

Colorado Department of Education  
Decision of the State Complaints Officer  
Under the Individuals with Disabilities Education Act (IDEA)

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**State-Level Complaint 2021:523  
Pueblo School District 60**

**DECISION**

**INTRODUCTION**

On October 8, 2021, the parent (“Parent”) of a child (“Student”) identified as a child with a disability under the Individuals with Disabilities Education Act (“IDEA”)<sup>1</sup> filed a state-level complaint (“Complaint”) against Pueblo School District 60 (“District”). The State Complaints Officer (“SCO”) determined that the Complaint identified one allegation subject to the jurisdiction of the state-level complaint process under the IDEA and its implementing regulations at 34 C.F.R. §§ 300.151 through 300.153. Therefore, the SCO has jurisdiction to resolve the Complaint.

On October 15, 2021, the SCO extended the 60-day investigation timeline to allow the parties to participate in mediation. However, mediation resulted in an impasse and on November 9, 2021, the SCO resumed the investigation.

**RELEVANT TIME PERIOD**

Pursuant to 34 C.F.R. §300.153(c), the Colorado Department of Education (the “CDE”) has the authority to investigate alleged violations that occurred not more than one year from the date the original complaint was filed. Accordingly, this investigation will be limited to the period of time from October 8, 2020 through October 8, 2021 for the purpose of determining if a violation of IDEA occurred. Additional information beyond this time period may be considered to fully investigate all allegations. Findings of noncompliance, if any, shall be limited to one year prior to the date of the Complaint.

**SUMMARY OF COMPLAINT ALLEGATION**

Whether District denied Student a Free Appropriate Public Education (“FAPE”) because the District:

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<sup>1</sup> The IDEA is codified at 20 U.S.C. § 1400, *et seq.* The corresponding IDEA regulations are found at 34 C.F.R § 300.1, *et seq.* The Exceptional Children’s Education Act (“ECEA”) governs IDEA implementation in Colorado.

1. Failed to make an offer of FAPE and provide special education and related services in accordance with an IEP from September 7, 2021 to the present, in violation of 34 C.F.R. § 300.323.

### **FINDINGS OF FACT**

After thorough and careful analysis of the entire record,<sup>2</sup> the SCO makes the following FINDINGS OF FACT:

#### **A. Background**

1. Student is an eighteen-year-old child who resides with Parent inside District’s boundaries. *Exhibit A*, p. 51; *Interview with Parent*. Student is enrolled in twelfth grade at a facility school (“Facility School”) located outside of District’s boundaries. *Exhibit A*, pp. 51, 73.
2. Student is eligible for special education and related services as a child with Multiple Disabilities, specifically Autism Spectrum Disorder and Intellectual Disability. *Exhibit N*, p. 12.
3. Student is described as a happy and intelligent young man who enjoys learning, writing, drawing, chores, and community outings. *Interviews with Parent and Special Education Coordinator*. He struggles with communication, impulse control, and behavior regulation. *Id.*
4. This investigation involves Student’s transfer to District from another Colorado school district (“Transfer District”) where he had attended a facility school (“Former Facility School”). *See Complaint; Exhibit A*, p. 1. Student enrolled in a District neighborhood high school (“School”) after the start of the current academic year—on September 9, 2021—with an IEP dated October 30, 2020 (“Transfer IEP”) in effect. *Exhibit A*, pp. 1-30; *Exhibit E*, p. 4; *Exhibit H*, p. 1.

#### **B. Student’s Transfer IEP**

5. The Transfer IEP reviews Student’s present levels of performance in academics, social-emotional functioning, communication, and gross motor functioning. *Exhibit A*, pp. 4-8. Student met one goal (communication), made progress on three goals (academic, communication, and gross motor), and made no progress on two goals (academic and social-emotional) for the 2020-2021 school year. *Id.*
6. The Transfer IEP describes “significant challenges related to intellectual functioning” and “significant struggles [for Student] when compared to peers his age” in adaptive functioning. *Id.* at p. 8. It also notes challenges with executive functioning, such as “controlling impulses” and “processing speed.” *Id.* at p. 8. It notes further that Student needs “substantial support to participate in daily activities.” *Id.* Student can act physically aggressive toward peers and

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<sup>2</sup> The appendix, attached and incorporated by reference, details the entire record.

staff, with the “greatest behavior of concern [being] self-harm that involves repeated and intense hits to his face.” *Id.* at pp. 5-6.

7. The Transfer IEP reviews Student’s disability-related needs in communication, as well as his need for demonstrating functional math, reading, and shopping skills. *Id.* at pp. 9-10. Due to Student’s “disabilities, unsafe behaviors (hitting, biting), and . . . inability to independently complete activities, [his] ability to make progress in a general education curriculum is impeded and progress will be gradual.” *Id.* at p. 10.
8. A behavior intervention plan (“BIP”) identifies target behaviors, as well as strategies and supports to address them, that were present pre-COVID-19, during remote instruction due to COVID-19, and after a return to in-person instruction. *Id.* at pp. 25-30. Target behaviors include physical aggression, avoidance, spitting, self-injury, and escalated self-injury. *Id.*
9. The Transfer IEP’s consideration of special factors section explains that Student requires multiple communication modes (i.e., a speech generating device, verbal phrases, low-tech photos, “ASL signs,” a yes/no board, and partner support in the classroom) due to “limited verbal skills” and “severe delays in receptive/expressive/pragmatic language skills.” *Id.* at p. 11. At times, Student demonstrates “fleeting joint attention” by failing to acknowledge the presence of a teacher when the two are focused on an object or activity for the purpose of interacting with one another. *Id.* at p. 6. Overall, he “is a supported communicator, who requires staff support to set up, model, and interpret communicative attempts.” *Id.* at p. 7.
10. A post-secondary transition plan has goals for career employment, independent living, and post-school education/training. *Id.* at pp. 11-14. Special education teachers, an affective education therapist, and an occupational therapist provided “real world activities such as completing chores, completing hygiene tasks, engaging in appropriate interactions with peers and adults, and practicing job skills during volunteer work opportunities.” *Id.* at p. 14.
11. The Transfer IEP contains six annual goals:
  - Mathematics: “By 10/29/2021, during classroom and community opportunities, [he] will match dollar amounts to merchandise costs up to \$20 from 1/20 controlled trials to 10/20 controlled trials as measured by classroom staff using monitor and chart progress.”
  - Reading: “By 10/29/2021, [he] will verbally identify appropriately leveled/functional sight words from 1/20 correct words to 10/20 correct words as measured by the special education teacher using monitor and chart progress.”
  - Social-Emotional/Wellness: “By 10/29/21, [he] will return staff greetings evidenced by looking at staff when they say his name and responding with hello (either a wave

or verbally say hi/hello) when he is greeted from 2/10 controlled trials to 6/10 controlled trials as measured by Social Worker and Special Education Teacher using monitor and chart progress.”

