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

State-Level Complaint 2024:594
Denver Public Schools

DECISION

INTRODUCTION

On September 20, 2024, the parent ("Parent") of a student ("Student") not currently identified as a child with a disability under the Individuals with Disabilities Education Act ("IDEA")[1] filed a state-level complaint ("Complaint") against Denver Public Schools ("District"). The Colorado Department of Education ("CDE") 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 CDE has jurisdiction to resolve the Complaint.

The CDE's goal in state complaint investigations is to improve outcomes for students with disabilities and promote positive parent-school partnerships. A written final decision serves to identify areas for professional growth, provide guidance for implementing IDEA requirements, and draw on all available resources to enhance the quality and effectiveness of special education services.

RELEVANT TIME PERIOD

The CDE has the authority to investigate alleged noncompliance that occurred no earlier than one year before the date the Complaint was filed. 34 C.F.R. § 300.153(c). Accordingly, findings of noncompliance shall be limited to events occurring after September 20, 2023. Information prior to September 20, 2023 may be considered to fully investigate all allegations.

SUMMARY OF COMPLAINT ALLEGATIONS

The Complaint raises the following allegation subject to the CDE's jurisdiction under 34 C.F.R. § 300.153(b)[2] of the IDEA:

1. District did not conduct an initial evaluation to determine whether Student qualified as a child with a disability under the IDEA, within 60 days of Parent's request on or around

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[1] 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.

[2] The CDE's state complaint investigation will determine if District complied with the IDEA, and if not, whether the noncompliance resulted in a denial of a free appropriate public education ("FAPE"). 34 C.F.R. §§ 300.17, 300.101, 300.151-300.153.

April 4, 2024, or provide Parent with prior written notice ("PWN") explaining its decision to not evaluate Student, as required by 34 C.F.R. §§ 300.301 and 300.503(a).

FINDINGS OF FACT

After thorough and careful analysis of the entire Record,[3] the CDE makes the following findings of fact ("FF"):

A. Background

1. Student is fifteen years old and is a tenth grader at a high school ("School") in District. *Response*, p. 1.

2. Student is not identified as a student with a disability under IDEA, although District is in the process of evaluating Student's eligibility for special education. *Id.* at p. 2. Student has a Section 504 plan ("504 plan"), based on several chronic medical conditions, which was initially developed on May 23, 2023, during his eighth-grade year. *Exhibit A*, p. 1; *Exhibit F*, pp. 1-7.

3. Student is described as a sensitive, resilient young man who enjoys school and his core group of friends. *Interview with Parent*. Student struggles with severe, chronic migraine headaches that impact all areas of Student's life, including his ability to sleep, interact with peers, engage in physical activity, and attend school. *Id.*

4. On April 4, 2024, Parent submitted to District a written request for an initial evaluation to determine Student's eligibility for special education and related services ("IEP Evaluation"). *Complaint*, p. 4. Parent asserts that District did not complete an evaluation within 60 days of his request and did not provide him prior written notice ("PWN") of its refusal to evaluate Student. *Id.* District acknowledges it did not provide Parent with PWN after deciding not to evaluate Student following Parent's request but asserts this was "an error that was rectified when the District ultimately sought consent for evaluation in the fall." *Response*, pp. 2, 6.

B. District's Policies, Practices, and Procedures

5. The Special Education Director ("Director") with knowledge of the facts concerning the Complaint described District's written policy regarding the special education referral and evaluation processes ("the Policy"). *Interview with Director*; *see Exhibit K*, pp. 1-141. Under the Policy, either school teams or parents may refer a child for a special education evaluation. *Exhibit K*, p. 8. "Once a [parental] referral has been made, the Special Education team . . . is responsible for replying within a reasonable time." *Id.*

6. It is standard procedure after receiving a parent's request for evaluation for School staff to first reach out to parents to better understand the concerns underlying the request and to

[3] The appendix, attached and incorporated by reference, details the entire Record.

