United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

J.G.,

Plaintiff,

v.

OAKLAND UNIFIED SCHOOL DISTRICT,

Defendant.
_____/

No. C -14-00366 EDL

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff J.G. filed this action seeking review of an administrative decision by an Administrative Law Judge ("ALJ") in the Office of Administrative Hearing ("OAH") rejecting Plaintiff's claims that from May 2011 through August 2012, Defendant failed to properly identify Plaintiff as an individual with a disability in violation of Defendant's "child find" obligations under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1412(a)(3), failed to assess Plaintiff in all areas of suspected disability, 20 U.S.C. § 1415(a)(3)(B), and accordingly failed to provide Plaintiff with a free and appropriate public education ("FAPE"), 20 U.S.C. § 1412(a)(1). The parties have filed cross-motions for summary judgment. For the reasons stated at the September 2, 2014 hearing and in this Order, Plaintiff's Motion for Summary Judgment is denied and Defendant's Motion for Summary Judgment is granted.

Facts

In fall 2009, when Plaintiff was in the third grade at CiviCorps Elementary School, a charter school chartered by Defendant Oakland Unified School District ("OUSD" or "Defendant"), he was given a psychoeducational assessment and an academic assessment to determine whether he was eligible for special education. Annie Lau, the District school psychologist, conducted the psychoeducational assessment in November 2009. Record on Appeal, AR000309-315. Ms. Lau

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conducted an examination of Plaintiff's school records, conducted observations of him and interviewed his third grade teacher. Ms. Lau concluded that Plaintiff was "not demonstrating any processing deficits which would be suggestive of a specific learning disability." Id. at AR000314.

In December 2009, Eric Miller, a resource specialist, assessed Plaintiff's academic performance. Record on Appeal, AR000272-273. Mr. Miller's educational evaluation was based on Plaintiff's prior test results and Mr. Miller's impressions from providing remedial support to Plaintiff on an informal basis. Mr. Miller made recommendations for improving Plaintiff's reading and getting his homework completed, but did not opine as to whether Plaintiff had a disability.

In December 2009, the District held an Individualized Education Program ("IEP") team meeting at which Ms. Lau and Mr. Miller presented the results of their assessments and expressed the view that Plaintiff did not have a disability that would make him eligible for special education. Record on Appeal, AR000187-197. Mr. Bartone, Plaintiff's third grade teacher, reported that he saw some improvements in Plaintiff's language arts skills after Plaintiff began working with Mr. Miller. Record on Appeal, AR000195. Mr. Miller added that he saw some "attentional" problems that contributed to Plaintiff's academic problems. Id. The IEP team ultimately found that Plaintiff was not eligible for special education.

During this time, Plaintiff was graded on a 1 to 5 scale with 1 being the lowest grade. In third grade, Plaintiff received a "2" grade for nearly all aspects of language and writing arts in the fall semester, but a "3" in most of those aspects in the winter and spring. Record on Appeal, AR000288-291. He received a mix of "2" and "3" grades in math for the fall semester, but a mix of "3" and "4" grades in the winter and spring. Id. In the fall, Mr. Bartone commented that Plaintiff had worked hard and was trying his hardest, and that Mr. Bartone had "seen a marked difference in his writing from the beginning of the year until now." Record on Appeal, AR000290. In the winter, Mr. Bartone stated that Plaintiff continued to show progress academically, especially in writing and reading. Id. Mr. Bartone stated in the spring that Plaintiff had made amazing progress and had "grown exponentially in each subject." Id. Mr. Bartone twice used the phrase "Keep up the awesome work!" in the report card. Id.

After Plaintiff's third grade year, Civicorps' new principal, Dr. Desiree Braganza, revised the

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school's grading system. In fourth grade, Plaintiff received lower grades. Record on Appeal, AR000334-336. Plaintiff received a "1" grade in every language arts category and a "2" grade in almost all math categories. Four of the thirteen language and writing arts categories rose to a "2" by the spring and nine of the twenty-five math categories rose to a "3." His fourth grade teacher, Ms. Vaughns, concluded in the fall that Plaintiff was a "very hard working student," but that "his skills lag far behind his grade level which is making it much more difficult for him to progress." Record on Appeal, AR000336. Ms. Vaughns stated that Plaintiff was in need of extra support. Id.

In fifth grade, Plaintiff's teachers were Jennifer Rikkers and Abdul-Haqq Khalifah. Record on Appeal, AR000337-339. Plaintiff received a mix of "2," "3" and "4" grades in language and writing arts categories, and a mix of "2" and "3" in math and science. His spring grades showed progress in a few areas. Plaintiff's teachers commented that Plaintiff's "grades do not reflect the amount of time and effort he puts into his learning." Record on Appeal, AR000338.

According to the ALJ, both fifth grade teachers stated that they expressed concern to one or more District administrators that Plaintiff's academic performance, particularly in reading and related subjects, was unsatisfactory and below his abilities. Record on Appeal, AR000385. Constance Moore, Plaintiff's art teacher and unrelated "aunt," also noticed that Plaintiff worked hard but read poorly, and repeatedly expressed her concerns about his low academic performance to at least one administrator. Record on Appeal, AR000599-602. Dr. Braganza, however, testified that at no time did Plaintiff's aunt or his fifth grade teachers specifically request further assessment of Plaintiff for special education eligibility. Id. AR000934-36.