- Independent Living Skills: “By 10/29/21, [he] will participate in group/classroom activities (including chores, movement schedules, hygiene, crafts, etc.) with use of a visual schedule and less than 2 initial verbal prompts from 3/10 controlled trials to 8/10 controlled trials as measured by occupational therapist and classroom staff using monitor and chart progress.”
- Communication: “By 10/29/21, [he] will answer yes/no questions about wants and needs with accuracy when provided with a yes/no board from 2/10 controlled trials to 8/10 controlled trials as measured by the speech-language pathologist and special education teacher using monitor and chart progress.”
- Communication: “By 10/29/21, [he] will utilize flexible 2+ word combinations during structured language activities utilizing pictures or his speech generating device from 1/10 controlled trials to 7/10 controlled trials as measured by the speech-language pathologist and special education teacher using monitor and chart progress.”

*Id.* at pp. 14-18.

12. The Transfer IEP identifies accommodations—such as line-of-sight supervision, access to low-tech picture communication systems, a daily picture schedule, and one-to-one staff support all day—and a “modified functional academic curriculum in all content areas.” *Id.* at p. 18.

13. Under the Transfer IEP, Student received the following special education and related services outside the general education classroom:

- Specialized Instruction: 1,634 minutes per week of direct instruction and 60 minutes per month of indirect instruction;
- Social-Emotional: 240 minutes per month of direct instruction and 60 minutes per month of indirect instruction;
- Occupational Therapy: 240 minutes per month of direct instruction and 60 minutes per month of indirect instruction;
- Speech-Language: 240 minutes per month of direct instruction and 60 minutes per month of indirect instruction; and

- Behavior Intervention: 60 minutes per month of indirect instruction.

*Id.* at p. 21.

14. Per the Transfer IEP, Student spent 100 percent of his time outside the general education environment. *Id.* at pp. 22-23. The least restrictive environment (“LRE”) was a separate school setting because he requires “constant care and support for his nutrition, hygiene, and personal safety.” *Id.* at p. 22. Due to “[Student’s] behaviors and lack of safety awareness, he requires a self-contained, structured educational environment with line of sight supervision, social emotional and therapeutic intervention and support.” *Id.* at p. 23. A separate school offered a small class size, a low student-to-staff ratio, and a high level of adult support. *Id.*
15. The Transfer IEP is written for in-person instruction, but contains a contingency learning plan (“CLP”) in case services had to be temporarily delivered remotely due to COVID-19:

. . . in order to provide access to curriculum and allow him to make progress on goals, [Student] will have access to Zoom Classroom, in which a regular school program will be available Monday through Friday 8am-2pm, to include therapy groups and instruction. He will also be supplied with paper packets for school work to complete at home and upload to Google Classroom for teacher review as a secondary option. He will also have access to online programs such as iReady, and other resources to support remote learning. School staff will check in daily to assure that he has staff support and to answer any questions/concerns.

*Id.* at p. 23.

16. The CLP provided for Student to receive all Transfer IEP services via Zoom, to include direct instruction from a special education teacher, social worker, speech therapist, occupational therapist, behavior team, and one-to-one paraprofessional. *Interview with Former Facility School Special Education Staff.*

### **C. Transfer to District**

17. Student started the 2021-2022 school year receiving services under the Transfer IEP at Former Facility School, but only through September 3, 2021. *Id.* Parent abruptly ended Student’s enrollment and moved to a location initially unknown to Transfer District or Former Facility School. *Id.*; *Interview with Transfer District’s child welfare education liaison (“CWEL”).*
18. On September 6, Parent texted CWEL for advice on obtaining services for Student in District. *Interview with CWEL.* CWEL advised Parent to register Student in a neighborhood school. *Id.*
19. Parent picked up enrollment paperwork from School on September 7 and provided the Transfer IEP to School’s registrar office later that afternoon. *Interview with Parent; Exhibit I,*

- p. 1. The Transfer IEP was forwarded to Special Education Coordinator, and it was received by District's special education team on September 8. *Exhibit I*, p. 1.
20. On Thursday, September 9—the last day of the academic week because District does not operate school buildings on Fridays—Parent enrolled Student in School. *Exhibit A*, p. 33; *Exhibit E*, p. 4. While at School, Parent met briefly with School Psychologist. *Exhibit A*, p. 33. During this time, Student engaged in self-injury (hitting himself in the head with a closed fist) and physical aggression toward Parent (hitting, kicking, and spitting). *Id.* Parent provided School Psychologist with CWEL's contact information before leaving School. *Exhibit I*, p. 6.
21. Upon reviewing the Transfer IEP, Special Education Director wrote to staff on September 9 that "HE NEEDS MUCH MORE THAN WHAT WE CAN OFFER." *Id.* at p. 8. She asked her team to find out more about Student and why an IEP meeting between Transfer District, Former Facility School, and District had not occurred prior to his transfer. *Id.* at p. 5.
22. District special education staff have access to a procedure handbook. *Interview with Special Education Director*. From the handbook, District provided the SCO with procedures for completing a transfer IEP form and IDEA transfer regulations from CDE's IEP Procedural Guidance. *Exhibit O*, pp. 2-3. Upon receiving a transfer IEP, District practice is to immediately contact the child's family to set up a meeting and ensure comparable services are in place within two to three days. *Interview with Special Education Director*. District strives to provide comparable services in "an appropriate classroom" until it decides to adopt the transfer IEP or develop and implement a new IEP. *Id.* Special Education Director stated her staff followed these procedures for the more than 20 students who transferred to District this year. *Id.*
23. Special Education Coordinator called Parent on Monday, September 13 to schedule a transfer IEP meeting but was not able to leave a message. *Exhibit A*, p. 33. When she called the next day, Parent answered but became upset and ended the conversation. *Id.* She called again on September 15, and they scheduled an IEP meeting for September 20. *Id.* Parent asked that CWEL and Student's former special education teacher be invited to the IEP meeting. *Id.*
24. On September 16, Special Education Coordinator contacted CWEL who shared information about Student's cognitive limitations and advised he "requires a high level of support due to aggressive unpredictable behaviors." *Id.* at pp. 33-34. That same day, District issued a notice for a September 20 IEP meeting. *Exhibit D*, p. 1.