gather additional information about Student. *Interviews with Director and School's Director of Curriculum and Instruction-Intervention ("DCI")*. Based on the information gathered, the School team determines the best path forward and, ultimately, whether to proceed with the requested evaluation. *Id.* District staff reported an obligation to respond to a parent's request for evaluation in a timely manner in all cases, though they strive to do so as quickly as possible, typically within one week. *Id.*

7. The Policy also provides that District "may deny referrals for evaluation based on sufficient evidence and data to suggest that the student does not have a suspected disability." *Exhibit K*, p. 18. If District determines a parental referral is not appropriate, "it must provide Prior Written Notice of Special Education Action stating the refusal to initiate the evaluation process." *Id.* at p. 90. The Policy recognizes the "vital importance" of PWN, noting it "provides a clear record for the student, parent, and school of the decisions that have been made; the basis for those decisions; and the actions that have been proposed or refused" and serves "as a clarification and reminder to all parties of commitments made." *Id.* at p. 92.

C. Parent's First Request for Evaluation and District's Response

8. Student enrolled at School on April 2, 2024, near the end of his ninth-grade year. *Exhibit L*, p. 6.

9. On April 4, Parent requested in writing that Student be evaluated for an IEP. *Complaint*, p. 4; *Response*, p. 2; *Exhibit A*, pp. 2-4. Specifically, Parent noted he was "formally requesting an [IEP] under Other Health Impairment (OHI) . . . due to the fact [Student] is missing a lot of school due to his [medical conditions]. The IEP will help support [Student] with services, supports and accommodations." *Exhibit A*, p. 3. Parent was particularly interested in the option of homebound services for Student given his medical needs, with the goal of getting Student "back to a place where he can access his education." *Exhibit L*, p. 30; *Interview with Parent*.

10. Since Parent's request came immediately after Student's enrollment at School, "relevant school staff did not know [Student] personally," though he "presented as a student with significant medical needs who required accommodations through a 504 plan." *Response*, p. 2. Thus, School staff "sought to consult with [Student's] parents . . . to better under the basis for their request." *Id.* at pp. 2-3; *Interviews with Director and DCI*. School staff then began collecting information from Parent regarding Student's health conditions, obtained signed releases of information from Parent to communicate with Student's medical providers, and communicated with those providers. *Reply*, p. 2; *Interview with Parent*; *see Exhibit L*, pp. 11-16, 406.

11. On May 6, Parent emailed School staff regarding the status of the "requested IEP." *Exhibit L*, p. 20. On May 7, DCI responded that it was "appropriate to move forward with a comprehensive IDEA evaluation" and noting a consent to evaluate form would be sent to Parent shortly. *Id.* at p. 23.

12. District did not provide Parent a consent to evaluate following the May 7 email. *Interviews with DCI and Parent*; *see Exhibit 2*, p. 2; *Exhibit L*, p. 369. Instead, School staff engaged in further internal discussions regarding whether homebound services could be provided under a 504 plan or required an IEP. *Exhibit L*, pp. 5-6, 55-56; *Interview with DCI*. After determining that homebound instruction could be provided under a 504 plan and that "Parent's primary reason for requesting an IEP was to acquire homebound instruction for [Student]," the School team began to consider that proceeding under Student's 504 plan was the appropriate path forward. *Response*, p. 3; *Interviews with DCI and Director*.

13. On May 21, the School nurse sent an internal email to the team, including DCI, and conveyed Parent's concerns in regard to "getting a[n] IEP in place for [Student] as soon as possible as school is ending." *Exhibit L*, p. 3. Specifically, Parent had expressed concern that Student's 504 plan had not reviewed as well "but [did] not want that to slow down the IEP process." *Id.*

14. On May 31, Director, DCI, and other School staff held a phone call with Student's Mother to discuss the plan moving forward. *Interviews with Parent, Mother, DCI, and Director*; *see Exhibit L*, p. 41. Parent was not able to participate in this call, though Mother relayed the team's discussions and decisions to Parent after the meeting. *Interviews with Parent and Mother*. The parties agree that the primary purpose of this call was to discuss the possibility of homebound instruction to address Student's medical needs through his 504 plan; however, their understandings differ as to the agreement reached regarding the requested IEP evaluation going forward. *Interviews with Director, DCI, and Parent*.

