

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

J.G.,

No. C -14-00366 EDL

Plaintiff,

**ORDER DENYING PLAINTIFF’S
MOTION FOR SUMMARY JUDGMENT
AND GRANTING DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT**

v.

OAKLAND UNIFIED SCHOOL DISTRICT,

Defendant.

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

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

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

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

17 During this time, Plaintiff was graded on a 1 to 5 scale with 1 being the lowest grade. In
18 third grade, Plaintiff received a "2" grade for nearly all aspects of language and writing arts in the
19 fall semester, but a "3" in most of those aspects in the winter and spring. Record on Appeal,
20 AR000288-291. He received a mix of "2" and "3" grades in math for the fall semester, but a mix of
21 "3" and "4" grades in the winter and spring. Id. In the fall, Mr. Bartone commented that Plaintiff
22 had worked hard and was trying his hardest, and that Mr. Bartone had "seen a marked difference in
23 his writing from the beginning of the year until now." Record on Appeal, AR000290. In the winter,
24 Mr. Bartone stated that Plaintiff continued to show progress academically, especially in writing and
25 reading. Id. Mr. Bartone stated in the spring that Plaintiff had made amazing progress and had
26 "grown exponentially in each subject." Id. Mr. Bartone twice used the phrase "Keep up the
27 awesome work!" in the report card. Id.

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

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

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

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

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

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

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

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

23
 24 ¹ An SLD is defined as "a disorder in 1 or more of the basic psychological processes
 25 involved in understanding or in using language, spoken or written, which disorder may manifest itself
 26 in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations." 20
 27 U.S.C. § 1401(30); Cal. Educ. Code § 56337; Cal. Code Regs. tit. 5 § 3030(b)(10) ("Specific learning
 28 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.").

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

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

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

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

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

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

25 The third document was the Berkeley Academic Assessment conducted in early December
26 2012 by education specialist Sheryll Holmes. Ms. Holmes completed an assessment that was similar
27 to the one conducted by Mr. Miller in 2009. Ms. Holmes concluded that Plaintiff would "benefit
28 from" special education support, but the basis for the conclusion was not in the record, so the ALJ

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

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

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

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

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

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

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

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

3 **The ALJ's decision**

4 The ALJ addressed three issues:

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

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

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

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

18 **Legal Standard**

19 **Statutory Framework**

20 Under the IDEA and California law, all children with disabilities are entitled to a FAPE. See
21 20 U.S.C. § 1412(a)(1). These statutes impose an affirmative obligation on school districts to
22 identify, locate, and evaluate children with disabilities within their local areas (child find
23 obligations). See 20 U.S.C. § 1412(a)(3). Furthermore, districts must develop, review, and revise an
24 individualized education program (IEP) for each child with a disability. See 20 U.S.C. § 1412(a)(4).
25 An IEP must, among other requirements, contain a written statement of: the child's present levels of
26 academic achievement and functional performance; measurable annual goals in academic and
27 functional areas; and the special education services that will be provided. See 20 U.S.C. §
28 1414(d)(1)(A).

1 School districts must comply with both the procedural and substantive requirements of the
2 IDEA. See N.B. v. Hellgate Elem. Sch. Dist., 541 F.3d 1202, 1207 (9th Cir. 2008) (citations
3 omitted). Compliance with the IDEA procedures is “essential to ensuring that every eligible child
4 receives a FAPE, and those procedures which provide for meaningful parent participation are
5 particularly important.” Amanda J. ex rel. Annette J. v. Clark County Sch. Dist., 267 F.3d 877, 891
6 (9th Cir.2001). “When the elaborate and highly specific procedural safeguards embodied in [the
7 IDEA] are contrasted with the general and somewhat imprecise substantive admonitions contained
8 in the Act, we think that the importance Congress attached to these procedural safeguards cannot be
9 gainsaid.” Bd. of Educ. v. Rowley, 458 U.S. 176, 205 (1982). Furthermore, a school district must
10 comply not only with federal statutory and regulatory procedures, but with state regulations as well:
11 “State standards that are not inconsistent with federal standards [under the IDEA] are also
12 enforceable in federal court.” W.G. v. Bd. of Trs. of Target Range Sch. Dist. No. 23, 960 F.2d 1479,
13 1483 (9th Cir.1992). As the Ninth Circuit has recognized, there is some leeway in the procedural
14 requirements:

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

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

22 Substantively, an IEP developed by a district for a disabled student must be “reasonably
23 calculated to enable the child to receive educational benefits.” Id. (quoting Board of Educ. of
24 Hendrick Hudson Central School Dist., Westchester County v. Rowley, 458 U.S. 176, 206–07, 102
25 S.Ct. 3034 (1982)). If parents disagree with “any matter relating to the identification, evaluation, or
26 educational placement of [their] child, or the provision of a free appropriate public education to such
27 child,” they may obtain review through an impartial due process hearing by the state educational
28 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).

1 **Standard of Review**

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

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

24 **Discussion**

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

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

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

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

16 Second, Plaintiff argues that the ALJ wrongfully failed to interpret Issue 1 as a child find
 17 issue by determining that Plaintiff substantively did not qualify for special education services under
 18 the SLD category from May 2011 through April 13, 2012, and that in doing so, the ALJ improperly
 19 “morphed” Issue 1 with Issue 3. See Student v. Santa Barbara Unified School Dist., OAH Case No.
 20 2012080468, at *2 (Jan. 4, 2013) (addressing an issue similar to Issue 1, while not addressing
 21 substantive qualification of student). Plaintiff argues that whether or not he qualified for special
 22 education under the SLD category was irrelevant to the initial question of whether Defendant
 23 violated its child find obligations.

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

25
 26 ² Plaintiff appears to argue that because Dr. Braganza testified that she was not aware of
 27 the term “child find” at the time of the hearing, Plaintiff is entitled to prevail on Issue 1. However, Dr.
 28 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.

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

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

1 Further, to determine whether a student is receiving appropriate accommodations in the
2 classroom, and therefore not entitled to special education, a court uses the educational benefit
3 standard established by Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S.
4 176, 202-06 (1982): “. . . the state satisfies the requirement to provide a handicapped child with a
5 ‘free appropriate public education’ by providing ‘personalized instruction with sufficient support
6 services to permit the child to benefit educationally from that instruction.’” Hood v. Encinitas
7 Union Sch. Dist., 486 F.3d 1099, 1107 (9th Cir. 2007) (While it is true that the Rowley case dealt
8 with the level of services that must be provided to a student already deemed eligible for special
9 education, rather than special education eligibility itself, “[the Ninth Circuit] ha[s] applied the
10 Rowley framework in numerous cases.”). Further, “the point at which this duty [to assess] would
11 have been triggered, if at all, is unclear from the record, as PVUSD had an obligation to attempt
12 regular-classroom intervention before initiating a formal assessment.”) (citing Hood, 486 F.3d at
13 1158 (no requirement of special education benefits where “any existing severe discrepancy between
14 ability and achievement appears correctable in the regular classroom”). Here, Defendant provided
15 Plaintiff with informal RTI with Mr. Miller, and there was evidence that the RTI was having
16 positive educational effects on Plaintiff’s work.

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

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

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

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

27 A referral for assessment means "any written request for assessment to identify an individual
28 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

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

5 5 Cal Code Regs. § 3021.

6 When a student is found eligible for special education, the district must reassess the student
7 at least every three years, or more frequently if the local educational agency determines that
8 conditions warrant reassessment, or if a reassessment is requested by the student's teacher or parent.

