Again, C.W. received no highly gifted and talented education. *Id.* In September 2016, C.W.'s parents filed an IDEA due-process complaint in which they maintained in detail that the School District had repeatedly denied C.W. a FAPE. App. Vol. 2 at 380-95.

Modified School District policies (2017). Each school year, after C.W.'s IEP for that year was finalized, C.W.'s parents received a standard set of guidelines governing homebound education from the School District's Alternative Placement Services Program. *See, e.g.*, App. Vol. 3 at 774 (2015 letter). In 2017, as the due-process proceedings commenced, the School District suddenly modified these guidelines, instituting new requirements for C.W.'s home education. App. Vol. 2 at 546 (¶ 91). The School District's modified guidelines effectively prevented C.W. from being educated at home. *Id.*

Because C.W. has a sensory processing disorder, he finds it painful and distressing to wear certain clothing items—primarily, pants and shorts. App. Vol. 4 at 948. C.W.'s instructors had previously accommodated this difficulty by allowing C.W. to wear boxer briefs with a blanket wrapped around him and to sit on the couch. App. Vol. 5 at 1079. Gene Bamesberger, the Associate Director of Special Education charged with setting C.W.'s IEP, knew about C.W.'s physical inability to wear pants. App. Vol. 4 at 957. Yet, on February 6, 2017, Bamesberger sent C.W.'s parents an email stating that the School District would only "implement [C.W.'s] services in accordance with the following guidelines": Unless C.W. wore pants or shorts and sat at a table, he would not receive

any instruction. App. Vol. 3 at 585; *see* App. Vol. 2 at 546 (¶ 91); App. Vol. 4 at 958. When C.W.'s parents asked Bamesberger why the policies were modified—given that none of C.W.'s instructors had expressed discomfort with C.W.'s blanket accommodation—Bamesberger indicated that the new policies had not resulted from any instructor's discomfort, but did not explain further. *See* App. Vol. 4 at 958-59.

In addition, the School District's new guidelines forbade C.W. from eating during instruction, despite his eating disorder. *See* App. Vol 3. at 585. As the School District was aware, C.W. undereats, leading to low energy levels, *id.* at 650, and his doctor wanted him to increase his food intake. App. Vol. 4 at 900.

C.W. was physically unable to comply with the new guidelines, and the School District immediately stopped providing C.W. with instruction. App. Vol. 2 at 546 (¶ 92).

The School District's failed insistence on residential placement (2017). Just a few days after instituting the new guidelines, Bamesberger asked C.W.'s parents to meet to reassess the IEP because he had developed "real concerns" about whether C.W. should receive home instruction. App. Vol. 5 at 1248-49. At this meeting, held in February 2017, the School District determined that C.W. was no longer fit for home education, in part because of C.W.'s inability to comply with the new restrictions unilaterally imposed by the School District. App. Vol. 3 at 730.

Over C.W.'s parents' objections—and though C.W. was unable to leave his home or spend a night away from his parents, App. Vol. 3 at 599, 731—the School District decided to stop home instruction and to instead require that C.W. be placed in a full-time residential facility. App. Vol. 3 at 730.

Bamesberger identified two examples of residential facilities for C.W.: Savio and Tennyson. App. Vol. 6 at 1301, 1258. But Bamesberger was unable to provide C.W.'s parents with any further information regarding these facilities. App. Vol. 4 at 959-60. Bamesberger had not conducted any prior research into either facility. App. Vol. 5 at 1096-97. Nor had that research been done by C.W.'s former instructors—Bryan Sanchez, Belulah Mormon, or Margaret Mathieson—all of whom nevertheless maintained that C.W. should be moved to a residential facility. *See* App. Vol. 4 at 995-96; App. Vol. 5 at 1191-94; App. Vol. 6 at 1303.

But C.W.'s parents did do the necessary research, and they soon learned that neither placement named at the IEP meeting was appropriate for C.W. Both programs are for young adults with problematic sexual behaviors or for children suffering from parental abuse, neglect, or trauma. App. Vol. 2 at 492. When C.W.'s parents contacted Savio and Tennyson, both facilities stated that they could not accept C.W. *Id.* at 435. Tennyson personnel told C.W.'s parents that they could not enroll a child with C.W.'s physical needs, particularly because Tennyson uses physical restraints. App. Vol. 4 at 961. Physical restraints pose a serious risk to C.W. given his Ehlers-Danlos Syndrome, which

risks "spontaneous internal organ rupture" and "serious threat of catastrophic spinal injuries." App. Vol. 4 at 961; App. Vol. 6 at 1328-29. And Savio was out of the question because it only enrolls children in the criminal-justice system, "by court order or through a probation officer." App. Vol. 4 at 963.

While insisting that C.W. cannot receive home instruction, the School District has still not identified any residential placement where C.W. can be enrolled and educated. App. Vol. 2 at 548 (¶ 108).

Scope of the due-process proceedings. Before C.W.'s due-process hearing, the parties agreed to consider the appropriateness of C.W.'s 2017 IEP as part of the proceedings. App. Vol. 2 at 426. The due-process hearing and subsequent District Court proceedings are discussed in our opening brief (at 11-13).

The 2017 IEP is the only FAPE claim at issue in the School District's cross-appeal, as the School District does not dispute, and has never disputed in court, the ALJ's finding that the School District failed to provide C.W. with a FAPE during periods in 2014, 2015, and 2016. *See* App. Vol. 3 at 554-55; SD Br. 8.

Summary of the Arguments

I. Reply Argument (No. 19-1407)

A. C.W. exhausted his non-IDEA claims under the Rehabilitation Act, the Americans with Disabilities Act, and 42 U.S.C. § 1983 by invoking and completing the IDEA's administrative process. The School District does not dispute that C.W. has

fulfilled the IDEA's exhaustion requirements set forth in 20 U.S.C. § 1415(b), (f), and (g). Nor has it identified any additional procedures C.W. should have employed to exhaust his non-IDEA claims other than those. And, finally, the School District does not contest—nor could it—that C.W.'s non-IDEA claims seek remedies not available under the IDEA nor that the IDEA requires exhaustion only when the complainant is "seeking relief that is also available under" the IDEA. *Id.* § 1415(*l*). This Court should therefore reverse the district court's decision and remand for proceedings on the merits of C.W.'s non-IDEA claims.

B. The School District has alternatively asked the Court to affirm summary judgment on the merits of C.W.'s non-IDEA claims. This Court, following its customary rule, should not grant summary judgment on the merits of C.W.'s non-IDEA claims before the district court has had a chance to weigh in on them. Even if, contrary to this tradition, this Court considers the merits of C.W.'s non-IDEA claims, the School District should not be granted summary judgment on C.W.'s non-IDEA claims because genuine issues of material fact exist as to each of them, making summary judgment inappropriate.

II. Response Argument (No. 19-1429)

A. C.W. raised the School District's failure to identify an educational placement in the 2017 IEP in the due-process proceedings by repeatedly arguing that the examples of placements noted by the School District were unable to enroll C.W., let alone provide

for his educational progress as required by the IDEA. The School District's contrary argument is flatly contradicted by the record.