15. District asserts that School staff "reached what they believed to be a shared understanding with Parents that Section 504 processes were the more fitting approach to address [Student's] medical needs related to school," specifically because Parent did not express he was seeking "special education" for Student, but rather homebound instruction and accommodations due to Student's medical conditions. *Response*, p. 3. Thus, it was School staff's understanding that the family agreed to move forward with the 504 processes, including scheduling a 504 meeting, instead of pursuing the IEP evaluation. *Id.*; *Interviews with Director and DCI*.

16. Mother confirms the team discussed the possibility of providing homebound instruction under Student's 504 plan and that she agreed to schedule a subsequent 504 meeting during the May 31 phone call. *Interview with Mother*. However, both Mother's and Parent's understanding after the call was that the team was still going forward with the requested IEP evaluation while they further explored the option of homebound instruction under Student's existing 504 plan. *Reply*, p. 2; *Interviews with Parent and Mother.* Specifically, Mother asserts that "at no time did anyone tell us that they weren't moving forward with the IEP evaluation." *Interview with Mother*.

17. There is no direct written documentation regarding the substance of the May 31 phone call, including any agreement by Mother to forego the requested IEP evaluation. *See Exhibit E*, p. 1; *Exhibit L*, pp. 1-727.

18. District acknowledges that, following the May 31 phone call, it had made the decision not to evaluate Student for special education services and was therefore required to issue Parent PWN of that decision at this time. *Interviews with Director and DCI*; *Response*, pp. 2, 6; *see Complaint*, p. 4. Given that Parent was not provided PWN and that there was no other written documentation provided around the substance of this call, the State Complaints Officer ("SCO") finds that Parent did not withdraw his request for evaluation at this time.

D. Parent's Continued Requests for Evaluation and District's Agreement to Evaluate

19. On June 13, Parent emailed DCI regarding the status of his April 4 request for an IEP evaluation, specifically asking "[w]hat has [District] accomplished to date on an IEP?" and "[w]hat next steps are needed going forward to get [Student's] IEP in place?" *Exhibit L*, p. 174. Parent did not receive a written response to this request, and it is unclear to what extent it was discussed in the subsequent 504 meeting held the same day. *Interviews with Parent and DCI*. However, it is clear that the parties' understandings after the June 13 meeting remained unchanged: District's understanding continued to be that Parent agreed to move forward with the 504 processes instead of the IEP evaluation and it remained Parent's understanding that the team was pursuing homebound instruction under Student's 504 plan while the IEP evaluation was simultaneously in process. *Reply*, p. 2; *Interviews with Parent, Director, and DCI*.

20. After the June meeting and throughout the summer, Parent and the School team continued to discuss the possibility of homebound instruction under Student's 504 plan, summer school plans, and related matters. *See, e.g.*, *Exhibit L*, pp. 215, 234-46, 251-52, 345, 359.

21. On August 21, Parent emailed School staff again asking to "initiate setting up an IEP" as soon as possible and sent a follow-up request on August 27 regarding the status of the IEP. *Id.* at pp. 362, 381. In response, on August 28, School staff noted the team would "document [his] formal request" for an IEP evaluation. *Id.* at p. 412. Director and DCI reported the action of "documenting a formal request" for evaluation refers to staff's trigger to begin gathering further information from parents and ultimately determine whether to seek consent for the evaluation or not within a reasonable time. (FF # 6); *Interviews with Director and DCI*. Based on School staff's understanding that Parent had previously agreed to move forward with the 504 processes instead of the IEP evaluation, Parent's request in August was treated as a new request for evaluation. *Interviews with Director and DCI*; *see Exhibit L*, p. 440.