#### **D. September IEP Meetings**

25. A properly constituted IEP Team, including Parent, met virtually on September 20. *Exhibit A*, pp. 34-35. CWEL and Student's former special education teacher participated in the meeting. *Id.* District members of the IEP Team described the options for accepting the Transfer IEP or developing a new IEP. *Id.* As the IEP Team generally explained the full continuum of

alternative placements available, Parent became upset and left the meeting before a decision was made. *Id.*; *Exhibit B*, pp. 1-2; *Interviews with Parent and Special Education Coordinator*.

26. On September 21, Special Education Coordinator called Parent to address any concerns and to reschedule the IEP meeting. *Exhibit A*, p. 35. Parent shared that Student would attend school only two days per week because he participates in private behavior therapy on Monday and Wednesday each week. *Id.* Parent agreed to reconvene on September 28. *Id.*
27. District did not issue a notice of meeting for the September 28 IEP meeting. *See Exhibit D*. A properly constituted IEP Team, including Parent and her educational advocate (“Advocate”), met virtually on September 28. *Exhibit N*, p. 1; *Interviews with Parent and Special Education Coordinator*. The IEP Team rejected the Transfer IEP and indicated consent for an evaluation would be obtained from Parent. *Exhibit N*, pp. 1-3. A prior written notice, issued that same day, explains that District considered but opted against placing him in an “Autism Inclusion Program” due to “aggressive behavior toward [Parent]” during “two observations completed” on September 9 and 28. *Id.* at p. 2.

#### **E. Student’s Evaluation**

28. On September 29, Parent signed a consent for evaluation. *Exhibit C*. That same day, District began its evaluation, in part to determine a comparable services plan for Student. *Interview with Special Education Coordinator*. A District board certified behavior analyst (“BCBA”) and Occupational Therapist observed Student in a classroom at School. *Exhibit J*, pp. 5-9.
29. Student eloped seconds into the observation, but staff were able to guide him back into the classroom with verbal cues. *Id.* During the observation, Student wrote his name and identified letters and numbers after multiple verbal and visual prompts. *Id.* Following a request to use the restroom, staff escorted Student to and from the bathroom without incident. *Id.* Over the next three minutes, Student engaged in significant acts of self-injury and physical aggression toward staff and Parent, which resulted in injury to a staff person. *Id.*
30. He required “almost constant redirection” during the observation, which ended due to unsafe behavior. *Id.* at p. 5. Staff helped him deescalate and transition to Parent’s car. *Id.* District concluded “it would not be appropriate to place [him] in a classroom until the IEP team had a chance to meet to determine appropriate placement to determine his needs.” *Id.* at p. 8.

#### **F. Comparable Services Offer for Student**

31. The comparable service delivery statement in District’s transfer form of September 28 provides “[d]ue to the out of district placement indicated as the LRE on [Student’s] IEP, placement in a lesser restrictive environment is not appropriate without an evaluation to determine whether this placement would benefit [Student] and support his educational

needs.” *Exhibit N*, p. 3. The annual goals section of the transfer form provides “[d]ue to [Student’s] ABA therapy two days a week, he will be given educational materials to complete for the other two days of the school week until the team completes the evaluation.” *Id.*

32. On October 6, District delivered “a package of assignments” (“Education Packets”) to Parent and placed them in her mailbox. *Exhibit A*, p. 35. A special education case manager (“Case Manager”) called Parent twice to review the Educational Packets but was not able to leave a message. *Id.* The Education Packets included writing and math instruction, though no copies exist for the SCO to review. *Interviews with Special Education Coordinator and Parent.*
33. On October 7, School Psychologist let Parent know social-emotional and speech language lessons would be added to a Google Classroom, which would include access to an instructor. *Interview with Special Education Coordinator; Exhibit I*, p. 37. Case Manager was available to help Parent access his Google Classroom and to learn how to implement the Education Packets. *Exhibit I*, p. 37. Parent received a laptop that day. *Id.*; *Exhibit A*, pp. 35-36.
34. On October 12, Case Manager provided Parent with Student’s Google Classroom username and password and called about a “homework packet” that was delivered to her home. *Exhibit A*, p. 36. Student never completed the Education Packets or accessed Google Classroom. *Interviews with Parent and Special Education Coordinator.* Parent cited concerns to District about her ability to educate Student, noting he required direct instruction. *Exhibit I*, p. 37.
35. District based its comparable services offer on the CLP because Student would not be able to safely receive interim, in-person services in a neighborhood school setting. *Interview with Special Education Coordinator.* The offer was not based on circumstances beyond its control, such as COVID-19 disruptions to in-person instruction. *Id.* District did not contact Former Facility School to discuss the CLP or Student’s prior experience with remote instruction. *Id.*
36. While at Former Facility School, Student had participated in remote instruction and completed “activities” at home after the Governor of the State of Colorado issued an executive order requiring all public and private elementary and secondary schools in Colorado to suspend in-person instruction due to COVID-19 in March 2020. *Exhibit A*, p. 6. He was “inconsistently on Zoom the first few months but later became more consistent.” *Id.*
37. After District completed the evaluation—entirely a record review apart from the observation—it issued a notice on October 11 for an IEP meeting. *Exhibit D*, p. 2; *Exhibit J.*

### **G. October IEP Meetings**

38. A multidisciplinary team (“MDT”), including Parent and Advocate, considered the evaluation at an IEP meeting on October 13 and determined that Student continued to be eligible for special education and related services. *Exhibit N*, pp. 6-7.