B. As the district court held, the School District's 2017 IEP denied C.W. a FAPE by failing to provide him any education. The School District is obligated under the IDEA to provide an education to children with disabilities. This statutory mandate required the School District to identify a residential facility on C.W.'s 2017 IEP capable of implementing a FAPE. Because the School District did not do so, and, in fact, provided no education at all based on that IEP, C.W. was denied a FAPE. The district court's decision should therefore be affirmed.

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).

Reply Argument (No. 19-1407)

I. C.W. met all applicable IDEA exhaustion requirements.

As our opening brief explains (at 17-19), C.W. completed the administrative process identified in 20 U.S.C. § 1415(f) and (g), which lay out the IDEA's *only* exhaustion requirements. Because he completed the statutory requirements, and because the facts

underpinning all claims were before the ALJ during the administrative proceedings, C.W. exhausted both his IDEA claims and his non-IDEA claims.

In any event, because the relief sought in C.W.'s non-IDEA claims is compensatory damages—which are unavailable under the IDEA—C.W. was not required to exhaust those claims.

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

1. Non-IDEA claims need not be expressly named during the administrative process to preserve them for judicial resolution.

a. The School District's brief nowhere disputes that C.W. fulfilled the IDEA exhaustion requirements in 20 U.S.C. § 1415(b), (f), and (g). The School District relies on 20 U.S.C. § 1415(*l*) to argue that C.W. was required to *name* his non-IDEA legal claims during the administrative process. *See* SD Br. 21-22. But it never does business with Section 1415(*l*)'s text, which requires only that for a complainant to preserve non-IDEA claims for judicial resolution, 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*). Because C.W. completed those administrative requirements under the IDEA, C.W. exhausted both his IDEA and non-IDEA claims.

The School District has also failed to identify any additional procedures that C.W. would be required to complete to exhaust his non-IDEA claims. The School District

does not confront the United States Department of Education's regulations, which implement the IDEA's due-process-complaint procedures but nowhere require complainants to present legal theories in the due-process complaint. *See* Opening Br. 19-21; 34 C.F.R. §§ 300.507(a)(1), 300.508. The School District is also silent on the model form developed by the Colorado Department of Education for use by complainants, and used here by C.W.'s parents, for presenting a due-process complaint. It, too, does not ask complainants to introduce non-IDEA legal theories. *See* Opening Br. 21-22; App. Vol. 2 at 381. These regulations and guidance document thus confirm that complainants only need to incorporate relevant factual support into their complaint, not legal theories.

b. Finding its position at odds with the statute and regulations, the School District turns to *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017), and *Durbrow v. Cobb County School District*, 887 F.3d 1182 (11th Cir. 2018), for the notion that non-IDEA legal theories must be named in an IDEA due-process complaint to preserve non-IDEA claims for federal court. Yet the School District cites *Fry* only for the proposition that "whenever an IDEA remedy is sought, regardless of what federal statute underlies the claim, the 'plaintiff must first submit [his] case to an IDEA hearing officer.'" *See* SD Br. 23 (quoting *Fry*, 137 S. Ct. at 754). C.W. *did* submit his case to an IDEA hearing officer and provided extensive factual support for his claims that were later litigated in a comprehensive administrative proceeding. *See* Opening Br. 19; App. Vol. 2 at 380-95.

And, unlike the plaintiff in *Fry*, who never invoked the administrative process at all, 137 S. Ct. at 751-52, C.W. did not bring suit until those procedures were completed.

The School District's reliance on *Durbrow* is simply misplaced, as *Durbrow* notably doesn't address the statutory text and the exhaustion requirements outlined in 20 U.S.C. § 1415(b), (f), and (g). *Compare Durbrow*, 887 F.3d at 1190-91 (absence of any discussion of statutory exhaustion requirements), *with, e.g.*, *A.U. v. District of Columbia*, No. 1:19-cv-3512, 2020 WL 4754619, at *4 (D.D.C. July 13, 2020) ("[T]o exhaust a claim under the IDEA, a plaintiff must file a due process complaint … have a hearing before an impartial hearing officer, and receive a decision on that complaint. 20 U.S.C. § 1415(b)(6), (f)(1)."). As we have explained, *Durbrow* misunderstood Section 1415(*l*). It held that because the plaintiffs there sought relief for a FAPE denial, they were required to do something further in the IDEA's administrative process to exhaust their non-IDEA claims (though *Durbrow* never identifies what that something further is). *See* Opening Br. 30-31 (discussing *Durbrow*). *Durbrow*'s understanding runs headlong into the statutory language, which, as explained above, states only 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, 20 U.S.C. § 1415(*l*), the child has satisfied the statute's exhaustion requirement. *See* Opening Br. 31-32.

c. The School District's attempt to distinguish *Doucette v. Georgetown Public Schools*, 936 F.3d 16 (1st Cir. 2019), is unpersuasive. The School District asserts that the

gravamen of the plaintiff's complaint in *Doucette* was "simple discrimination" and not denial of a FAPE, and that the case is distinguishable because it involved a service animal. *See* SD Br. 24-25. But, as the School District concedes, the *Doucette* plaintiffs' Section 1983 claim, which *was* about the denial of a FAPE, was permitted to go forward because the plaintiffs had completed the IDEA's administrative processes and brought their constitutional claim "only after they had no further 'remedies under the IDEA to exhaust.'" *Doucette*, 936 F.3d at 31 (quoting *Blanchard v. Morton Sch. Dist.*, 420 F.3d 918, 921-22 (9th Cir. 2005)). The same is true here.

d. Most tellingly, the School District has failed to explain why expressly naming non-IDEA legal theories in a due-process complaint would serve any purpose. The School District suggests that it could have provided additional relief for C.W.'s educational injuries if his non-IDEA claims had been named in the due-process complaint. *See* SD Br. 29-30. But that explanation doesn't work. C.W.'s parents *did* make claims for compensatory damages during the administrative process, and the School District vehemently opposed them. *See* App. Vol. 2 at 498-99, 506. It did so because C.W.'s "demands include many [remedies] not available under IDEA," *see id.* at 506, noting in particular that damages are "not consistent with IDEA's statutory scheme," *see id.* at 509, thus underscoring why requiring C.W.'s pro se parents to name their non-IDEA claims would have been an empty gesture.

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

As our opening brief explains (at 33-34), neither the IDEA nor Colorado law assigns administrative judges the task of separately adjudicating non-IDEA claims. Quite the contrary, the IDEA and its regulations demonstrate that administrative adjudicators are empowered to decide only whether a child has been provided a FAPE and to provide only IDEA relief, such as compensatory education and tuition reimbursement. 20 U.S.C. § 1415(f)(3)(E)(i) ("[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."). Indeed, *the School District itself* emphatically made this point during the administrative process. *See* App. Vol. 2 at 509-511; *see id.* at 511 ("[C]ompensatory services or tuition reimbursement are the appropriate remedies for an IDEA violation.").