John Rusk, the District's compliance coordinator, testified at the administrative hearing that variations in grades such as those earned by Plaintiff typically result from a partial failure to access the curriculum or to focus, whereas grades of special education students typically show difficulties throughout their school experiences. Record on Appeal, AR000694. Mr. Rusk noted that Plaintiff had twenty-four absences in the third grade year and eighteen absences in his fourth grade year, and that such high absences prevented access to the curriculum. Record on Appeal, AR000386. Mr. Rusk testified that the District did not turn down a written or oral request to assess Plaintiff. Record on Appeal, AR000867.

Dr. Pamela Mills testified as an expert for Defendant. Record on Appeal, AR000985. She reviewed Plaintiff's educational records and assessments. She testified that a student with a processing disorder would not show as wide a variation in performance as Plaintiff did, and that a student with a specific learning disability ("SLD")[1] typically makes very slight to no academic progress. Record on Appeal, AR001050-1051. Also, she testified that a processing disorder normally appears when a child is young, and would not typically appear for the first time in fifth grade, absent a specific event such as head trauma, which was not at issue here. Record on Appeal, AR001051. Dr. Mills opined that Plaintiff did not qualify as a student with an SLD. Id.

The ALJ noted that no expert who was trained in identifying disabilities, or any other witness, testified in contradiction to the interpretation of Plaintiff's variable grades by Dr. Mills and Mr. Rusk. Record on Appeal, AR000387. The ALJ also noted that the record did not reveal that any person, including Plaintiff's fifth grade teachers and Plaintiff's family members, made a written request for further assessment of Plaintiff for special education. Id. AR000387-388.

In fall 2011, the District decided to reconsider Plaintiff's eligibility for special education. It did not administer new psychoeducational and academic assessments, but instead continued to rely on the assessments completed in 2009. In February 2012, Lesley Tilley, Civicorps' speech and language pathologist, administered the Clinical Evaluation of Language Fundamentals, a standardized measure of receptive and expressive language skills, to Plaintiff. She noted that Plaintiff "presents with solid expressive and receptive language skills within expected ranges for his grade, age and gender when compared to his peers." Record on Appeal, AR000345. She did not find that Plaintiff had any problems with speech intelligibility. Id. She concluded that he did not have a speech or language impairment and did not need special speech and language services. Id.

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[1] An SLD is defined as "a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations." 20 U.S.C. § 1401(30); Cal. Educ. Code § 56337; Cal. Code Regs. tit. 5 § 3030(b)(10) ("Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may have manifested itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The basic psychological processes include attention, visual processing, auditory processing, sensory-motor skills, cognitive abilities including association, conceptualization and expression.").

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On April 3, 2012, the District held another IEP team meeting. Record on Appeal, AR000213-226. The District determined that Plaintiff was not eligible for special education. Id.

The ALJ in this case held a hearing in September 2013 on Plaintiff's appeal of the District's decision. According to the ALJ, Plaintiff contended that he had an auditory processing disorder ("APD"). Ms. Tilley opined that several of the tests she conducted for the speech and language assessment would have exposed an APD if he had one, but did not. See e.g., Record on Appeal, AR000763. Pamela Macy, a speech and language pathologist, testified for Defendant and stated that an APD is a disorder in how the brain processes a message in spoken language, and the ability to process spoken language affects language development, language use and language understandings. Record on Appeal, AR001057-58. Ms. Macy reviewed Plaintiff's records and corroborated Ms. Tilley's conclusion that the test results did not indicate that Plaintiff had an APD or any other disorder. Record on Appeal, AR001063. Ms. Macy also testified that if Plaintiff had an APD, he could not have achieved the grades he earned in areas that implicated auditory processing skills such as listening and speaking. She opined that Plaintiff was "within the instructional range" for fifth grade. Record on Appeal, AR001088. No witness testified at the administrative hearing that Plaintiff had an APD or disagreed with Ms. Tilley and Ms. Macy that he did not have an APD. The ALJ concluded that there was no evidence by April 2012, the date of the IEP team decision, that Plaintiff had an APD.

After the April 2012 IEP team decision, Plaintiff left Civicorps and the Oakland Unified School District to attend sixth grade at the Realm school in the Berkeley Unified School District ("BUSD"). BUSD assessed Plaintiff in December 2012, and found him eligible for special education services in the category of SLD due to an APD. At the hearing, Plaintiff offered into evidence three assessments by BUSD as well as the BUSD IEP document itself.

The first document was the UC Berkeley Binocular Vision Assessment, conducted by the Children's Vision and Neuro-Optometry Binocular Vision Clinic. Among other things, the Vision Clinic assessed Plaintiff's auditory perceptual skills, using an unidentified version of the Test of Auditory Perceptual Skills ("TAPS"). The assessment concluded that Plaintiff had a learning deficit in the area of auditory perception, and recommended an evaluation with a speech and language

therapist. The ALJ noted that Plaintiff did not call the authors of the Vision Clinic's report as witnesses, or anyone who could discuss it. Record on Appeal, AR000393. Ms. Macy and Dr. Mills testified at the hearing that the report was invalid and unreliable because the optometrists who conducted the assessment were not trained to determine the existence of an APD, because the publisher of the TAPS test does not recommend relying solely on the TAPS test to diagnose an APD, because the Vision Clinic used an outdated version of the TAPS test, and because the TAPS scores were wrongly reported. Record on Appeal, AR001071-73. Ms. Macy testified that she found no test scores in the Vision Clinic's report that demonstrated the presence of an APD. Record on Appeal, AR001077. The ALJ noted that no witness defended the Vision Clinic's report. Record on Appeal, AR000393.