39. A properly constituted IEP Team then started to develop an IEP (“New IEP”) for Student. *Exhibit A*, p. 74; *Exhibit N*, pp. 4-5. The meeting ended before the New IEP was finalized, so District issued a notice of meeting for October 15. *Exhibit A*, p. 74; *Exhibit D*, p. 3.
40. The IEP Team reconvened on October 15 to complete the New IEP. *Exhibit A*, p. 74. Under the New IEP, Student receives 1,140 minutes per week of direct specialized instruction, 150 minutes per week of direct social-emotional/behavioral instruction, 40 minutes per month of indirect speech-language instruction, and 40 minutes per month of indirect occupational therapy intervention. *Id.* at p. 72.
41. Per the New IEP, Student spends 100 percent of his time outside the general education environment. *Id.* at pp. 72-73. The LRE is a separate school setting because Student “requires a self-contained, structured educational environment, line of sight supervision, [and] social emotional and therapeutic intervention and support . . .” *Id.* at p. 73.
42. Student is to receive services at Facility School Monday through Thursday. *Id.* at pp. 73-74. District offered “60 additional days of support” due to “various disruptions” since enrollment. *Id.* at p. 74. This “support” is not described in the Transfer IEP, but it is to be provided in 2024 after Student turns twenty-one. *Interviews with Parent and Special Education Coordinator.*
43. Parent does not have concerns with the New IEP but reports she did not receive a copy of it until her request on November 3. *Interview with Parent; Exhibit 2.* To “the best of [his] recollection” Case Manager left the New IEP in Parent’s mailbox on October 15.<sup>3</sup> *Exhibit N*, p. 8. Parent indicated the New IEP was not delivered to her mailbox. *Interview with Parent.*
44. A detailed special education contact log shows District consistently contacted Parent to let her know if an item was placed in her mailbox, just as Case Manager did with the Education Packets. *Exhibit A*, p. 35. Also, District documented all visits to her home. *Id.* at pp. 33-46. Although a checked box on the New IEP indicates a copy was provided to Parent, there is no related entry in the contact log (or elsewhere). *Exhibit A*, pp. 33-46, 74; *Exhibit 1.* The SCO thus finds that the New IEP was first provided to Parent by e-mail on November 3. *Exhibit 2.*

#### **H. Facility School Enrollment and Attendance**

45. Between October 18 and October 22, District assisted Parent in completing and submitting enrollment paperwork for Facility School. *Exhibit A*, pp. 37-40; *Exhibit 1*, pp. 42-60. The process took longer than anticipated because Facility School initially provided outdated forms and did not recognize the error until October 20. *Exhibit 1*, pp. 45-46. District’s transportation

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<sup>3</sup> The IDEA requires school districts to protect the confidentiality of any personally identifiable data, information and records they collect or maintain. 34 C.F.R. § 300.622(a). The SCO recognizes District staff went above and beyond by making visits to Parent’s home, and no related IDEA violation occurred here, but the New IEP contains personally identifiable information that could have been disclosed to others without Parent’s consent had it been left unattended in the mailbox. *Id.*; *See El Paso County School District #49*, 120 LRP 8081 (SEA CO 11/25/19).

team contacted Parent on October 22 to remind her of pickup and drop off times for Student's first day of school the following Monday. *Exhibit A*, p. 40.

46. On Monday, October 25, Student was not present when transportation arrived to take him to Facility School. *Exhibit A*, pp. 40-41; *Exhibit E*, p. 1; *Exhibit I*, pp. 63-64. Parent told District she "was very clear" that he had private behavior therapy on Monday and Wednesday each week. *Exhibit I*, pp. 63-64. She added, "[o]ther than that he will be there every Tuesday and Thursday just like I had said from the beginning. I have not wavered from that." *Id.* at p. 64.
47. Student attended Facility School on October 26. *Exhibit E*, pp. 1-2; *Interview with Parent*. He exhibited behavior that presented a safety concern and prevented him from safely riding the bus, so Parent transported him to and from Facility School. *Exhibit A*, pp. 41-42; *Exhibit E*, pp. 1-2. District adjusted services to provide a dedicated bus for Student. *Exhibit E*, pp. 2-3.
48. On October 27, Student was not present when transportation arrived, and he did not attend Facility School. *Exhibit A*, p. 42; *Exhibit E*, p. 2. Facility School was closed on October 28 for parent-teacher conferences. *Exhibit A*, p. 43; *Exhibit E*, p. 3. District continued to offer special education and related services (including transportation) under the New IEP, but Parent did not allow Student to return to Facility School until December 2. *Exhibit A*, pp. 43-45; *Exhibit E*, p. 3; *Interviews with Parent, Special Education Coordinator, and Special Education Director*.

#### **I. Parent's Concern with Facility School**

49. On October 29, Parent raised a concern that Student will not eat Facility School's food and that he is thus forced to watch peers eat. *Exhibit A*, p. 43; *Exhibit I*, pp. 73-75. Parent requested that Student bring in outside meals (primarily fast food), which is generally not permitted for students at Facility School. *Exhibit A*, p. 43; *Interviews with Special Education Coordinator and Special Education Director*.
50. Facility School's food service program is designed to provide nutritional meals and increase food tolerance for all students. *Interview with Special Education Coordinator*. Special Education Coordinator and Facility School staff informed Parent that an applied behavior analysis therapist was working with Student to collect data and address sensory issues related to food. *Exhibit A*, p. 43. They assured Parent he would not be left hungry. *Id.* On October 30, Parent requested an IEP meeting before she would return him to school. *Exhibit I*, p. 76.
51. On November 3, Parent and District participated in special education mediation under the IDEA regarding the Complaint. *Interviews with Parent and Special Education Coordinator*. Special Education Coordinator let Parent know on November 7 that District's offer of FAPE was still available, and that she could arrange a meeting with Facility School. *Exhibit I*, p. 86.