The School District relies on *Durbrow*, as well as the Fifth Circuit's decision in *Reyes v. Manor Independent School District*, 850 F.3d 251 (5th Cir. 2017), to argue that C.W.'s non-IDEA claims needed to be adjudicated independently. *See* SD Br. 23-24, 28. But neither case describes what a separate adjudication of non-IDEA claims would entail

or what purpose that would serve because, again, IDEA adjudicators may provide only the limited relief available under the IDEA.[1]

In this regard, the School District does not dispute that Colorado ALJs have issued dozens of due-process decisions without ever considering non-IDEA claims. *See* Opening Br. 34. That makes sense, again, because they cannot award compensatory damages, which are not available under the IDEA. App. Vol. 2 at 509-10; *see, e.g.*, *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 (2d Cir. 2015). In any case, *Durbrow* and *Reyes* are unpersuasive because neither case confronts Section 1415(*l*)'s text, which requires complainants to exhaust only the processes set forth in Sections 1415(b), (f), and (g). *See Durbrow*, 887 F.3d at 1190-91; *Reyes*, 850 F.3d at 256.

[1] The School District argues that the Colorado Department of Education's Memorandum of Understanding with the Colorado Office of Administrative Courts—cited in our Opening Brief (at 33-34) and showing that ALJs' statutory responsibilities are limited to resolving IDEA claims—is outside the administrative record. *See* SD Br. 22 n.3. But the contents of an administrative agency's publicly available files traditionally qualify for judicial notice. *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1212-13 (10th Cir. 2012); *Tal v. Hogan*, 453 F.3d 1244, 1264 n.24 (10th Cir. 2006); *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990). In any case, the Memorandum of Understanding simply underscores a point that all other authority supports and that the School District itself affirmatively trumpeted before the ALJ: that IDEA ALJs are powerless to grant non-IDEA relief. *See* App. Vol. 2 at 509-10.

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

The facts underpinning all of C.W.'s legal claims were brought before the hearing officer during the administrative process. App. Vol. 2 at 380-95, 407-09, 434-35, 495; App. Vol. 3 at 587, 589, 592, 593, 598, 600 (record references to C.W.'s claims of discrimination). For starters, the School District suggests that C.W.'s due-process complaint was factually deficient because it did not specifically challenge the School District's new 2017 guidelines requiring C.W. to wear pants. *See* SD Br. 28. That makes no sense. The 2017 guidelines were not promulgated until *after* C.W.'s due-process complaint was filed. *See* App. Vol. 2 at 546 (¶ 92). And the School District consented to C.W. incorporating the factual allegations underlying his challenge to the 2017 IEP and to the School District's alleged failure to provide a FAPE in that year. *See id.* at 426.[2]

The School District also argues that C.W. has failed to adequately plead his non-IDEA claims before the ALJ. *See* SD Br. 27. The School District suggests that explicitly naming non-IDEA legal theories is the *only* way a litigant can satisfactorily plead those claims, even when the facts underpinning both the IDEA and non-IDEA claims are the same. *See* SD Br. 26.

[2] The School District has also asserted that C.W. failed to argue below that he presented his non-IDEA theories during the administrative process. *See* SD Br. 26. On the contrary, C.W. explicitly argued in the district court that the facts forming the basis of all of his non-IDEA claims were fully presented to and considered by the ALJ. App. Vol. 2 at 329; *see* Opening Br. 37-41.

Not so. The School District's position cannot be squared with time-honored pleading principles, which require only the pleading of sufficient facts, not legal theories, *see Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014), and which are meant to afford pro se litigants the benefit of reasonable doubt. *See Greer v. Dowling*, 947 F.3d 1297, 1302 (10th Cir. 2020); *see also Lattimore v. Polaroid Corp.*, 99 F.3d 456, 464 (1st Cir. 1996). Indeed, as noted by the Supreme Court in *Fry*, 137 S. Ct. at 755, it is the "substance" of the complaint, "rather than the labels used," that is important in assessing the claim in a particular case.

Requiring explicit naming of legal theories in due-process complaints would also do nothing to assist ALJs in determining whether a child received a FAPE, which, again, is the only question that ALJs may address at a due-process hearing. *See* Opening Br. 23-24; 20 U.S.C. § 1415(f)(3)(E)(i).

C.W. received findings and rulings from the ALJ on the facts underlying his non-IDEA claims. The ALJ considered the facts and arguments made by C.W. and the School District during the administrative process and reached a determination regarding whether C.W. received a FAPE. *See* App. Vol. 2 at 536-52; App. Vol. 3 at 553-57; *see also* Opening Br. 39 (providing other record citations). C.W.'s due-process complaint and supporting evidence provided all the facts necessary to support both his IDEA and non-IDEA claims. C.W. therefore exhausted those claims.

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

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*), and therefore C.W. was not required to exhaust those claims.[3]

As our opening brief explained (at 42-43), this conclusion is demanded by Section 1415(*l*)'s text. That provision states that the IDEA does not "restrict or limit the rights, procedures, and remedies" available under the Constitution or other federal laws, "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).

As the United States explained in *Fry*, under this text, if the plaintiff seeks non-IDEA relief that is *not* also available under the IDEA, such as compensatory damages, the IDEA simply does not require exhaustion. Br. for the United States as Amicus Curiae at 23, Fry, 137 S. Ct. 743, 2016 WL 4524537, at *23 (noting that requiring

[3] The School District makes a fleeting, unexplained assertion that this argument is "unpreserved." SD Br. 29. C.W. opposed the School District's exhaustion defense. App. Vol. 2 at 329. In any case, with all respect, this assertion makes no sense. C.W.'s argument that the IDEA does not require exhaustion of claims seeking relief not available under the IDEA is an argument that *the School District* must overcome if it wishes to show that C.W. has not exhausted his non-IDEA claims. C.W. does not have to show that he is excused from a requirement that does not exist in the first place.

exhaustion of damages claims would "directly contravene[] the statutory language."); *see also* Tr. of Oral Argument at 21-22, *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743 (2017) (No. 15-497) (Assistant to the Solicitor General: "I think there's common agreement that [the damages] relief sought is not available under the IDEA, so you would not need to exhaust.").

The School District disagrees but does not even mention the statutory text, which, as just noted, does not demand exhaustion when the plaintiff seeks relief not available under the IDEA. Instead, the School District turns to this Court's decision in *Carroll v. Lawton Independent School District*, 805 F.3d 1222 (10th Cir. 2015), but that case has no bearing on whether exhaustion is demanded here. *Carroll* involved exhaustion of non-IDEA claims where the primary issue was not about denial of a FAPE, but instead about physical injuries and other claims without an "educational source." *Id.* at 1228-29. *Carroll* does not resolve the question whether exhaustion is required where the IDEA's administrative remedies cannot provide the relief sought—that is, the question the Supreme Court left open in *Fry*, 137 S. Ct. at 752 n.4.