The second document was the Berkeley psychoeducational assessment conducted by Berkeley school psychologist Vy Nguyen in late 2012. Mr. Nguyen found that Plaintiff was performing in the average range to high average range on all standardized measures of thinking, reasoning, and problem solving as well as most measures for processing with the exception of language. Mr. Nguyen concluded that Plaintiff met the eligibility requirements for an SLD because he had a discrepancy between ability and achievement, and a processing deficit in auditory processing. Record on Appeal, AR000394. The ALJ noted that these conclusions were not explained, and no reference was made to any specific measurement or test data. Record on Appeal, AR000394-395. Dr. Mills testified that she did not agree with Mr. Nguyen's SLD finding, and that none of the scores revealed a severe discrepancy between tested cognition and achievement required for a finding of SLD. Record on Appeal, AR000395. Dr. Mills concluded that Mr. Nguyen's finding of a discrepancy was not supported by the test data and that his conclusion concerning auditory processing was not adequately documented. Id. The ALJ noted that no witness appeared to defend Mr. Nguyen's assessment and Dr. Mills' criticism was unrefuted. Id.

The third document was the Berkeley Academic Assessment conducted in early December 2012 by education specialist Sheryll Holmes. Ms. Holmes completed an assessment that was similar to the one conducted by Mr. Miller in 2009. Ms. Holmes concluded that Plaintiff would "benefit from" special education support, but the basis for the conclusion was not in the record, so the ALJ

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gave the conclusion no weight. Record on Appeal, AR000395.

The fourth document was the Berkeley IEP report (Record on Appeal, AR000227-271) in which the IEP team accepted Mr. Nguyen's opinion that Plaintiff had a learning disability, and found that Plaintiff had a "severe discrepancy between measures of intellectual ability" in the areas of reading comprehension, basic reading skills and reading fluency. Record on Appeal, AR 000396. BUSD offered Plaintiff sixty minutes per week of resource support, which Plaintiff's grandmother accepted. Id.

At some time during Plaintiff's sixth grade year in BUSD, his grandmother withdrew him from Realm and placed him at Rascob, a non-public school. Rascob's executive director, Edith Ben Ari, testified that Plaintiff's reading skills were at a third grade level. Record on Appeal, AR000683. Plaintiff contends that this assessment supported his conclusion that he must have a learning disability of some kind. Record on Appeal, AR000396. The ALJ concluded that the Rascob assessment, which was conducted more than one year after Plaintiff left Defendant's school district, was of no value in determining whether Plaintiff had an SLD, because the record did not contain any other information about the Rascob assessment and because Ms. Ben Ari testified that having an SLD is not a requirement for admission to Rascob and that she did not know the nature of any disability suffered by Plaintiff. Record on Appeal, AR000396.

The ALJ noted that there might have been other causes for Plaintiff's academic difficulties. Record on Appeal, AR000396. Mr. Miller noted that Plaintiff had a history of missing school and was frequently absent on Fridays when Mr. Miller was supposed to work with him. Record on Appeal, AR000794. Because of his absences, Plaintiff was not consistently exposed to the curriculum. Record on Appeal, AR000794-95. Also, Plaintiff did not complete his homework on a consistent basis. Record on Appeal, AR000794. Mr. Miller testified that the remedial work that he did with Plaintiff in the third, fourth and fifth grades largely involved his class assignments and homework completion because Plaintiff would frequently fail to complete the work without Mr. Miller's help. Record on Appeal, AR000799. Mr. Miller testified that Plaintiff's low average cognitive profile, in combination with his attendance and homework problems, made it difficult for him to work at grade level. Record on Appeal, AR000820-21. Mr. Miller does not believe that

Plaintiff has a learning disorder. Record on Appeal, AR000826. In addition, Mr. Rusk established that Plaintiff's absences from school worsened his ability to access the curriculum. Record on Appeal, AR000397.

In his decision, the ALJ examined Plaintiff's need for special education. Mr. Rusk established that Defendant offers remedial instruction to students who need it, called Response to Intervention ("RTI"), even if they do not qualify for special education. Record on Appeal, AR000866. This informal process in Oakland differs from formal RTI that some other districts utilize. While remediation provides assistance with matter that a student misses or has already received, special education is specialized instruction uniquely designed to provide a student with a disability access to the curriculum. Record on Appeal, AR000398. Mr. Miller's instruction of Plaintiff during his third, fourth and fifth grade years was remedial and was Defendant's version of informal RTI, and was not the kind of instruction given for students with an IEP. Id. Mr. Miller testified without contradiction that the remedial instruction that he gave Plaintiff was successful, that Plaintiff enjoyed it, and that they were able to complete Plaintiff's assignments so that Plaintiff made progress in school. Id.