52. On November 8, Parent indicated she still wanted a meeting and that Facility School “isn’t appropriate for my son.” *Id.* at pp. 86, 89. Special Education Coordinator contacted Facility School that day, but “miscommunication” led her to understand that Facility School would schedule the meeting. *Exhibit A*, pp. 44-45; *Interview with Special Education Coordinator*.
53. Since a meeting had not been scheduled, Special Education Coordinator contacted Facility School on November 11 and 14. *Exhibit A*, pp. 45-46. After another attempt on November 15, Facility School indicated its staff would not be available until after Thanksgiving. *Id.* at p. 46. On November 16, District issued a notice for a November 30 IEP meeting. *Exhibit O*, p. 1. District observed Thanksgiving break November 22 through November 26. *Exhibit E*, p. 4.
54. A properly constituted IEP Team met on November 30 and amended the New IEP. *Exhibit N*, p. 32; *Interviews with Parent and Special Education Coordinator*. First, the IEP Team agreed that Student would be provided with food choices from home and Facility School, and that the IEP Team would reconvene in a few months to reevaluate meal services based on data collected. *Exhibit N*, p. 32; *Interview with Special Education Coordinator*. Second, the IEP Team agreed Student could attend Facility School Tuesday through Friday. *Exhibit N*, p. 32.
55. Student returned to Facility School on December 2, but Parent will not make him available to attend on Wednesdays due to private behavior therapy. *Interviews with Parent and Special Education Coordinator*.

### **CONCLUSIONS OF LAW**

Based on the FINDINGS OF FACT above, the SCO enters the following CONCLUSIONS OF LAW:

**Conclusion to Allegation No. 1: District failed to provide comparable services from September 9, 2021 through October 21, 2021, in violation of 34 C.F.R. § 300.323. This violation resulted in a denial of FAPE.**

#### **A. Student’s Transfer to District**

The allegation accepted for investigation concerns Student’s transfer from one Colorado school district (Transfer District) to another (District) within the same school year (2021-2022). (FF # 4.)

If a student has an IEP and moves to a new school district in the same state within the same school year, the new school district (in consultation with parents) must provide comparable services until the new school district: (1) adopts the IEP developed by the old school district or (2) develops, adopts, and implements a new IEP. 34 C.F.R. § 300.323(e). There is not a set timeline for the new school district to adopt an IEP from the old school district or develop and implement a new IEP. *See* 34 C.F.R. § 300.323. However, the new school district must act “within a reasonable period of time to avoid any undue interruption in the provision of required special

education and related services.” *Questions and Answers on Individualized Educ. Programs (IEPs), Evaluations, and Reevaluations*, 111 LRP 63322 (OSERS 09/01/11).

The first question here is whether District acted within a reasonable amount of time to avoid undue interruption in the provision of services. *Id.* When Student enrolled in School on Thursday, September 9, his Transfer IEP was in effect. (FF # 4.) District received the Transfer IEP from Parent two days prior to enrollment. (FF # 19.) On Monday, September 13—District school buildings are closed on Friday—Special Education Coordinator called Parent to schedule a transfer IEP meeting. (FF #s 20, 23.) After multiple attempts, Special Education Coordinator collaboratively scheduled an IEP meeting with Parent for September 20. (FF # 23.)

The IEP Team met on September 20 to consider the provision of services for Student, but Parent ended the meeting early. (FF # 25.) Special Education Coordinator contacted Parent the next day and they collaboratively scheduled another IEP meeting. (FF # 26.) The IEP Team (including Parent and Advocate) met on September 28 and elected to develop, adopt, and implement a new IEP. (FF # 27.) Parent signed a consent for evaluation the next day. (FF #28.)

District completed its evaluation and scheduled a meeting with Parent to consider the results. (FF #37.) During October 13 and October 15 IEP meetings, the IEP Team determined that Student continued to qualify for special education and related services and developed the New IEP. (FF #s 38-42.) A mix-up in paperwork slightly delayed his enrollment in Facility School, but services were available under the New IEP starting on Monday, October 25. (FF #s 45-46.)

Only twenty-five school days (or forty-six calendar days)—even considering delays attributable to Parent—elapsed between Student’s enrollment on September 9 and implementation of the New IEP on October 25. (FF #20.) Also notable, the New IEP was developed and implemented ahead of the Transfer IEP’s annual review date of October 30, 2020. (FF #s 4, 40.) The SCO thus finds and concludes that District acted promptly and within a reasonable amount of time to avoid undue interruption in the provision of Student’s services, consistent with 34 C.F.R. § 300.323(e).

The remaining question here is whether District provided “comparable” services to Student until the New IEP was developed, adopted, and implemented. Enrollment triggers the duty to provide “comparable” services. *N.B. v. State of Hawaii, Dep’t of Educ.*, 63 IDELR 216 (D. Hawaii 2014). Comparable services are “similar” or “equivalent” to those services described in the child’s IEP from the old school district, as determined by the IEP Team at the new school district. *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46681 (Aug. 14, 2006). Whether services are comparable depends on the facts of the case. *See, e.g., Palo Alto Unified Sch. Dist.*, 114 LRP 1431 (SEA CA 2013) (finding that placement of a child with pica and food allergies in an isolated classroom was comparable to the in-home placement required by the child’s prior IEP).

The new school district is not required to replicate the services the student received from the old school district. *See, e.g., Sterling A. v. Washoe County Sch. Dist.*, 51 IDELR 152 (D. Nev. 2008)

(holding that a district could provide school-based services to a child with a cochlear implant who received home-based services from his former district). But if a district deviates too far from a child's existing program, it may violate the IDEA. *See, e.g., Alvord Unified Sch. Dist.*, 50 IDELR 209 (SEA CA 2008) (finding that an orthopedic impairment special day class was not comparable to a child's prior placement because it served students who functioned on a much lower level and did not provide opportunities to interact with typically developing peers). The requirement to provide "comparable" services includes a duty to provide "temporary goals" that align with the annual goals described in the child's prior IEP. *Letter to Finch*, 56 IDELR 174 (OSEP Aug. 5, 2010).

Here, the SCO finds and concludes that District failed to provide Student with services comparable to those described in the Transfer IEP. In total, District was obligated to provide comparable services for twenty-five school days, from September 9 (enrollment) through October 21 (the final school day before implementation of the New IEP). (FF #s 4, 40.) Indeed, District did not provide services for the first fifteen school days of that timeframe. (FF #s 4-31.) For the final ten school days, District's offer of services—remote instruction through Education Packets and a Google Classroom—fully deviated from the Transfer IEP's program. (FF #s 31-35.)

