALJ. Indeed, C.W. argues that was not necessary to do so because the same facts were before the ALJ. Not only is that statement not supported by any cited authority, it is contrary to the express language of the IDEA. *See* 20 U.S.C. § 1415(*l*) (requiring exhaustion "before the filing of a civil action *under such laws*"). The laws and legal *claims* are therefore important. This requirement consolidates all theories seeking the same remedy on the same facts in a single action. Doing so saves cost, increases judicial efficiency, and best provides for comprehensive and consistent determinations. In this case, Congress required C.W. to bring his non-IDEA claims before the ALJ in the due-process hearing. Having failed to do so, he cannot now assert them in this action. They are subject to dismissal.

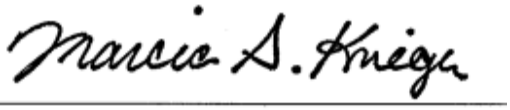
V. CONCLUSION

For the foregoing reasons, the Administrative Law Judge's decision is **REVERSED** and **REMANDED** for a determination on what relief the Plaintiff is due given that the 2017 IEP has not provided a FAPE at all times it was operative. The Plaintiff's Motion for Summary

Judgment (**# 56**) is **GRANTED IN PART** in that the ALJ is reversed and is **DENIED** in all other respects. The Defendant's Motion for Summary Judgment (**# 57**) is **GRANTED IN PART** in that the Plaintiff's remaining, non-IDEA claims are **DISMISSED** and is **DENIED** in all other respects. The Clerk is directed to close this case.

Dated this 25th day of September, 2019.

BY THE COURT:



Marcia S. Krieger
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-02462-MSK-SKC

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

Plaintiff,

v.

DENVER COUNTY SCHOOL DISTRICT NO. 1,

Defendant.

FINAL JUDGMENT

Pursuant to and in accordance with Fed. R. Civ. P. 58(a) and the Opinion and Order on Administrative Appeal and on Motion for Summary Judgment, filed September 25, 2019, by the Honorable Marcia S. Krieger, Senior United States District Judge, and incorporated herein by reference as if fully set forth, it is hereby

ORDERED that the Administrative Law Judge's decision is **REVERSED** and **REMANDED** for a determination on what relief the Plaintiff is due given that the 2017 IEP has not provided a FAPE at all times it was operative. The Plaintiff's Motion for Summary Judgment (# 56) is **GRANTED IN PART** in that the ALJ is reversed and is **DENIED** in all other respects. The Defendant's Motion for Summary Judgment (# 57) is **GRANTED IN PART** in that the Plaintiff's remaining, non-IDEA claims are **DISMISSED** and is **DENIED** in all other respects. The Clerk is directed to close this case.

DATED at Denver, Colorado this 25th day of September, 2019.

FOR THE COURT:

JEFFREY P. COLWELL, CLERK

s/ Robert R. Keech
Robert R. Keech,
Deputy Clerk