Ms. Rikkers, Plaintiff's grandmother and Plaintiff's aunt each opined that Mr. Miller's instruction was insufficient because it was irregular and Mr. Miller was not always present. Record on Appeal, AR000398. The ALJ noted that their view that Mr. Miller irregularly provided services was inaccurate, particularly because Ms. Rikkers left Civicorps during Plaintiff's fifth grade year, so she was not in a position to know how often Mr. Miller was there after she left. Record on Appeal, AR000398. Also, the ALJ noted that Plaintiff's aunt was unaware of any in-class services that may have been provided, and Plaintiff's grandmother did not have personal knowledge about events at school or Mr. Miller's instruction. Record on Appeal, AR000398. The ALJ found that Mr. Miller and Dr. Braganza testified credibly that Mr. Miller was at Civicorps on Wednesdays and Fridays, and that he missed many sessions with Plaintiff because of Plaintiff's absences. Record on Appeal, AR000398. The ALJ concluded that other than suggesting that Mr. Miller appeared at school only irregularly, Plaintiff produced no evidence concerning whether Plaintiff's deficits could be adequately addressed by means short of special education, and stated that: "No witness testified that

the District's non-special-education remedial program would not adequately address Student's academic difficulties." Ex. 58 at AR000399.

The ALJ's decision

The ALJ addressed three issues:

Issue 1: From May 2011 through February 2012, did the District deny Student a free appropriate public education (FAPE) by not finding him eligible for special education services?

Issue 2: Between February 2012 and August 2012, did the District deny Student a FAPE by failing to assess him in all areas of suspected disability, which prevented Grandmother from meaningfully participating in Student's educational decision-making process and/or denied Student an educational benefit?

Issue 3: Did the District deny Student a FAPE by not finding him eligible for special education services on April 3, 2012?

Record on Appeal, AR000380. The ALJ analyzed Issues 1 and 3, and concluded that Plaintiff "did not prove that at any time from May 2011 through April 3, 2012, the District should have found him eligible for special education." Record on Appeal, AR000407. As for Issue 2, the ALJ found that: "the District, once having assessed Student for eligibility and found him ineligible, had no obligation to reassess him simply due to the passage of time or on request of a parent or teacher." Id. at AR000404.

Legal Standard

Statutory Framework

Under the IDEA and California law, all children with disabilities are entitled to a FAPE. See 20 U.S.C. § 1412(a)(1). These statutes impose an affirmative obligation on school districts to identify, locate, and evaluate children with disabilities within their local areas (child find obligations). See 20 U.S.C. § 1412(a)(3). Furthermore, districts must develop, review, and revise an individualized education program (IEP) for each child with a disability. See 20 U.S.C. § 1412(a)(4). An IEP must, among other requirements, contain a written statement of: the child's present levels of academic achievement and functional performance; measurable annual goals in academic and functional areas; and the special education services that will be provided. See 20 U.S.C. § 1414(d)(1)(A).

School districts must comply with both the procedural and substantive requirements of the IDEA. See N.B. v. Hellgate Elem. Sch. Dist., 541 F.3d 1202, 1207 (9th Cir. 2008) (citations omitted). Compliance with the IDEA procedures is "essential to ensuring that every eligible child receives a FAPE, and those procedures which provide for meaningful parent participation are particularly important." Amanda J. ex rel. Annette J. v. Clark County Sch. Dist., 267 F.3d 877, 891 (9th Cir.2001). "When the elaborate and highly specific procedural safeguards embodied in [the IDEA] are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid." Bd. of Educ. v. Rowley, 458 U.S. 176, 205 (1982). Furthermore, a school district must comply not only with federal statutory and regulatory procedures, but with state regulations as well: "State standards that are not inconsistent with federal standards [under the IDEA] are also enforceable in federal court." W.G. v. Bd. of Trs. of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1483 (9th Cir.1992). As the Ninth Circuit has recognized, there is some leeway in the procedural requirements:

> Not every procedural violation, however, is sufficient to support a finding that the child in question was denied a FAPE. Technical deviations, for example, will not render an IEP invalid. On the other hand, procedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits, clearly result in the denial of a FAPE.

Amanda J., 267 F.3d at 892 (citations and internal quotations omitted).

Substantively, an IEP developed by a district for a disabled student must be "reasonably calculated to enable the child to receive educational benefits." Id. (quoting Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley, 458 U.S. 176, 206–07, 102 S.Ct. 3034 (1982)). If parents disagree with "any matter relating to the identification, evaluation, or educational placement of [their] child, or the provision of a free appropriate public education to such child," they may obtain review through an impartial due process hearing by the state educational agency. See 20 U.S.C. § 1415(b)(6)(A), (f). Subsequently, parties may appeal the administrative agency's decision by filing suit in district court. § 1415(i)(2)(A), (f).

Standard of Review

On appeal of an administrative agency decision, the IDEA provides that "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i). Congress' instruction that a court base its decision on the preponderance of the evidence means that judicial review of IDEA proceedings is not confined to the "highly deferential" standard typically accorded other agency actions. See Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1471 (9th Cir.1993). At the same time, the preponderance of the evidence standard "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." Capistrano Unified Sch. Dist. v. Wartenberg by & Through Wartenberg, 59 F.3d 884, 891 (9th Cir.1995) (internal quotation marks omitted) (quoting Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)). Instead, the district court's obligation to receive the administrative record "carries with it the implied requirement that due weight shall be given to these proceedings." Rowley, 458 U.S. at 206, 102 S.Ct. 3034.

On the question of what constitutes "due weight," the Ninth Circuit has instructed courts that they retain discretion in determining how much deference to give state educational agencies. See Gregory K. v. Longview Sch. Dist., 811 F.2d 1307, 1311 (9th Cir. 1987). Greater deference is appropriate where the administrative findings are "thorough and careful." See Capistrano, 59 F.3d at 891 (quoting Union Sch. Dist. v. Smith, 15 F.3d 1519, 1524 (9th Cir. 1994)). The party challenging a prior administrative ruling bears the burden of persuasion. See Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396, 1399 (9th Cir.1994).