First, District based its offer on the Transfer IEP's CLP, a temporary plan proactively explaining how Student's special education and related services would be implemented remotely if an emergency (i.e., COVID-19) were to prevent Former Facility School from providing in-person instruction. (FF #s 15-16, 35.) Notably, there were no extended school closures or disruptions to in-person instruction here in District that required Student to learn remotely from home. (FF #35.) Moreover, the CLP described the services provided by District—Education Packets and Google Classroom—as a "secondary option" to providing all special education and related services from the Transfer IEP via Zoom Classroom, to include one-to-one support. (FF #s 15-16.)

Second, District did not consider the unique, disability-related needs described in the Transfer IEP. (FF #s 5-9.) Student struggles to "independently complete activities," demonstrates "fleeting joint attention," and has "limited verbal skills." (FF #s 7, 9.) District's offer did not contemplate that he requires multiple modes of communication, such as a speech generating device, low-tech photos, or partner support in the classroom. (FF # 9.) District's offer also failed to address behavior regulation, despite the BIP describing supports and strategies to address target behaviors during remote instruction. (FF #s 8.)

Third, District did not consider the six annual goals and the post-secondary goals described in the Transfer IEP. (FF #s 10-11.) District's offer included no temporary goals or objectives. (FF #s 31-34.) Fourth, District did not consider the accommodations, or the special education and related services, described in the Transfer IEP. (FF #s 12-13.) Importantly, Student requires one-to-one staff support all day and line-of-sight supervision, in addition to other accommodations, none of which were offered by District. (FF # 12.) The Education Packets included writing, math, social-emotional, and speech language lessons, but District expected Parent to implement the instruction from home with access to educator support through Google Classroom. (FF # 33.) Also, District offered no occupational therapy or behavior intervention services. (FF #s 32-33.)

Finally, the Transfer IEP placed Student in a separate school because behavior and lack of safety awareness prevented him from making progress in a general education setting. (FF #s 32-33.) Student clearly required the restrictive setting of a self-contained, structured educational environment with a high level of adult support. *Id.* District’s offer placed him in an even more restrictive setting, at home and without necessary intensive behavioral supports. (FF #s 31-35.) For these reasons, the SCO finds and concludes that District’s failure to provide “comparable” services to Student consistent with 34 C.F.R. § 300.323(e) results in a denial of FAPE.

A showing of educational harm is not required to conclude that Student here is entitled to compensatory education. *See El Paso County School District 11*, 119 LRP 37641 (SEA CO 7/29/19). Instead, it is sufficient to consider the timely provision of educational services, comparing the services Student should have received to the services he actually received. *See Holman v. District of Columbia*, 67 IDELR 39 (D.D.C. 2016) (stating that “[t]he ‘crucial measure’ under the materiality standard is the ‘proportion of services mandated to those provided’ and not the type of harm suffered by the student”). District effectively left Student without services for twenty-five school days, which is sufficient to demonstrate educational harm. (FF #s 4-35.) Consequently, the SCO concludes that Student is entitled to compensatory education to remedy the denial of FAPE.<sup>4</sup>

### **B. Compensatory Education**

Compensatory education is an equitable remedy intended to place a student in the same position he would have been if not for the violation. *Reid v. Dist. of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). Compensatory services need not be an “hour-for-hour calculation.” *Colo. Dep’t of Ed.*, 118 LRP 43765 (SEA CO 6/22/18). The guide for any compensatory award should be the stated purposes of the IDEA, which include providing children with disabilities a FAPE that meets the particular needs of the child and ensuring children receive the services to which they are entitled. *Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712, 717-18 (3d Cir. 2010).

Here, twenty-five school days in District roughly equates to six weeks (FF #20.) During this time under the Transfer IEP, Student was entitled to approximately (a) 9,804 minutes of direct and 60 minutes of indirect specialized instruction, (b) 1,440 minutes of direct and 60 minutes of indirect social-emotional services, (c) 1,440 minutes of direct and 60 minutes of indirect occupational therapy services, (d) 1,440 minutes of direct and 60 minutes of indirect speech-language services, and (e) 60 minutes of indirect behavior intervention. (FF #13.) In consideration of Student’s individualized needs, and upon consultation with CDE Content Specialist, the SCO finds and concludes that a minute-for-minute award would burden Student. The SCO also considers that Parent made it clear Student would not have been available for services on Mondays and Wednesdays due to private behavior therapy (roughly twelve school days across six weeks). (FF

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<sup>4</sup> There is no award of compensatory education beyond October 21, particularly on dates where District continues to make a full offer of FAPE available at Facility School—which now includes services on Friday to accommodate Student’s private behavior therapy—and Parent refuses to make Student available for school at her discretion.

#26); See *Douglas County School District RE-1*, 120 LRP 19820 (SEA CO 5/15/20) (crediting a school district for two school days when it attempted to provide instruction, but the child was absent).

Accordingly, the SCO awards (a) 3,268 minutes (or 54 hours) of direct and 30 minutes of indirect specialized instruction, (b) 180 minutes (or 3 hours) of direct and 30 minutes of indirect social-emotional services, (c) 180 minutes (or 3 hours) of direct and 30 minutes of indirect occupational therapy services, (d) 180 minutes (or 3 hours) of direct and 30 minutes of indirect speech-language services, and (e) 30 minutes of indirect behavior intervention.

### **C. Related Procedural IDEA Violations**

#### **Notice for the September 28 IEP Meeting**

The IDEA requires school districts to “take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate.” 34 C.F.R. § 300.322(a). Such steps must include: (1) “[n]otifying parents of the meeting early enough to ensure they have an opportunity to attend; and (2) “[s]cheduling the meeting at a mutually agreed on time and place.” *Id.* at § 300.322(a)(1)-(2).

Here, District did not provide Parent a notice for the September 28 IEP meeting. (FF #27.) The SCO finds and concludes that this results in a procedural violation of 34 C.F.R. § 300.322(a). A procedural violation results in denial of a FAPE for a child if the violation (1) impeded the child's right to a FAPE, (2) significantly impeded the parent’s opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).