9 See 20 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a); Cal. Ed. Code § 56381(a)(1). The ALJ
10 found that these reassessment standards do not apply to a student previously found to be ineligible.
11 Record on Appeal, AR000403 (Legal Conclusion #13). The ALJ reasoned that the IDEA defines a
12 "child with a disability" as a child who has a qualifying disability and therefore needs special
13 education, which means a child who is eligible for special education. See 20 U.S.C. §
14 1401(3)(A)(ii). If a child is determined not to be a child with a disability, he is not entitled to the
15 protections of the reassessment provisions, which extend only to a child with a disability. See 20
16 U.S.C. § 1414(a)(2)(A); 34 C.F.R. § 300.303(a). The ALJ concluded:

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

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

25 Plaintiff argues that the ALJ's Legal Conclusion 13 contradicts affirmative obligations
26 imposed by Section 3021, although Plaintiff concedes that the duty to assess may not have been
27 triggered if the requests were not in writing and does not dispute that there is no evidence that there
28 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.

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

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

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

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

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

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

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

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

28 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

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

5 In Placentia-Yorba Linda Unified School Dist v. Student, OAH Case No. 2012051153, the
6 question was whether the two year statute of limitations for filing a request for a due process hearing
7 also applied to a request for an independent educational evaluation ("IEE"). Parents who disagree
8 with a district assessment have the right to obtain an IEE at public expense. See 34 C.F.R. §
9 300.502; Cal. Ed. Code § 5639(b). The ALJ in Placentia-Yorba Linda found that the two year
10 statute of limitations for due process hearing requests also applied to requests for IEE. Thus,
11 because the request for IEE in Placentia-Yorba Linda was made more than two years after the
12 assessment, the District was not required to fund Student's request for an IEE or to file for due
13 process to defend the appropriateness of its assessment.

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

20 As noted above, parents have the right to review all records that the school possesses
21 in relation to their child. § 1415(b)(1). They also have the right to an "independent
22 educational evaluation of the[ir] child." Ibid. The regulations clarify this entitlement
23 by providing that a "parent has the right to an independent educational evaluation at
24 public expense if the parent disagrees with an evaluation obtained by the public
25 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.

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

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

1 years, but did not. See also Record on Appeal, AR000405. Plaintiff argues that the fact that he did
2 not challenge the 2009 assessment demonstrates, at best, that Plaintiff accepted the validity of the
3 assessment for that two year period and does not mean that Plaintiff accepted its validity as of April
4 2012. This argument would turn the statute of limitations on its head, undermining its purpose of
5 providing repose. Moreover, there was uncontradicted testimony at the 2012 hearing that the results
6 of the 2009 assessments were still valid as to Plaintiff's lack of an SLD.

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

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

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

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

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

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

6 In addition, Plaintiff argues that the ALJ erred in finding that Plaintiff had no right to be
 7 reassessed in 2012 because Defendant ruled out SLD eligibility in December 2009 and because
 8 Plaintiff did not establish that the 2009 assessment was invalid. Rather, Plaintiff argues that the fact
 9 that he qualified for special education services in BUSD in 2012 “persuasively establishes
 10 Defendant’s unreasonableness at the April 3, 2012 IEP meeting.” Pl.’s Opening Brief at 25
 11 (“Surely, Berkeley is not in the business of simply ‘handing out’ IEPs to students who do not qualify
 12 under the IDEA.”). Although Plaintiff cites E.M. v. Pajaro Valley Unified Sch. Dist., 652 F.3d 999,
 13 1004 (9th Cir. 2011) for the proposition that after-acquired evidence may shed light on the objective
 14 reasonableness of a school district’s actions at the time of the disability decision, that case analyzed
 15 the issue of whether evidence acquired after the *ALJ’s decision* could be used to by the district court
 16 in reviewing the ALJ’s decision. By contrast, here, the ALJ considered the BUSD documents.
 17 There is no authority that the BUSD’s documents constituted a presumption of disability.

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

20 **Conclusion**

21 Accordingly, Plaintiff’s Motion for Summary Judgment is denied. Defendant’s Motion for
 22 Summary Judgment is granted.

23 **IT IS SO ORDERED.**

24 Dated: September 19, 2014

25 
 26 ELIZABETH D. LAPORTE
 27 United States Chief Magistrate Judge
 28