Discussion

1. The ALJ did not err in interpreting Issue 1.

The IDEA and California state law impose upon each school district the duty actively and systematically to identify, locate, and assess all children with disabilities or exceptional needs who are in need of special education and related services. See 20 U.S.C. § 1412(a)(3); 34 C.F.R. §

300.111(a)(1)(ii); Cal. Ed. Code §§ 56300, 56301.2. The federal and state statutory obligations of a school district to identify, locate, and assess children with disabilities is often referred to as the "child find" obligation. A district's child find obligation applies to all children who are suspected of having a disability in need of special education, even though they may be advancing from grade level to grade level. See 34 C.F.R. § 300.111(c)(1). A district's child find obligation toward a specific student is triggered when there is a reason to suspect a disability and that special education services may be needed to address that disability.[2] See, e.g., Dept of Educ. v. Cari Rae S., 158 F.Supp.2d 1190, 1194 (D. Haw. 2001).

First, Plaintiff argues that the ALJ erred by failing to address Plaintiff's allegations that Defendant denied Plaintiff a FAPE by failing to maintain written child find policies and by failing to train staff in those policies. However, the ALJ found that Plaintiff did not raise those issues in the amended complaint and improperly raised them for the first time in the closing brief at the administrative level. Therefore, the ALJ concluded that he could not address those issues. Record on Appeal, AR000404, n.21. Plaintiff has not established that the ALJ erred in failing to address these issues. The Court will not reach these issues on appeal.

Second, Plaintiff argues that the ALJ wrongfully failed to interpret Issue 1 as a child find issue by determining that Plaintiff substantively did not qualify for special education services under the SLD category from May 2011 through April 13, 2012, and that in doing so, the ALJ improperly "morphed" Issue 1 with Issue 3. See Student v. Santa Barbara Unified School Dist., OAH Case No. 2012080468, at *2 (Jan. 4, 2013) (addressing an issue similar to Issue 1, while not addressing substantive qualification of student). Plaintiff argues that whether or not he qualified for special education under the SLD category was irrelevant to the initial question of whether Defendant violated its child find obligations.

To the extent that Plaintiff argues that Defendant violated its child find obligations by not

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[2] Plaintiff appears to argue that because Dr. Braganza testified that she was not aware of the term "child find" at the time of the hearing, Plaintiff is entitled to prevail on Issue 1. However, Dr. Braganza testified substantively as to her awareness of the District's child find duties, recognizing her obligation to refer any child with a suspected disability to the OUSD Special Education Local Area Plan and noting that she referred Plaintiff for an assessment, and regularly met with OUSD staff to identify any child with a disability. Record on Appeal, AR000937-938. Dr. Braganza's knowledge, or lack thereof, of the specific term "child find" is not dispositive.

referring Plaintiff for testing *in general*, the premise of that argument is incorrect. Under the child find obligations, Defendant is required to assess a student for *suspected* disabilities. See 20 U.S.C. § 1414(b)(3)(B); C.M. ex rel. Jodi M. v. Dep't of Educ. State of Hawaii, 476 Fed. Appx. 674, 677 (9th Cir. 2012); D.R. ex rel. Courtney R. v. Antelope Valley Union High School Dist., 746 F. Supp. 2d 1142, 1144 (C.D. Cal. 2010) ("Pursuant to IDEA's 'child find' provision, Defendant has a duty to identify and evaluate children who are suspected of having a qualifying disability within a reasonable time after school officials are placed on notice."). Plaintiff does not dispute that the only suspected disability was SLD. See Cal. Code Regs. tit. 5 § 3030(b)(10). Further, in his First Amended Request for Due Process Hearing, Plaintiff focused on SLD as the relevant eligible disability. Record on Appeal, AR000074-77.

In addition, even if Defendant had violated its child find obligations, those procedural errors were harmless because Plaintiff was not denied a remedy because he was not entitled to relief under an IEP. See J.L. v. Mercer Island Sch. Dist., 592 F.3d 938, 953 (9th Cir. 2010) ("A procedural violation denies a free appropriate public education if it results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process or causes a deprivation of educational benefits."). In particular, and as discussed in more detail below, there was no competent evidence presented at the hearing that Plaintiff had an APD. Neither the 2009 assessments nor the 2012 assessment found that Plaintiff had an APD, and the BUSD results were discredited without contradiction at the hearing. Further, Defendant's experts, Dr. Mills and Ms. Macy, testified that Plaintiff's testing did not reveal an APD. Plaintiff did not present any evidence to refute Dr. Mills and Ms. Macy or to show that he had an APD. Further, Plaintiff's reliance on the BUSD documents to show an APD was not persuasive because those documents did not establish that Plaintiff had an APD and unrebutted expert testimony showed they were unreliable and unsupported. Plaintiff argues that the ALJ should have attached little to no weight to the experts' testimony because none of them knew what information the Berkeley IEP team considered and they did not observe Plaintiff in his learning environment. However, Plaintiff did not call any witnesses to explain the Berkeley documents or to contradict Defendant's experts, so the ALJ reasonably credited those witnesses who did testify.