22. On September 6, Parent expressed the "need to focus on getting [Student's] IEP . . . in place," noting "[t]his was formally requested in writing on April 4, 2024 as well as we have made numerous requests regarding his IEP and we have received no communication." *Exhibit L*, p. 414. The Record indicates that, between his initial request on April 4 and District ultimately seeking consent to evaluate, Parent made written inquiries to School staff related to an IEP or IEP evaluation for Student on at least seven separate occasions. *See id.* at pp. 15, 20, 26, 174, 362, 398, 414.

23. District recognizes Parent's "repeated communications to the school" during this time but argues those communications "confirmed that the services and supports [Parent was] seeking were homebound instruction and accommodations, not 'special education.'" *Response*, p. 3; *see Exhibit L*, pp. 173, 362, 414.

24. Ultimately, on September 11, "[w]hile the District still lacked information suggesting a suspected need for special education evaluation, the District agreed to comply with Parent's request for evaluation" and provided Parent PWN and a consent form for initial evaluation. *Response*, p. 4; *Interview with DCI*; *see Exhibit L*, pp. 440-41; *Exhibit B*, pp. 1-3. Parent signed the consent for evaluation on September 12. *Response*, p. 4; *Exhibit B*, p. 3.

25. Student's evaluation is currently in process but has not yet been completed as of the date of this Decision. *Interview with Parent*; *see Exhibit L*, p. 501.

CONCLUSIONS OF LAW

Based on the Findings of Fact, the CDE enters the following CONCLUSIONS OF LAW:

Conclusion to Allegation No. 1: District did not seek parental consent for evaluation within a reasonable timeframe after Parent's request or provide Parent with PWN explaining its decision to not evaluate Student, as required by 34 C.F.R. §§ 300.301 and 300.503(a). This did not result in a denial of FAPE.

A. Legal Requirements

An initial special education evaluation seeks to determine whether a child has a disability within the scope of the IDEA and, if so, aids the IEP Team in the development of the child's IEP. 34 C.F.R. § 300.304(b)(1)(i)-(ii); ECEA Rule 4.02(4). School districts must complete a comprehensive initial evaluation before providing special education services to a child with a disability. 34 C.F.R. § 300.301(a).

A school district may initiate a special education evaluation on its own reasonable suspicion, or a parent may request an initial special education evaluation. *Id.* § 300.301(b); ECEA Rule 4.02(3)(a). Once a parent requests an evaluation, a school district has two options: (1) agree to evaluate the child and obtain parental consent for the evaluation, or (2) deny the request to evaluate and provide the parent with PWN explaining its decision. *Cherry Creek Sch. Dist.*, 119 LRP 30204 (SEA CO 05/17/19); 34 C.F.R. § 300.503(a).

If a district agrees with a parent's request for an initial evaluation, it must seek parental consent for the evaluation and, within 60 days of receiving parental consent, conduct the evaluation. 34 C.F.R. § 300.301(c); ECEA Rule 4.02(3)(c). IDEA does not set a specific timeframe from when a parent requests an initial evaluation to when parental consent must be obtained for the evaluation. *See In re Student with a Disability*, 124 LRP 9974 (SEA MT 01/29/24). However, the U.S. Department of Education instructs that school districts should seek parental consent within

a reasonable period of time after a parent referral for evaluation and that "delays of several months are generally unacceptable." *Memorandum to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011); *Letter to Anonymous*, 50 IDELR 258 (OSEP 2008).

If a school district does not suspect a child has a disability and denies a parent's request for an initial evaluation, the district must provide PWN to parents explaining why the district refuses to conduct an initial evaluation and the information that was used as the basis for that decision. 34 C.F.R. § 300.503(a)-(b); *see also Memorandum to State Directors of Special Education*, 56 IDELR 50 (OSEP 2011). Further, "[a] district cannot escape its obligation to provide [PWN] by failing to appropriately respond to a parent's request. A school district's decision to take no action qualifies as affirmative refusal." *W. Linn-Wilsonville Sch. Dist.*, 121 LRP 40626 (SEA OR 06/11/21).