At the end of the day, the School District is left to assert only that allowing C.W. to avoid exhaustion on his non-IDEA claims seeking compensatory damages would frustrate Congress's legislative purpose. *See* SD Br. 30. But again, that makes little sense because IDEA hearing officers cannot provide non-IDEA relief. In any case, Congress's purpose is best evidenced by the text of its enactments—here, Section

1415(*l*)—which demands exhaustion only when the plaintiff is "seeking relief that is also available under" the IDEA.

II. This Court should not grant summary judgment to the School District on the merits of C.W.'s non-IDEA claims.

Hedging its bets on exhaustion, the School District alternatively asks this Court to award it summary judgment on the merits of C.W.'s ADA, Rehabilitation Act, and equal-protection claims—even though the District Court never considered these claims on their merits. This Court should not consider these claims before the district court has had a chance to weigh in on them. In any event, the School District is not entitled to summary judgment on C.W.'s non-IDEA claims.

A. This Court should not consider the merits of C.W.'s non-IDEA claims before the district court has had a chance to consider them.

Although this Court may affirm on alternative grounds in some circumstances, "affirming on legal grounds not considered by the trial court is disfavored." *Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1256 (10th Cir. 2011). This Court has been especially reluctant to take a first pass at sifting through facts on the merits of a claim—as it would have to do in deciding whether disputes of material fact preclude summary judgment here—because "it is best to have the fact issues addressed first by the trial court." *See, e.g.*, *Yvonne L. v. N.M. Dep't of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992). Where a district court did not consider the merits of a claim, but rather avoided that determination, this Court has declined to affirm alternatively on the merits, and instead

has remanded to the district court to examine the issue in the first instance. *See, e.g.*, *Evers v. Regents of Univ. of Colo.*, 509 F.3d 1304, 1310 (10th Cir. 2007); *Yvonne L.*, 959 F.2d at 893; *Bath v. Nat'l Ass'n of Intercollegiate Athletics*, 843 F.2d 1315, 1317 (10th Cir. 1988).

These precedents fit this case to a T. The district court granted summary judgment on C.W.'s non-IDEA claims on exhaustion grounds alone and avoided addressing the merits of C.W.'s non-IDEA claims. App. Vol. 2 at 366-67 (Dist. Ct. Op. 16-17). C.W.'s ADA, Section 504, and equal-protection claims are premised on years of discriminatory treatment, including the School District's failure to provide appropriate instruction from 2014-2016 and its failure to provide any education in 2017. *See* App. Vol. 1 at 23-30 (Am. Compl. at 2-9). Rather than sifting through these facts and weighing the merits of C.W.'s claims now, this Court should remand to allow the district court to do so first.

B. The School District is not entitled to summary judgment on the merits of C.W.'s claims.

Assuming that this Court takes the "disfavored" approach, *Rimbert*, 647 F.3d at 1256, and addresses the merits of C.W.'s non-IDEA claims, it should refuse to award summary judgment to the School District.

C.W.'s Section 504 and ADA claims. To succeed on his claims under Section 504 of the Rehabilitation Act, C.W. must show that (1) he is "handicapped under the Act," (2) "he is 'otherwise qualified' to participate in the program," (3) "the program receives federal financial assistance," and (4) "the program discriminates against" him. *Hollonbeck v. U.S. Olympic Comm.*, 513 F.3d 1191, 1194 (10th Cir. 2008). As relevant here, C.W.'s

ADA claim involves the same substantive standard as his Section 504 claim, so both claims are analyzed together. *See Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Schs.*, 565 F.3d 1232, 1245 (10th Cir. 2009). The School District concedes that C.W. has established the first three elements, arguing only that C.W. has not shown that the School District discriminated against him. *See* SD Br. 31.

Though C.W. must show that the School District intentionally discriminated against him, *see Havens v. Colorado Department of Corrections*, 897 F.3d 1250, 1264 (10th Cir. 2018), intentional discrimination does not require proof of animus and "can be inferred from [the School District's] deliberate indifference." *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1153 (10th Cir. 1999). The School District was deliberately indifferent if it "had knowledge that a harm to a federally protected right was substantially likely" but failed to act upon "that likelihood." *Barber ex rel. Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1229 (10th Cir. 2009) (quoting *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001)).

Construing the evidence in a light most favorable to the non-moving party, C.W.—as required at summary judgment, *D.L. v. Unified Sch. Dist. No. 497*, 596 F.3d 768, 772 (10th Cir. 2010)—a reasonable factfinder could find that the School District knew that harm to C.W.'s right to a meaningful public education was substantially likely, yet failed to act to prevent that harm. The School District failed to provide C.W. with *any* educational services for substantial periods between 2014 and 2017. App. Vol. 3 at 556.

For seven months in the 2014-2015 school year and for five months in the 2015-2016 school year, the School District did not provide C.W. with an instructor. App. Vol. 2 at 541 (¶ 46), 543 (¶ 64).

Contrary to the School District's assertion that it "diligently" searched for an instructor, SD Br. 33, the evidence indicates that the School District was indifferent to C.W.'s educational needs. In 2014, the School District official in charge of determining C.W.'s homebound placement told C.W.'s parents that she had not received C.W.'s IEP and medical records until two months after the conclusion of C.W.'s IEP meeting. App. Vol. 2 at 405. This failure likely explains why neither of the instructors that the School District claims to have offered in 2014, *see* SD Br. 33, were an appropriate fit for C.W. One of these instructors was able to provide only one hour of instruction and, in any event, declined the position because she didn't feel it would "work for her." App. Vol. 3 at 743. The other instructor would work only in the mornings—which did not accommodate C.W. given his sleep disorder—and lacked any experience with autistic children or with highly gifted and talented children. App. Vol. 4 at 922.

The School District also failed to provide C.W. with appropriate curriculum hours and content, making it substantially likely that C.W. would not receive a meaningful education. C.W.'s IEPs from 2014 to 2016 required the School District to provide only two hours of instruction a day, yet the School District failed to meet even that minimal

requirement, providing C.W. with one hour of education daily, on average. App. Vol. 2 at 541 (¶¶ 46-47).

Even when C.W. received some education, his curriculum was inappropriately limited. C.W.'s IEPs from 2014 to 2016 indicated that C.W. was to receive education in core academic subjects, yet only identified learning goals in math and English. App. Vol. 3 at 626-28, 642-45, 673-76. C.W. did not receive education in the core curriculum because of the School District's inaction and indifference. For example, C.W.'s 2014 and 2015 IEPs required the School District to provide him with assistive technology to attend science class remotely. App. Vol. 2 at 543 (¶ 63). The School District simply did not provide this technology. *Id.* The School District's indifference is further shown by its failure to provide C.W. with highly gifted and talented education, despite C.W.'s status as a highly gifted and talented student and his parents' repeated requests for appropriate gifted education. App. Vol. 2 at 537; App. Vol. 3 at 653. Ultimately, when his instructor, Cathy Kromrey, was asked whether C.W.'s educational needs were fully served by the School District, she answered "probably not." App. Vol. 5 at 1151.