Further, to determine whether a student is receiving appropriate accommodations in the classroom, and therefore not entitled to special education, a court uses the educational benefit standard established by Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 202-06 (1982): " . . . the state satisfies the requirement to provide a handicapped child with a 'free appropriate public education' by providing 'personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.'" Hood v. Encinitas Union Sch. Dist., 486 F.3d 1099, 1107 (9th Cir. 2007) (While it is true that the Rowley case dealt with the level of services that must be provided to a student already deemed eligible for special education, rather than special education eligibility itself, '[the Ninth Circuit] ha[s] applied the Rowley framework in numerous cases.'"). Further, "the point at which this duty [to assess] would have been triggered, if at all, is unclear from the record, as PVUSD had an obligation to attempt regular-classroom intervention before initiating a formal assessment.") (citing Hood, 486 F.3d at 1158 (no requirement of special education benefits where "any existing severe discrepancy between ability and achievement appears correctable in the regular classroom")). Here, Defendant provided Plaintiff with informal RTI with Mr. Miller, and there was evidence that the RTI was having positive educational effects on Plaintiff's work.

Defendant uses the "severe discrepancy" model to determine eligibility for special education. Cal. Code Regs., tit. 5 § 3030(b)(10)(B); see also 20 U.S.C. § 1414(a)(6)(B). In using this model, a district considers standardized testing as well as other factors to determine whether there is a discrepancy between intellectual ability and achievement. Id. Here, Plaintiff relies primarily on his grade reports to support his argument that there was a severe discrepancy sufficient to trigger eligibility for special education. At the administrative hearing, the parties disputed the meaning of Plaintiff's report cards from the third, fourth and fifth grades. Record on Appeal, AR000386. The ALJ noted that Defendant's witnesses asserted that the grade reports showed that Plaintiff was approaching grade level, yet Plaintiff's teachers and family members believed that the grades showed that Plaintiff was failing short of grade level. Id. Ms. Rikkers and Mr. Khalifah testified that Plaintiff was performing below grade level in at least some subject areas. Record on Appeal, AR000555-56; 897-903. Without resolving the controversy over the grade reports, the ALJ stated

that the reports showed that in reading, writing and spelling, Plaintiff was significantly below grade level, and that his grades were quite variable. Id.

Plaintiff argues that the factual dispute about Plaintiff's grades cannot be left undecided because if the teachers believed he was performing below grade level and observed areas of difficulty, a sufficient suspicion of disability existed to trigger the child find obligations. However, Plaintiff has not specified how those concerns were sufficient to trigger a renewed assessment for SLD eligibility. Defendant counters that there is no evidence showing a severe discrepancy. In particular, Defendant notes that scores from Plaintiff's standardized tests must be converted into common scores using a mean of 100 and a standard deviation of 15, and when making that calculation with Plaintiff's scores, Defendant found that Plaintiff had an overall standardized score of 91, with only one area (reading comprehension) showing a deviation over 15. Record on Appeal, AR001049. There is evidence that weakness in reading could have been caused by environmental factors and that there was no processing disorder. The later testing by BUSD did not contradict this conclusion. BUSD found that the overall score was 92 (Record on Appeal, AR000251, 1018), and in some cases, Plaintiff did better on the tests than in Oakland (Record on Appeal, AR000254-55) with no deviations over 15. No witnesses appeared at the hearing to explain the BUSD results or to counter Defendant's experts who testified that the BUSD documents contained errors. See Adams v. State of Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999) ("Actions of the school systems cannot ... be judged exclusively in hindsight.... [A]n individualized education program ("IEP") is a snapshot, not a retrospective. In striving for "appropriateness," an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.") (quoting Fuhrmann v. East Hanover Bd. of Educ., 993 F.2d 1031, 1041 (3d Cir. 1993)). Giving due weight to the ALJ's thorough analysis, the Court concludes that the preponderance of the evidence does not support Plaintiff's argument that the ALJ erred in analyzing Issue 1.

2. The ALJ did not improperly place additional limitations or requirements on referrals for assessment.

A referral for assessment means "any written request for assessment to identify an individual with exceptional needs" made by, among others, a parent or teacher. Under California law:

All referrals for special education and related services shall initiate the assessment

> process and shall be documented. When a verbal referral is made, staff of the school district, SELPA, or county office shall offer assistance to the individual in making a request in writing, and shall assist the individual if the individual requests such assistance.

5 Cal Code Regs. § 3021.

When a student is found eligible for special education, the district must reassess the student at least every three years, or more frequently if the local educational agency determines that conditions warrant reassessment, or if a reassessment is requested by the student's teacher or parent. See 20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a); Cal. Ed. Code § 56381(a)(1). The ALJ found that these reassessment standards do not apply to a student previously found to be ineligible. Record on Appeal, AR000403 (Legal Conclusion #13). The ALJ reasoned that the IDEA defines a "child with a disability" as a child who has a qualifying disability and therefore needs special education, which means a child who is eligible for special education. See 20 U.S.C. § 1401(3)(A)(ii). If a child is determined not to be a child with a disability, he is not entitled to the protections of the reassessment provisions, which extend only to a child with a disability. See 20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a). The ALJ concluded:

> There is, therefore, no requirement that a child found not eligible for special education be reassessed either on request of a parent or teacher or because of the passage of time. A contrary rule would allow a parent of an ineligible child to request reassessments without limit.