School districts that do not either obtain parental consent or provide PWN after a parental request for an evaluation will not comply with IDEA. *See Athens City Schs.*, 123 LRP 36938 (SEA OH 07/18/23) (following Parent's request for evaluation, "District did not obtain consent, complete an evaluation, nor did it send the Parent [PWN] to say it did not suspect a disability and would not be conducting an evaluation," resulting in IDEA violation); *Bay Cnty. Sch. Bd.*, 81 IDELR 172 (SEA FL 07/12/22) (finding district did not comply with IDEA when it "did not, . . . prior to filing of [Parent's] Complaint, obtain consent from [Parent] to conduct the evaluation or provide [PWN] explaining the refusal to conduct the evaluation").

B. <u>Parent's Requests for an Initial Evaluation</u>

Here, Parent requested an initial IEP evaluation on April 4, 2024. (FF #s 4, 9). At that time, District did not directly agree to the evaluation and obtain Parent's consent to evaluate, and it did not directly refuse the evaluation and provide Parent PWN of its decision; instead, District effectively took no action on Parent's request for an evaluation until September 11, 2024, when it first sought Parent's consent. (FF #s 12, 17-18, 24). District asserts it reached a shared understanding with Parent in May 2024 that the 504 processes, rather than an IEP evaluation, was the appropriate path forward for Student's needs. (FF # 15). However, Parent's continued and consistent requests for an IEP evaluation after his initial request in April belies this assertion, and nothing in the Record indicates Parent at any time agreed to proceed with the 504 processes instead of an IEP evaluation such that Parent withdrew his request for evaluation. (FF #s 18, 22).

District acknowledges that PWN should have been provided to Parent in May 2024 when District decided not to pursue Parent's requested evaluation in favor of the 504 processes (FF #s 4, 18). However, District asserts that its "error was rectified" when it ultimately sought Parent's consent for evaluation on September 11, 2024. (FF # 4). Pursuant to District's own policy and the federal guidance, however, District must seek parental consent for evaluation within a reasonable time after a parent's request. (FF #s 5-6). Here, the SCO finds and concludes that the five-month gap between Parent's request for evaluation and District seeking Parent's consent was unreasonable and did not "cure" District's failure to provide Parent PWN after its initial decision not to evaluate Student. *See, e.g.*, *Arapahoe Cnty. Sch. Dist. 6*, 121 LRP 13659 (SEA CO 03/03/21) (finding a 45-day delay in obtaining parental consent for an initial evaluation resulted in IDEA noncompliance).

Therefore, the SCO finds and concludes that District did not seek parental consent for evaluation within a reasonable timeframe after Parent's request or provide Parent with PWN explaining its decision to not evaluate Student, as required by 34 C.F.R. §§ 300.301 and 300.503(a).

C. <u>Procedural Noncompliance</u>

Procedural noncompliance with the IDEA results in a denial of FAPE if it (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); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765-66 (6th Cir. 2001). For a district to be held liable for a denial of FAPE, the student must be a student with a disability. *D.G. v. Flour Bluff Indep. Sch. Dist.*, 481 F. App'x 887, 893 (5th Cir. 2012) (holding that a district cannot be held liable for a denial of FAPE unless the student has a need for special education).

Here, Student is not currently IDEA-eligible (FF # 2) and "it cannot be known until after an evaluation whether Student will qualify for special education." *Pueblo Sch. Dist. 60*, 124 LRP 36441 (SEA CO 05/31/24). Without the ability to determine at this time whether Student is a child with a disability who is in need of special education and related services (FF #s 2, 25), the SCO cannot determine that District's procedural noncompliance impeded Student's right to a FAPE, significantly impeded Parent's opportunity to participate in the decision-making process, or caused a deprivation of educational benefit. *See id.*; *Douglas Cnty. Sch. Dist.*, 119 LRP 30196 (SEA CO 04/15/19); *D.G.*, 481 F. App'x at 893. For this reason, the SCO finds and concludes that District's noncompliance did not result in a denial of FAPE.