Perhaps most egregiously, after years of failing to provide C.W. the education he was entitled to receive, and only months after C.W. filed a due-process complaint saying so, the School District took affirmative steps that frustrated C.W.'s ability to receive an education. The School District instituted targeted policies that it knew made it likely—indeed, made it virtually certain—that C.W. would not receive an education. Knowing

C.W. could not wear pants or shorts due to his sensory processing disorder, App. Vol. 4 at 958, the School District mandated that C.W. wear pants or shorts, or else forfeit instruction. App Vol. 3 at 585. Knowing that C.W.'s eating disorder and restrictive eating habits led to low energy levels and inability to engage, App. Vol. 3 at 650, the School District mandated C.W. not snack or else forfeit instruction. *Id.* at 585. When C.W. was, as expected, unable to comply with the School District's new policies, the School District neither reconsidered its policies nor took steps to help C.W. comply. Rather, the School District simply stopped educating him. App. Vol. 2 at 546 (¶¶ 91-92).

Shortly thereafter, the School District decided unilaterally that C.W. was no longer fit for home instruction and modified his IEP to require that he be placed in a residential facility instead. App. Vol. 3 at 730. The School District made this sudden decision recklessly, without conducting any research into whether an appropriate facility for C.W. even existed. *See* App. Vol. 5 at 1096-97, 1194. The School District failed to identify any appropriate facility to enroll C.W. As a result, the School District stopped providing C.W. educational services after January 2017. App. Vol. 2 at 546 (¶ 92).

To sum up: The School District failed to provide C.W. with sufficient home instruction from 2014-2016, moved the goalposts for C.W.'s ability to receive an education in 2017, and, over his parents' objections, discontinued home education in 2017, requiring C.W. to be educated in a facility that did not, in fact, exist. A reasonable

factfinder, construing the evidence in C.W.'s favor, could find that the School District knew its policies and actions placed C.W.'s right to a meaningful public education in jeopardy, yet failed to do anything about it. This is the epitome of indifference.

C.W.'s equal-protection claim. C.W. has been denied equal protection of the laws by being denied access to a basic education. *See Plyler v. Doe*, 457 U.S. 202, 216 (1982). In addressing an equal-protection claim where the plaintiff is not a member of a protected class and does not claim denial of a fundamental right, the court must determine whether the alleged discriminatory action has a rational basis. *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442-46 (1985). Though people with disabilities are not generally within a protected class, *id.* at 442, and access to a public education is not generally viewed as a fundamental right, *Plyler*, 457 U.S. at 223, the Supreme Court has left open use of a higher standard in cases where the state denies "children the free public education that it offers to other children residing within its borders." *Id.* at 230. In those cases, "that denial must be justified by a showing that it furthers some substantial state interest." *Id.* Though the School District's disparate treatment of C.W. is, we submit, subject to this higher level of scrutiny, the School District's misconduct cannot withstand even rational-basis review.

- **C.W.'s disparate treatment.** All students with disabilities are entitled to a free appropriate public education regardless of the nature and severity of their disabilities, or where the student is educated—at home, in a residential facility, or in a

public school. *See Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 995 (2017). The School District argues that C.W.'s treatment should be compared to all School District students with IEPs. *See* SD Br. 36-37. But the School District does not dispute that it must provide a FAPE to "all eligible children" regardless of whether the child is educated at home or in the classroom. *See Endrew F.*, 137 S. Ct. at 993 (citing 20 U.S.C. § 1412(a)(1)). Because C.W. has the same right to a FAPE as every other child with a disability, he is similarly situated to all other children entitled to a FAPE.

The School District has acknowledged that it customarily denies all homebound students with the opportunity to participate in accelerated gifted programs, even when they are qualified. *See* SD Br. 32 ("[N]o DPS students receiving homebound services receive formal gifted and talented instruction."). But Colorado law requires that all students identified as gifted be provided a gifted educational program. *See* Colo. Rev. Stat. §§ 22-20-201 et seq. It is only because C.W. has a disability that necessitates he be educated at home that C.W. is treated disparately and deprived of gifted instruction.

The School District's policy for limiting the instruction of homebound disabled students to the number of service hours in the IEP and the subject areas of the IEP goals has meant that, for years, C.W. has not been instructed in core subjects required for a basic education. App. Vol. 3 at 632, 642-45, 648, 678; App. Vol. 4 at 1140-41. Moreover, as the ALJ found and the School District does not dispute, at times the School District failed to provide C.W. with the two hours of education outlined in his

IEP, or even an instructor, which led to four periods when C.W. went without *any* education. App. Vol. 3 at 555.

Similarly situated students—those entitled to a FAPE but who are educated in public schools—are, at a minimum, provided access to the full general education curriculum and receive that curriculum from qualified instructors, as required by the Elementary and Secondary Education Act. 20 U.S.C. § 6311(b)(1)(E)(i)(II), (V). It is only because C.W. is a homebound student that he has been deprived of a basic education that has been provided to other students with disabilities.

- **No rational basis.** Similarly situated students entitled to a FAPE receive a basic core education when they are at a public school. The School District does not provide a basic core education to FAPE-entitled students who are homebound. The School District has not provided any explanation for why denying homebound students with disabilities access to basic core education furthers a legitimate state interest. The School District asserts that so long as homebound students receive the services identified in their IEP, it has a rational basis for limiting instructional time. *See* SD Br. 37. That cannot be. What if, as here, the IEP resulted in years without any education at all? C.W.'s lack of education imposes a lifetime hardship and makes it impossible for him to "live within the structure of our civic institutions … [or] contribute in even the smallest way to the progress of our nation." *Plyler*, 457 U.S. at 223-24. The School District has similarly failed to provide any rationale for why it deprives homebound

students access to accelerated gifted programs. In sum, the School District is not entitled to summary judgment on C.W.'s equal-protection claim.

Response Argument (No. 19-1429)

I. C.W. raised, and the district court properly ruled on, the School District's failure to identify an educational placement in the 2017 IEP.

The School District asserts that, in the due-process proceedings, C.W. did not challenge the School District's failure to identify a residential placement in his 2017 IEP. *See* SD Br. 14. That assertion is flatly incorrect.[4]

The School District's own closing statement at the due-process hearing belies its new-found assertion. There, the School District argued that "it is not a violation—*as parents suggested*—for the School District not to have named a specific site to implement C.W.'s IEP." App. Vol. 2 at 483 (emphasis added). The School District thus acknowledged what is undeniably true: Throughout the due-process proceedings, C.W.