Record on Appeal, AR000403. The ALJ, however, also noted that there is a continuing duty of educational agencies to comply with their child find obligations, and stated that: "As part of that continuing duty, a district may in appropriate circumstances be required to reassess a student previously found ineligible for special education." Id.

Plaintiff argues that the ALJ's Legal Conclusion 13 contradicts affirmative obligations imposed by Section 3021, although Plaintiff concedes that the duty to assess may not have been triggered if the requests were not in writing and does not dispute that there is no evidence that there were any written requests. Substantively, Plaintiff argues that the ALJ's Legal Conclusion 13 impermissibly limits Section 3021 by holding that there is no requirement that a child be reassessed after he has been found ineligible because of another referral or the passage of time. Here, Ms.

Rikkers, Mr. Khalifah and Ms. Moore testified that they "repeatedly told school administrators that [Plaintiff] should be further assessed for special education and determined eligible for it." Record on Appeal, AR000387; see also id. AR000551, 605, 893. Plaintiff's grandmother testified that she made similar requests as early as Plaintiff's fourth grade year. Id. Dr. Braganza, however, testified that she never spoke with Ms. Rikkers about Plaintiff's need to be tested for special education services (Record on Appeal, AR000975), that Mr. Khalifah only provided general concerns (Record on Appeal, AR000936) and that Ms. Moore only spoke to her about Plaintiff's eye testing (Record on Appeal, AR000935). Dr. Braganza also testified that if she had received a verbal request for testing, she would have had it put into writing. Record on Appeal, AR000977-78. Mr. Rusk testified that Defendant never turned down a written or oral request to assess Plaintiff. Record on Appeal, AR000388. The ALJ found that Defendant's obligation to assess or reassess Plaintiff was not triggered by a request from a parent or teacher. Giving due weight to the ALJ's thorough opinion, the ALJ reasonably gave more credit to the testimony of Dr. Braganza and Mr. Rusk that no actionable requests for assessment were made.

Plaintiff argues that the ALJ's concern about the possibility of endless requests for reassessments is outweighed by the general structure and purpose of the IDEA, which casts a wide net with the child find policy. Plaintiff acknowledges that the reassessment rules for children with disabilities may not extend to children who have not yet qualified, but argues that assessment for eligibility at a similar frequency for a child such as Plaintiff, who is purportedly "on the cusp" of qualifying for services, should be the standard. Finally, Plaintiff argues that it is illogical to deny Plaintiff a complete reassessment for eligibility in 2012 based on the concern of limitless requests, pointing to Defendant's speech and language assessment conducted in 2012.

However, there is no evidence in the record to contradict the experts' testimony that a child who has been found not to have a processing disorder would not need to be reassessed for special education eligibility under SLD absent a material change in circumstances. Record on Appeal, AR001052. Dr. Mills testified that processing disorders are static, affecting a child throughout his life, in a predictable and consistent way. Record on Appeal, AR001051. The ALJ found that there was no evidence following the 2009 assessment which would require questioning the assessment's

validity, and in fact, when the district conducted the 2012 assessment, the assessment did not reveal an APD.

Plaintiff also notes that the California Education Code provides that: "Before any action is taken with respect to the initial placement of an individual with exceptional needs in special education instruction, an individual assessment of the pupil's educational needs shall be conducted, by qualified persons,. . . ." Cal. Ed. Code § 56320. Thereafter, as described above, a special education student is reassessed at least every three years. Cal. Ed. Code. § 56381(a). Plaintiff argues that Section 56320 is not restricted to reassessments of children with disabilities only. In support of this argument, Plaintiff cites another OAH decision, Student C. v. California Children's Services, OAH Case No. 2012080386, p. 26-27, ¶ 6 (June 27, 2013). Paragraph 6 of Student C states:

> Before any action is taken with respect to the initial placement of a special education student, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.) Thereafter, a special education student must be reassessed at least once every three years, or more frequently if conditions warrant, or if a parent or teacher requests an assessment. (Ed. Code, § 56381, subd. (a).) No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2)(B); Ed. Code, § 56320, subd. (e).)

Id. Although Plaintiff argues that Student C. suggests that Section 56381 applies to a student before his initial placement in special education, that non-binding case does not opine as to whether a student must be assessed on any particular schedule before the initial placement in special education. Thus, giving due weight to the administrative proceedings, the Court concludes that the preponderance of the evidence supports the ALJ's careful analysis of reassessment.

3. Plaintiff has not shown that Defendant is precluded from relying on an assessment that is more than two years old to determine eligibility for special education or that Plaintiff was entitled to a psycheducational assessment between February 2012 and August 2012.

The statute of limitations to challenge a district assessment through a due process hearing is two years. See 20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2); Cal. Ed. Code, § 56505(l) (providing that any request for a due process hearing shall be filed within two years from the date that the party initiating the request knew or had reason to know of the facts underlying the basis for the request). The two year limitations period does not apply if the parent was prevented from filing

a due process request due to either: (1) specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request; or (2) the local educational agency's withholding of information from the parent which it is required to provide. See J.L. v. Ambridge Area Sch. District, 622 F. Supp.2d 257, 268-269 (W.D. Pa. 2008).