In this case, the procedural violation did not impede Student’s right to a FAPE, significantly impede Parent’s opportunity to participate in the decision-making process, or cause a deprivation of educational benefit. First, Special Education Coordinator scheduled this meeting at a mutually agreed on time and place with Parent on September 21. (FF #26.) Second, Parent knew this was a continuation of the September 20 IEP meeting and had enough time to invite Advocate to attend. (FF #27.) Finally, Parent and Advocate participated in the meeting. *Id.*

#### **September 28 Prior Written Notice**

Under IDEA, prior written notice must be provided to the parents of a child with a disability within a reasonable time before the school district:

- (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

- (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

34 C.F.R. § 300.503(a). The notice must include, in part, an explanation of why the district proposes or refuses to take an action and a description of each evaluation procedure, assessment, record, or report used by the district as a basis for the action. *Id.* § 300.503(b)(2-3).

In this case, the September 28 prior written notice did not provide an adequate explanation of why the “Autism Inclusion Program” would not meet Student’s unique needs. (FF #27.) The notice simply cited “aggressive behaviors” seen during “two observations completed” on September 9 and 28. *Id.* Notably, Student enrolled in School on September 9 and no observation occurred until September 29, the date Parent signed consent. (FF #s 4, 28.) The SCO finds and concludes that this results in a procedural violation of 34 C.F.R. § 300.503(b). A procedural violation results in denial of a FAPE for a child if the violation (1) impeded the child’s right to a FAPE, (2) significantly impeded the parent’s opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).

Here, the procedural violation did not impede Student’s right to a FAPE, significantly impede Parent’s opportunity to participate in the decision-making process, or cause a deprivation of educational benefit. First, although District’s refusal considered only “aggressive behaviors” based on a short visit to School on September 9 and not Student’s individualized needs, District completed an evaluation to inform an appropriate long-term placement. (FF #s 27, 38-42.) Second, it was apparent from the Transfer IEP that Student’s needs required the support of a separate school setting. (FF # 14.) Third, the IEP Team, including Parent, ultimately placed Student in a separate school setting, Facility School. (FF # 42.) Finally, to the extent this violation contributed to District’s failure to offer comparable services somewhere other than at Student’s home, it will be remedied through the compensatory education award outlined above.

#### *Provision of the New IEP to Parent*

Parent raised a concern that she was not provided with the New IEP. (FF #43.) IDEA requires a school district to provide a copy of the child’s IEP to the parent at no cost. 34 C.F.R. § 300.322(f). This is essential to a parent’s ability to participate in the development and enforcement of their child’s IEP. *M.C. v. Antelope Valley Union High School District*, 858 F.3d 1189, 1197 (9th Cir. 2017).

In this case, Parent was not provided with a copy of the New IEP until she requested it on November 3, 2021, a little over two weeks after the October 15 IEP meeting. (FF #44.) The SCO finds and concludes that this results in a procedural violation of 34 C.F.R. § 300.322(f). A procedural violation results in denial of a FAPE for a child if the violation (1) impeded the child’s right to a FAPE, (2) significantly impeded the parent’s opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).



Here, the procedural violation did not impede Student’s right to a FAPE, significantly impede Parent’s opportunity to participate in the decision-making process, or cause a deprivation of educational benefit. First, Parent did not allege that she was denied a meaningful opportunity to participate in the October IEP meetings. (FF #s 38-40.) Second, Parent was aware Student would be attending Facility School and District went above and beyond to assist her in completing enrollment forms. (FF #45.) Third, Parent received a copy of the New IEP a little over one week after it was first implemented on October 25. (FF #s 44, 46.) Finally, Student attended Facility School only one day before Parent opted to make him unavailable for his services. (FF #s 47, 50.)

#### **D. Systemic IDEA Violations**

Pursuant to its general supervisory authority, CDE must consider and ensure the appropriate future provision of services for all IDEA-eligible students in District. 34 C.F.R. § 300.151(b)(2). Indeed, the U.S. Department of Education has emphasized that the state complaint procedures are “critical” to the SEA’s “exercise of its general supervision responsibilities” and serve as a “powerful tool to identify and correct noncompliance with Part B.” *Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46601 (Aug. 14, 2006).

Here, the SCO finds and concludes that the violations of 34 C.F.R. §§ 300.322, 300.323, and 300.503 are not systemic in nature. District failed to provide comparable services, but otherwise developed, adopted, and implemented the New IEP in a reasonable amount of time consistent with its practices and procedures. (FF #s 39-40.) Special Education Director and Special Education Coordinator demonstrated an understanding of IDEA’s transfer rules in interviews with the SCO, and District acknowledged the “various disruptions” to Student’s enrollment by offering “60 additional days of support.” (FF #s 22, 42.) District also failed to provide Parent a notice of meeting, but otherwise issued notices for four other IEP meetings. (FF #s 24, 27, 39, 53.) District further failed to provide a sufficient prior written notice, but the IEP team ultimately relied on an evaluation to inform a placement in the LRE based on Student’s unique needs. (FF #s 38-42.) Finally, District failed to provide Parent with the New IEP. (FF # 44.) Overall, District diligently communicated with Parent and this failure appears to stem from a miscommunication related to the generous actions of its staff to consistently print and deliver hard-copy documents to Parent’s home. (FF #s 43-44.) Nothing in the Record indicates any of these issues exist District-wide.

#### **REMEDIES**

The SCO finds and concludes that District has violated the following IDEA requirements:

- a. Failing to provide Parent with a notice for the September 28 IEP meeting, in violation of 34 C.F.R. § 300.322(a);

- b. Failing to provide Parent with a copy of the New IEP, in violation of 34 C.F.R. § 300.322(f);
- c. Failing to provide Student with comparable services, in violation of 34 C.F.R. § 300.323(e); and
- d. Failing to provide proper prior written notice, in violation of 34 C.F.R. § 300.503(b).