[4] The School District frames this assertion as an "exhaustion" argument and labels IDEA exhaustion as jurisdictional in an attempt to raise this issue now though it never raised it in the district court. *See* SD Br. 12-13. Although this Court has recently indicated that IDEA exhaustion likely is not jurisdictional, *see Muskrat v. Deer Creek Pub. Schs.*, 715 F.3d 775, 783-84 (10th Cir. 2013); *McQueen v. Colo. Springs Sch. Dist. No. 11*, 488 F.3d 868, 873 (10th Cir. 2007), this Court need not reach that issue here because, as we now show, C.W. extensively exhausted his 2017 FAPE claim.

repeatedly highlighted the School District's failure to identify an appropriate residential placement in the 2017 IEP.[5]

Ignoring all of this, the School District relies on C.W.'s due-process complaint to argue that C.W.'s 2017 FAPE claim was not premised on the failure to identify a residential facility. SD Br. 15. That makes no sense. C.W.'s due-process complaint could not have indicated any grounds for challenging the 2017 IEP because the complaint was filed in 2016, *before* the 2017 IEP meeting even took place. App. Vol. 2 at 380. As noted above (at 19), the parties agreed at a pre-hearing conference to incorporate issues relating to the 2017 IEP into the due-process proceeding. *Id.* at 426. Once that occurred, C.W.'s parents vigorously contested, and the ALJ considered, the School District's failure to identify a residential placement. *Id.* at 550-51.

[5] *See, e.g.*, App. Vol. 2 at 435 (position statement challenging the 2017 IEP as "misguided" and "offensive" because none of the identified residential facilities would accept C.W.); App. Vol. 4 at 847-48 (opening statement arguing that the School District offered "no education at all" because the only facilities it identified would not accept C.W.); App. Vol. 2 at 491 (closing statement reiterating the view that the School District "thr[ew] in the towel" and suggested sending C.W. to "inappropriate residential facilities"); *see also* App. Vol. 3 at 599 (letter to Gene Bamesberger in which C.W.'s father challenged the residential facilities as inappropriate). C.W.'s father also elicited witness testimony on this topic. *See* App. Vol. 5 at 1096-1102, 1191-94; App. Vol. 6 at 1255-61.

II. The district court correctly concluded that the School District failed to provide C.W. a FAPE in 2017.

In February 2017, the School District unilaterally amended C.W.'s IEP to abrogate all home instruction and require that C.W. be placed in a residential facility. App. Vol. 3 at 730. But the School District has not implemented any residential instruction, proposed an adequate facility, or provided any educational services as required by the IDEA. 20 U.S.C. § 1401(9). As the district court observed, "C.W.'s IEP provided for education in a residential facility, but none was designated," which amounted to "the equivalent of providing none and failing to admit that it could not provide required services." App. Vol. 2 at 357, 362 (Dist. Ct. Op. 7, 12). The district court recognized that failing to provide a child with disabilities an education is not a FAPE. That decision should be affirmed.

A. The School District did not provide C.W. a FAPE because it did not implement, and was not capable of implementing, his 2017 IEP.

The IEP is not just an empty procedural formality. It must provide something of substance: a FAPE. *See, e.g.*, *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017). The IEP must "articulate measurable educational goals, and must specify the nature of the special services that the school will provide." *Schaffer v. Weast*, 546 U.S. 49, 53 (2005) (citing 20 U.S.C. § 1414(d)(1)(A)). These goals and the "special education and related services," 20 U.S.C. § 1401(9), set out in the IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's

circumstances." *Endrew F.*, 137 S. Ct. at 999. And an IEP does not provide a FAPE unless it can actually implement these educational services tailored to "meet the unique needs of a child with a disability." 20 U.S.C. § 1401(29).

If, as the Supreme Court has held, a FAPE is an offer of educational progress that is "markedly more demanding" than what is "merely more than *de minimis*," *Endrew F.*, 137 S. Ct. at 1000 (quotation marks omitted)—then an offer that fails to provide any education at all cannot be a FAPE.

1. C.W.'s 2017 IEP denied him a FAPE because the placement that the School District trumpeted for C.W.'s education was never provided.

C.W.'s 2017 IEP demanded that C.W. be educated at a residential facility. But the School District itself recognizes that "C.W. was never served in a residential treatment facility," SD Br. 20, and it is undisputed that C.W. never received *any* education—whether at a residential facility or at home—stemming from his 2017 IEP. This alone is a failure to provide a FAPE, and an easy, straightforward basis for affirming the district court.

a. The School District now claims that it proposed "two facilities" and "that a specific residential treatment center that could implement C.W.'s IEP had been identified." SD Br. 18. To begin with, this Court has warned against considering placements that—like those named here by the School District—were not included in the IEP. *See Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1315-16 (10th Cir. 2008). Moreover, the School District's characterization of the named facilities is misleading.

The School District's own testimony demonstrates that it had no idea whether the named facilities, or any others, could even implement C.W.'s IEP. *See* App. Vol. 4 at 995; App. Vol. 5 at 1192.

Gene Bamesberger, the Associate Director of Special Education and a member of C.W.'s IEP team, called the named residential facilities (Savio and Tennyson) only "examples of facilities" that might serve the needs of a child with a disability. App. Vol. 6 at 1258, 1301. Bryan Sanchez, C.W.'s home teacher, testified that, at the IEP meeting, "we all just gave the ones that came to our head." App. Vol. 5 at 1192. And, as we know, Savio and Tennyson could not possibly serve C.W. because "both [facilities] stated that [C.W.] would not be accepted" there. App. Vol. 2 at 435. In fact, Bamesberger acknowledged that the School District made no offer of a facility in the months following the IEP meeting because "all of the facilities that we referred [C.W.] to said they could not meet his needs." App. Vol. 6 at 1258.

Nor can Savio and Tennyson be characterized as reasonable proposals. Both facilities are for children with problematic sexual behaviors or harmed by abuse, neglect, or trauma. App. Vol. 2 at 492. Tennyson personnel insisted that they "cannot house autistic children compounded with the types of physical problems [C.W.] has." App. Vol. 4 at 961. Savio enrolls children only "by court order or through a probation officer" and requires the child to be "in the criminal justice system." *Id.* at 963. It was impossible for either of these facilities to educate C.W., let alone meet the IDEA's requirement

that an IEP be "tailored to the unique needs" of the child. *Endrew F.*, 137 S. Ct. at 994 (citing *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 181 (1982)). In sum, failing to find a facility altogether, and conferring no educational benefit in the process, is at war with the IDEA's guarantee of an individualized quality education and "specially designed instruction" for children with disabilities. *Id.* at 999, 1000 (citing 20 U.S.C. § 1401(29)). As the School District itself recognized in its summary-judgment brief below, "an IEP cannot be implemented at a proposed school that lacks the services required by the IEP." App. Vol. 1 at 290 (quoting *M.O. v. N.Y.C. Dep't of Educ.*, 793 F.3d 236, 244 (2d Cir. 2015)).

b. The School District points to decisions in which purportedly similar IEPs did not deny a FAPE, *see* SD Br. 16, but those decisions involved school districts that proposed adequate placements and then moved forward *and implemented* a placement selection—one that was "reasonably calculated to provide [the child] with a free and appropriate public education"—after the IEP's creation. *Brad K. v. Bd. of Educ. of Chi.*, 787 F. Supp. 2d 734, 744 (N.D. Ill. 2011). In *T.Y. v. New York City Department of Education*, 584 F.3d 412, 419 (2d Cir. 2009), for example, the court agreed that "the initial IEP lacked the requisite speech and language services," but did not find a FAPE denial because the child was provided significant benefits and the IEP errors were "suitably corrected." *Brad K.* rejected the proposition that the IDEA invariably requires an IEP to name a specific educational location for a child's placement, but nonetheless

agreed with C.W.'s position here, observing that "placing a student at a location where the IEP cannot be implemented would be a failure to provide adequate educational benefits." 787 F. Supp. 2d at 740.