In Placentia-Yorba Linda Unified School Dist v. Student, OAH Case No. 2012051153, the question was whether the two year statute of limitations for filing a request for a due process hearing also applied to a request for an independent educational evaluation ("IEE"). Parents who disagree with a district assessment have the right to obtain an IEE at public expense. See 34 C.F.R. § 300.502; Cal. Ed. Code § 5639(b). The ALJ in Placentia-Yorba Linda found that the two year statute of limitations for due process hearing requests also applied to requests for IEE. Thus, because the request for IEE in Placentia-Yorba Linda was made more than two years after the assessment, the District was not required to fund Student's request for an IEE or to file for due process to defend the appropriateness of its assessment.

Here, Plaintiff argues that since the statute of limitations is two years, it somehow follows that Defendant cannot rely on the 2009 assessment to determine eligibility. Plaintiff states that he could not have challenged the validity of the 2009 assessment at the time of the April 2012 IEP meeting because the statute of limitations had passed, so he was forced to accept the assessment as valid. Plaintiff argues that these circumstances deprived him of a procedural and substantive right afforded by the IDEA:

> As noted above, parents have the right to review all records that the school possesses in relation to their child. § 1415(b)(1). They also have the right to an "independent educational evaluation of the[ir] child." Ibid. The regulations clarify this entitlement by providing that a "parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." 34 CFR § 300.502(b)(1) (2005). IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

Schaffer v. Weast, 546 U.S. 49, 60-61 (2005).

Plaintiff's arguments are not persuasive. Plaintiff could have sought an IEE or challenged the 2009 assessment through the due process hearing process at any time during the subsequent two

years, but did not. See also Record on Appeal, AR000405. Plaintiff argues that the fact that he did not challenge the 2009 assessment demonstrates, at best, that Plaintiff accepted the validity of the assessment for that two year period and does not mean that Plaintiff accepted its validity as of April 2012. This argument would turn the statute of limitations on its head, undermining its purpose of providing repose. Moreover, there was uncontradicted testimony at the 2012 hearing that the results of the 2009 assessments were still valid as to Plaintiff's lack of an SLD.

Also, Plaintiff has misconstrued Placentia-Yorba Linda. In that case, the ALJ used the word "stale" to describe issues in an assessment, but not in the context of whether the content was stale, but rather as to whether any legal claim challenging that assessment would be stale. See Placentia-Yorba Linda, at p. 9, ¶ 19 ("This finding is supported by the statutory purposes for permitting IEE's and for implementing statutes of limitations to foreclose stale legal claims."); at p. 9, ¶ 20 ("A statute of limitations serves to assure that claims are not brought up years after they have become stale."). The ALJ in Placentia-Yorba Linda did not hold that assessments more than two years old are automatically stale or no longer valid as a matter of law. Thus, Plaintiff has not shown that the content of Defendant's 2009 assessment here was stale as a matter of law in 2012.

Further, Plaintiff argues that Defendant had an ongoing obligation to respond to referrals for assessment and comply with child find obligations after the 2009 assessment. Plaintiff points to the ALJ's reasoning that:

> Student first argues that since his teachers all suspected he had a disability that needed to be assessed, that suspicion alone required assessment. That claim might have merit if Student had not been previously assessed and found ineligible, but that is not this case. If Student were correct, a district would have a constant duty to assess a student previously found ineligible, if any teacher disagreed and still suspected a disability.

Record on Appeal, AR000404. Contrary to the ALJ's findings, Plaintiff believes that Defendant *does* have a duty to constantly assess a student previously found ineligible, although Plaintiff concedes that the duty may be relieved during the first two years after the assessment. But Plaintiff argues that after the two year period, Defendant has a continual duty to assess.

Although Plaintiff complains that Defendant should have reassessed Plaintiff in connection with its child find obligations, the evidence shows that Defendant *did* assess Plaintiff in 2012 for

speech and language issues. In addition, even if Defendant had given Plaintiff a psychoeducational reassessment in 2012 for SLD, there has been no showing that Plaintiff would have qualified for special education services, as stated above, so there would be no remedy. At the hearing in this Court, Plaintiff did not indicate what remedy, if any, would be available to him for such a purported violation of the child find obligation.

In addition, Plaintiff argues that the ALJ erred in finding that Plaintiff had no right to be reassessed in 2012 because Defendant ruled out SLD eligibility in December 2009 and because Plaintiff did not establish that the 2009 assessment was invalid. Rather, Plaintiff argues that the fact that he qualified for special education services in BUSD in 2012 "persuasively establishes Defendant's unreasonableness at the April 3, 2012 IEP meeting." Pl.'s Opening Brief at 25 ("Surely, Berkeley is not in the business of simply 'handing out' IEPs to students who do not qualify under the IDEA."). Although Plaintiff cites E.M. v. Pajaro Valley Unified Sch. Dist., 652 F.3d 999, 1004 (9th Cir. 2011) for the proposition that after-acquired evidence may shed light on the objective reasonableness of a school district's actions at the time of the disability decision, that case analyzed the issue of whether evidence acquired after the *ALJ's decision* could be used to by the district court in reviewing the ALJ's decision. By contrast, here, the ALJ considered the BUSD documents. There is no authority that the BUSD's documents constituted a presumption of disability.

On balance, and giving due weight to the ALJ's thorough decision, the Court concludes that the preponderance of the evidence supports the ALJ's decision on these issues.

Conclusion

Accordingly, Plaintiff's Motion for Summary Judgment is denied. Defendant's Motion for Summary Judgment is granted.

IT IS SO ORDERED.

Dated: September 19, 2014

Elizabeth D. Laporte

ELIZABETH D. LAPORTE
United States Chief Magistrate Judge