<u>Systemic IDEA Noncompliance</u>: This investigation does not demonstrate noncompliance that is systemic and likely to impact the future provision of services for all children with disabilities in the District if not corrected.

Pursuant to its general supervisory authority, CDE must consider and ensure the appropriate future provision of services for all IDEA-eligible students in the 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 Disability and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46601 (Aug. 14, 2006).

Here, nothing in the Record indicates that the District's noncompliance is systemic in nature. District's policies and procedures regarding special education referrals and initial evaluations are consistent with IDEA's requirements, and District staff accurately described those policies. (FF #s 5-7). Further, District acknowledges it was required to provide Parent PWN of its decision not to evaluate Student in accordance with its own policies and IDEA's requirements (FF #s 4, 18). Accordingly, the SCO finds and concludes that the noncompliance in this case was not systemic and is unlikely to affect the future provision of services to children with disabilities.

REMEDIES

The CDE concludes that District did not comply with the following IDEA requirements:

1. Seeking Parent's consent for evaluation within a reasonable timeframe after Parent's request or providing Parent with PWN explaining its decision not to evaluate Student, as required by 34 C.F.R. §§ 300.301 and 300.503(a).

To demonstrate compliance, District is ORDERED to take the following actions:

1. **Corrective Action Plan**

    a. By **December 17, 2024**, District shall submit to the CDE a corrective action plan ("CAP") that adequately addresses the noncompliance 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 CDE will approve or request revisions that support compliance with the CAP. Subsequent to approval of the CAP, the CDE will arrange to conduct verification activities to confirm District's timely correction of the areas of noncompliance.

2. **Final Decision Review**

    a. Director, DCI, and all other special education administrators in District must review this Decision, as well as the requirements of 34 C.F.R. §§ 300.301 and 300.503(a). This review must occur no later than **January 7, 2025**. A signed assurance that these materials have been reviewed must be completed and provided to CDE no later than **January 14, 2025**.

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

Colorado Department of Education
Exceptional Student Services Unit
Attn.: CDE Special Education Monitoring and Technical Assistance Consultant
201 E. Colfax Avenue
Denver, CO 80203

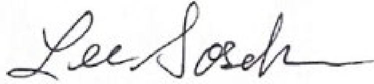
NOTE: If District does not meet the timelines set forth above, it may adversely affect the District's annual determination under the IDEA and subject the District to enforcement action by the CDE.

CONCLUSION

The Decision of the CDE is final and is not subject to appeal. *CDE State-Level Complaint Procedures*, 13. 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 (Aug. 14, 2006). This Decision shall become final as dated by the signature of the undersigned SCO.

Dated this 19th day of November, 2024.



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Lee Sosebee, Esq.
State Complaints Officer

APPENDIX

<u>Complaint, pages 1-8</u>

<u>Response, pages 1-7</u>

- <u>Exhibit A</u>: Request to Evaluate
- <u>Exhibit B</u>: PWN
- <u>Exhibit C</u>: Consent Forms
- <u>Exhibit E</u>: Meeting Notes
- <u>Exhibit F</u>: 504 Documents
- <u>Exhibit G</u>: Evaluations
- <u>Exhibit H</u>: Student's Medical Documents
- <u>Exhibit I</u>: Grade, Progress, Attendance Reports
- <u>Exhibit J</u>: District Calendar
- <u>Exhibit K</u>: Policies and Procedures
- <u>Exhibit L</u>: Correspondence
- <u>Exhibit M</u>: Relevant Staff Information

<u>Reply, pages 1-3</u>

- <u>Exhibit 1</u>: Request for Evaluation
- <u>Exhibit 2</u>: Response to Exhibit L
- <u>Exhibit 3</u>: Policies
- <u>Exhibit 4</u>: Medical Note
- <u>Exhibit 5</u>: Timeline
- <u>Exhibit 6</u>: Correspondence

<u>Telephone Interviews</u>

- <u>Parent and Mother</u>: October 22, 2024; November 4, 2024
- <u>Director</u>: October 24, 2024
- <u>DCI</u>: October 23, 2024