Relying on 34 C.F.R. § 300.323(c), the School District maintains that it is required only to make a placement *offer* that materially implements the IEP. *See* SD Br. 19-20. Not so. That regulation requires that "[a]s soon as possible following development of the IEP, special education and related services *are made available* to the child in accordance with the child's IEP." *Id.* § 300.323(c)(2) (emphasis added). In other words, a school district cannot lawfully pretend to offer what does not exist. It is the School District's reality-shattering proposition—that a school district need only offer a hypothetical placement, not actually provide an education—that has caused C.W. to idle in educational purgatory for years.

And that is exactly the conclusion reached by the district court. The School District demanded that the parents accede to "an IEP stating that [C.W.] cannot attend any [public] school in the District but provid[ed] no other alternative." App. Vol. 2 at 361 (Dist. Ct. Op. 11). "The effect," the district court recognized, "is to assign the student to a school that cannot satisfy the IDEA's requirements." *Id.*

2. The district court properly found a FAPE denial rooted in the School District's failure to develop and implement an IEP.

a. In defining a FAPE, Congress entitled C.W. (and other students like him) to specific performance by the School District. That is, C.W.'s "special education and

related services" must be "provided in conformity with the individualized education program." 20 U.S.C. § 1401(9)(D) (defining FAPE). The School District's role is to provide a FAPE; it "cannot eschew its affirmative duties under the IDEA by blaming the parents." *Doug C. v. Haw. Dep't of Educ.*, 720 F.3d 1038, 1045 (9th Cir. 2013). Put another way, C.W.'s "entitlement to special education should not depend on the vigilance of the parents." *M.C. ex. rel. J.C. v. Cent. Reg'l Sch. Dist.*, 81 F.3d 389, 397 (3d Cir. 1996). Instead, "it is the responsibility of the child's teachers, therapists, and administrators… ." *Id.*

As if to anticipate C.W.'s case, the Fourth Circuit explained in *A.K. v. Alexandria School Board* that when an IEP does not identify a particular school, parents may not be "left to fend for themselves" to find a satisfactory location. 484 F.3d 672, 681 (4th Cir. 2007). "This is not," the court explained, "how the IDEA was designed to work." *Id.* It is the job of the school district to "take the final step and clearly identify an appropriate placement… ." *Glendale Unified Sch. Dist. v. Almasi*, 122 F. Supp. 2d 1093, 1108 (C.D. Cal. 2000).

b. Yet, here, the parents' vigilance was necessary. Given the School District's abdication, it was C.W.'s parents who investigated the named residential facilities and discovered that neither facility would enroll their son in light of his disabilities and lack of criminal record. *See* App. Vol. 4 at 961, 963. School District officials made no

inquiries about residential facilities nor did any research beyond naming Tennyson and Savio.[6]

Remarkably, after failing to name a facility or attempt any research, the School District turned around and complained that C.W.'s parents were uncooperative. *See* SD Br. 2, 18-20. But the School District cannot point to any facility that would have taken C.W. regardless of the parents' disagreement. Nor can this disagreement be characterized as unreasonable parenting or as a situation where wholly intransigent parents "develop[ed] a competing IEP." *K.L.A. v. Windham Se. Supervisory Union*, 371 F. App'x 151, 154 (2d Cir. 2020); *see* SD Br. 20.

To be sure, C.W.'s parents did not want C.W. in a residential facility because they were understandably concerned that the facility's use of restraints could cause C.W. severe harm—including "spontaneous internal organ rupture" and "serious threat of catastrophic spinal injuries"—because he has Ehlers-Danlos Syndrome. *See* App. Vol. 4 at 961; App. Vol. 6 at 1328-29. And they believed home education could work if it were actually implemented. As the ALJ determined, and the School District does not

[6] Margaret Mathieson, C.W.'s speech therapist, was asked, "So is it fair to say that in your recommendation of residential facilities for C.W., that you did—you did not look into the issue as far as where he should go?" and answered, "That's fair to say, yes." App. Vol. 5 at 1103. Bryan Sanchez, C.W.'s Alternative Placement Services homebound teacher, agreed that there was "no prior investigation" into whether Savio or Tennyson would be appropriate. *Id.* at 1194-95. Gene Bamesberger, the Associate Director of Special Education, testified that he "did not make any" inquiries or do any research into Tennyson or Savio regarding their appropriateness. App. Vol. 6 at 1258.

now dispute, C.W. was "regressing" at home because he was denied a FAPE and had been left without a home instructor for significant parts of the preceding four years. *See* App. Vol. 2 at 354-55 (Dist. Ct. Op. 4-5).

The School District's impermissible blame-the-parents approach is all the more remarkable because it was the *School District* that unilaterally dictated that C.W.—a child it knew was "unable to leave his home," App. Vol. 3 at 731—be pulled from home and sent to a residential facility. The School District cannot have it both ways. It may not argue both for its singular power to determine a child's placement *and* to be held unaccountable when parents are, in its view, less than completely cooperative.

c. For the purposes of this appeal, we accept that C.W.'s IEP placed him at a (phantom) residential facility. But "a school district cannot escape its obligation under the IDEA to offer formally an appropriate educational placement by arguing that a disabled child's parents expressed unwillingness to accept that placement." *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994); *see also Sytsema*, 538 F.3d at 1315-16 (citing *Union* favorably). To put it more bluntly, a school district cannot insist on a residential facility—against the parents' wishes no less—and, at the same time, plausibly maintain that it has provided the child a FAPE when it has been unable to place the child in that type of facility.

The district court properly held that the School District's unilateral determination "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." App. Vol. 2 at 361 (Dist. Ct. Op. 11). It appropriately held that the failure of the School District to identify a residential facility was "the equivalent of providing none and failing to admit that it could not provide required services"—which denied C.W. a FAPE. *Id.* at 362 (Dist. Ct. Op. 12).

B. The district court correctly recognized that, in this instance, the School District's failure to identify a specific residential facility denied C.W. an education.

To show a denial of a FAPE, it was enough to demonstrate that the 2017 IEP could not be implemented, which, in turn, resulted in no education for C.W. As the district court recognized, in this case, the analysis can stop there.

The School District argues nonetheless that the district court erred in requiring it to identify a specific residential facility on the 2017 IEP. *See* SD Br. 15. The School District's failure, it maintains, was, at most, a "procedural shortcoming" under 20 U.S.C. § 1414(d)(1)(A)(i)(VII), which requires that an IEP state "the anticipated … location" of educational services. *See* SD Br. 11, 15, 19. That is not correct. The district court properly held that the "significance of the failure to designate a specific location depends upon the facts of each case," and, in this case, "the deficient IEP [rose] to the level of a substantive violation." App. Vol. 2 at 360, 361 (Dist. Ct. Op. 10, 11). Stated differently, a procedural inadequacy results in a denial of a FAPE if it "caused a deprivation of educational benefits." 20 U.S.C. § 1415(f)(3)(E)(ii)(III).