To remedy these violations, District is ORDERED to take the following actions:

**1. Corrective Action Plan**

- a. By **Monday, January 31, 2022**, District shall submit to the CDE a corrective action plan (“CAP”) that adequately addresses the violation noted in this Decision. The CAP must effectively address how the cited noncompliance will be corrected so as not to recur as to Student and all other students with disabilities for whom District is responsible. The CAP must, at a minimum, provide for the following:
  - i. Special Education Director, Special Education Coordinator, and Case Manager must review this Decision, as well as the requirements of 34 C.F.R. §§ 300.322, 300.323, and 300.503. This review must occur no later than **Tuesday, March 1, 2022**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **Tuesday, March 8, 2022**.
- b. CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, CDE will arrange to conduct verification activities to confirm District’s timely correction of the areas of noncompliance.

**2. Compensatory Education Services for Denial of a FAPE**

- a. Student shall receive **54 hours of direct specialized instruction** and **30 minutes of indirect specialized instruction** outside the general education classroom to promote progress on Student’s annual IEP goals. This instruction must be provided by an appropriately licensed special education teacher.
- b. Student shall receive **3 hours of direct social-emotional services** and **30 minutes of indirect social-emotional services** outside the general education classroom. These services must be provided by an appropriately licensed provider.

- c. Student shall receive **3 hours of direct occupational therapy services** and **30 minutes of indirect occupational therapy services** outside the general education classroom. These services must be provided by a licensed occupational therapist.
- d. Student shall receive **3 hours of direct speech-language services** and **30 minutes of indirect speech-language services** outside the general education classroom. These services must be provided by an appropriately licensed speech language pathologist or speech language pathology assistant.
- e. Student shall receive **30 minutes of indirect behavior intervention** outside the general education classroom. These services must be provided by an appropriately licensed provider.
- f. All compensatory education must be completed by **Thursday, December 1, 2022**.
- g. Monthly consultation between the provider(s) delivering compensatory services and Special Education Coordinator shall occur to evaluate Student's progress towards IEP goals and adjust instruction accordingly. The purpose of this consultation is to help ensure that compensatory services are designed and delivered to promote progress on IEP goals. District must submit documentation that these consultations have occurred **by the second Monday of each month**, once services begin, until compensatory services have been completed and no later than one year following the date of this Decision. Consultation logs must contain the name and title of the provider, and the date, the duration, and a brief description of the consultation.
- h. To verify that Student has received the services required by this Decision, District must submit records of service logs to CDE **by the second Monday of each month**, once services begin, until all compensatory education services have been provided. The name and title of the provider, as well as the date, the duration, and a brief description of the service, must be included in the service log. District shall communicate with the licensed provider to obtain this information.
- i. By **Monday, February 7, 2022**, District shall schedule compensatory services in collaboration with Parent. A meeting is not required to arrange this schedule, and the parties may collaborate, for instance, via e-mail, telephone, video conference, or an alternative technology-based format to arrange for compensatory services. These compensatory services shall begin as soon as possible and will be in addition to any services Student currently receives, or will receive, that are designed to advance Student toward IEP goals and objectives. The parties shall cooperate in determining how the compensatory services will be provided. If Parent refuses to meet with District within this time, District will be excused from delivering

compensatory services if District diligently attempts to meet with Parent and documents its efforts. A determination that District diligently attempted to meet with Parent, and should thus be excused from providing compensatory services, rests solely with CDE.

- j. District shall submit the schedule of compensatory services to CDE by **Monday, February 14, 2022**. If for any reason, including illness, Student is not available for any scheduled compensatory services, District will be excused from providing the service scheduled for that session. If for any reason District fails to provide a scheduled compensatory session, District will not be excused from providing the scheduled service and must immediately schedule a make-up session in consult with Parent and notify CDE of the change in the appropriate service log.

Please submit the documentation detailed above to the CDE as follows:

Colorado Department of Education  
Exceptional Student Services Unit  
Attn.: Rebecca O'Malley  
1560 Broadway, Suite 1100  
Denver, CO 80202-5149

**NOTE:** Failure by the District to meet any of the timelines set forth above may adversely affect the District's annual determination under the IDEA and subject the District to enforcement action by the CDE. **Given the current circumstances surrounding the COVID-19 pandemic, the CDE will work with District to address challenges in meeting any of the timelines set forth above due to school closures, staff availability, or other related issues.**

#### **CONCLUSION**

The Decision of the SCO is final and is not subject to appeal. *CDE State-Level Complaint Procedures*, ¶13; Rule 2620-R-2.07(9)(c). If either party disagrees with this Decision, the filing of a Due Process Complaint is available as a remedy provided that the aggrieved party has the right to file a Due Process Complaint on the issue with which the party disagrees. *CDE State-Level Complaint Procedures*, ¶13; *See also* 34 C.F.R. § 300.507(a); *71 Fed. Reg. 156, 46607* (August 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 1st day of January, 2022.



Brandon Edelman, Esq.  
State Complaints Officer

## **APPENDIX**

### **Complaint, pages 1-9**

- Exhibit 1: Transfer IEP and E-mail Correspondence
- Exhibit 2: E-mail Correspondence
- Exhibit 3: E-mail Correspondence
- Exhibit 4: E-mail Correspondence
- Exhibit 5: E-mail Correspondence and Letter from Special Education Director

### **Response, pages 1-15**

- Exhibit A: Transfer IEP, Contact Log, Miscellaneous Notes, and New IEP
- Exhibit B: Prior Written Notices
- Exhibit C: Consent for Evaluation
- Exhibit D: Notices of Meeting
- Exhibit E: Transportation Notes and District's 2021-2022 Instructional Calendar
- Exhibit F: None
- Exhibit G: None
- Exhibit H: Miscellaneous Notes and Documents
- Exhibit I: E-mail Correspondence
- Exhibit J: Evaluation Report
- Exhibit K: Policy and Procedures
- Exhibit L: None
- Exhibit M: Response Delivery Verification
- Exhibit N: Prior Written Notices, Amendments to New IEP, and E-mail Correspondence
- Exhibit O: Notice of Meeting and Policy and Procedures

**Reply**: None

### **Telephone Interviews**

- Parent: November 30 and December 7, 2021
- Special Education Director: December 3, 2021
- Special Education Coordinator: December 3 and 6, 2021
- Former Facility School Special Education Staff: December 3, 2021
- CWEL: December 3, 2021