1. The School District's discussion about "location" conceals its failure to provide C.W. a FAPE.

Assume (counterfactually) that the School District is correct that the IDEA's requirement that an IEP state the "location" of educational services, *see* 20 U.S.C. § 1414(d)(1)(A)(i)(VII), refers only to the *type* of educational setting and not a specific location. *See* SD Br. 16. Even so, "the school district's duty is to provide a FAPE." *Deer Valley Unified Sch. Dist. v. L.P.*, 942 F. Supp. 2d 880, 887 (D. Ariz. 2013). And this duty is not nullified by checking the boxes of the IEP or, as already discussed, proposing a placement at which the student cannot be educated. Any argument about whether a "location" was properly named is a smokescreen that seeks to conceal the School District's larger failure: that it denied C.W. an education.

2. The IDEA requires the identification of a specific educational placement when failing to do so denies a FAPE.

This appeal is not about the meaning of "location." As just explained, regardless of whether the 2017 IEP named a location, the IEP failed under the IDEA because it never provided C.W. with special education—indeed, with *any* education—and thus denied him a FAPE. 20 U.S.C. § 1401(9)(D).

But nothing in the IDEA's text supports the School District's contention. The IDEA's text, relevant Department of Education (DOE) comments, and case law all show that whether "location" refers to a specific school or a type of educational setting is context-specific and turns on the facts of the particular case and whether the IEP in

that case was "reasonably calculated" to provide educational benefits. *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (2017).

Statutory text and DOE guidance. While implementing regulatory changes under the IDEA Amendments of 1997, DOE maintained that "location" in Section 1414(d)(1)(A)(i)(VII) "*generally* refers to the type of environment." *Assistance to States for the Education of Children With Disabilities and the Early Intervention Program for Infants and Toddlers With Disabilities*, 64 Fed. Reg. 12406, 12594 (Mar. 12, 1999) (emphasis added). Even assuming that "location" *generally* refers to a type of environment, that does not mean that it always does, or that it does here. Rather, as the district court pointed out, "the significance of the failure to designate a specific location depends on the facts of each case" and a school district could, in some circumstances, meet its statutory obligations by providing the generalized environment as the location. App. Vol. 2 at 360 (Dist. Ct. Op. 10). Indeed, the School District has itself defined "location" as "the actual school or building." App. Vol. 2 at 483.[7]

In any case, more-recent DOE commentary from 2006—which the School District ignores—indicates that "location" means "the physical surrounding, such as the classroom, in which a child with a disability receives special education and related

[7] Similarly, the former Senate Labor and Human Resource Committee's explanation that "the appropriate place for related services *may* be the regular classroom" is only an example. S. Rep. No. 105-17, at 21 (1997) (emphasis added); *see* SD Br. 16.

services." *Assistance to the States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities*, 71 Fed. Reg. 46540, 46588 (Aug. 14, 2006). DOE viewed its understanding of "location" as contrasting with the IDEA's use of "placement," which refers more broadly to "the provision of special education and related services rather than a specific place." *Id.* at 46687 (quotation marks omitted).

Regardless of the precise definition of "location," there are circumstances in which an IEP must name the brick-and-mortar location of services to meet the IDEA's demands. The IDEA imposes on school districts creating an IEP the obligation to identify "a description of specialized instruction and services that the child will receive." *Endrew F.*, 137 S. Ct. at 999, 1000 (citing 20 U.S.C. § 1414(d)(1)(A)(i)(II), (IV)). And, in any given case, a generalized description of instruction may fail to indicate which services the child will actually receive.

Therefore, at times, a school district can fulfill its obligation to provide a FAPE by naming the generalized educational setting because, in many cases, the physical location is self-evident. An IEP designating that a student receive speech therapy in the public-school classroom means that services will be provided in that child's local, regular classroom. But here, as the district court observed, the School District's failure to identify a particular residential facility "impaired C.W.'s receipt of educational services and prevented his parents from exercising procedural and substantive rights on his behalf." App. Vol. 2 at 362 (Dist. Ct. Op. 12). The School District was therefore

required to identify a residential facility in C.W.'s 2017 IEP—not because Section 1414(d)(1)(A)(i)(VII)'s "location" requirement demands specificity in all instances, but because not naming a facility could (and did) lead to an IEP incapable of educating C.W. and, thus, to denial of a FAPE.

Case law. The judiciary has understood the context-specific meaning of "location" and that failure to identify a specific location in an IEP may, in some cases, result in a denial of a FAPE. Thus, in a case strikingly similar to C.W.'s, a school district changed a student's educational placement to an "unspecified private day school," and the parents challenged the placement because no private school could be found. *A.K. v. Alexandria Sch. Bd.*, 484 F.3d 672, 676 (4th Cir. 2007). The Fourth Circuit held that this failure denied the child a FAPE but emphasized: "[W]e do not hold today that a school district could never offer a FAPE without identifying a particular location." *Id.* at 681-82.

As the district court explained, *see* App. Vol. 2 at 360 (Dist. Ct. Op. 10), the Fourth Circuit's view is consistent with the approach taken in the other decisions on which the School District mistakenly relies. *See* SD Br. 16. The Second and Ninth Circuits have held only that a "failure to identify a specific school location" is not a "*per se* procedural violation of the IDEA." *T.Y. v. N.Y.C. Dep't of Educ.*, 584 F.3d 412, 420 (2d Cir. 2009); *accord Rachel H. v. Dep't of Educ. Haw.*, 868 F.3d 1085, 1092 (9th Cir. 2017) ("[A]n educational agency does not commit a per se violation of the IDEA by not specifying

the anticipated school … .”). Indeed, the Second Circuit “emphasize[d] 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.” *T.Y.*, 584 F.3d at 420. And citing to the Fourth Circuit’s decision in *A.K.*, the Ninth Circuit stressed “that knowledge of a particular school, classroom, or teacher may well be relevant to allowing parents to participate meaningfully in the IEP process.” *Rachel H.*, 868 F.3d at 1092 (citing *A.K.*, 484 F.3d at 681). In that situation, “failure to specify a school may violate the IDEA … . Nothing in our holding is meant to suggest otherwise.” *Id.*

The district court here held the same. C.W.’s case, the court concluded, “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.” App. Vol. 2 at 361 (Dist. Ct. Op. 11). That conclusion is correct and should be affirmed.

Conclusion

This Court should reverse the district court’s decision that C.W. had not exhausted his non-IDEA claims and remand for proceedings on the merits of those claims. This Court should affirm the district court’s determination that C.W. was denied a FAPE for the period covered by his 2017 IEP.

Respectfully submitted,

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October 15, 2020

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I certify that, on October 15, 2020, I electronically filed this Reply-Response Brief of Appellant/Cross-Appellee 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), Robert P. Montgomery, IV (montgomery@semplelaw.com), and Ellen M. Saidman (esaidman@gmail.com).

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