

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

R. Z. C.,

Plaintiff,

V.

NORTHSHERE SCHOOL DISTRICT.

Defendant.

C16-1064 TSZ

ORDER

THIS MATTER comes before the Court on Plaintiffs' Motion for Partial

Summary Judgment, docket no. 13, and Defendant's Cross-Motion for Summary Judgment, docket no. 16. Having considered the motions, all pleadings filed in support of and opposition to the motions, and the administrative record, the Court GRANTS Defendant's Cross-Motion for Summary Judgment, DENIES Plaintiffs' Motion for Partial Summary Judgment, and enters the following Order.

Introduction

Plaintiff R.Z.C. (the “Student”)¹ brings two causes of action. First, the Student seeks judicial review of an administrative law judge (the “ALJ”) determination that: (1)

¹ Although the Student's parents filed this lawsuit, the use of the defined term "Student" and the corresponding male pronoun will collectively refer to the Student and his parents for ease of analysis, unless otherwise specified.

1 Defendant Northshore School District's (the "District") reevaluation of the Student was
2 appropriate or any defects did not deny the Student Free Appropriate Public Education
3 ("FAPE"); (2) the District's decision to exit the Student from special education pursuant
4 to the reevaluation was legally correct; and (3) the Student's parents did not carry their
5 burden of proving the District failed to implement the Student's Individualized Education
6 Program ("IEP").

7 Second, the Student claims damages under Section 504 of the Rehabilitation Act
8 of 1973 alleging that the District: (1) denied the Student FAPE; (2) discriminated against
9 the Student; and (3) retaliated against the Student.

10 The Student's Motion for Partial Summary Judgment, docket no. 13 (the
11 "Motion"), is limited to the Student's first cause of action. The Student asks the Court to
12 overturn the ALJ's decision and grant the Student an Independent Educational Evaluation
13 ("IEE"). The District's Cross-Motion for Summary Judgment, docket no. 16 (the "Cross-
14 Motion"), seeks summary judgment on all of the Student's claims.² The District asks the
15 Court to affirm the ALJ's decision and dismiss the Student's Section 504 claims for
16 discrimination and retaliation.

17 For the reasons stated in this Order, the Student's Motion for Partial Summary
18 Judgment is DENIED. The District's Cross-Motion for Summary Judgment is
19 GRANTED.

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² Plaintiff's Reply to the District's Opposition to Plaintiff's Motion for Partial Summary Judgment, and
Response to the District's Cross-Motion for Summary Judgment on all Claims, docket no. 25, is referred
to as "Plaintiff's Reply." The District's Reply, docket no. 28, is referred to as "District's Reply." For the
reasons discussed in this Order, Plaintiff's Surreply, docket no. 29, need not be addressed.

1 **Background**

2 The Student has been a student within the District since elementary school. AR
3 1184. Between fourth grade and ninth grade, the Student qualified for special education
4 services under the Specific Learning Disability (“SLD”) category in the area of Written
5 Expression. AR 1477–79, 1493.

6 In seventh and eighth grade, the Student received Specialized Designed Instruction
7 (“SDI”) in a general education class co-taught by a general education and special
8 education teacher. AR 990, 427–28, 1445–46.

9 Leading up to the Student’s ninth grade year, on October 23, 2014, the Student’s
10 IEP team (comprising District personnel) held a meeting with the Student’s parents to
11 address an issue with the Student’s school schedule. AR 1220–21. Because the
12 Student’s parents did not wish to change his schedule, the Student would be unable to
13 attend the ninth grade co-taught English class. AR 993–94; AR 895–96. The District
14 proposed giving the Student his written language SDI in a general education class taught
15 solely by a general education teacher, with R.Z.C.’s special education teacher providing
16 limited consultation. AR 1464 (October 23, 2014, Prior Written Notice). The District
17 implemented the Student’s revised IEP plan, in which the Student’s general education
18 teacher focused on the Student’s IEP goals in her general education class with 10 minutes
19 of special education support from his special education teacher. AR 791, 793, 808–09,
20 1462.

21 The District also suggested to reevaluate the Student to determine whether he
22 should be exited from the Section 504 Plan. AR 1464; AR 864–65, 882. While his
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1 parents initially agreed, AR 997, 1185, 1222–23, they revoked their consent on
2 November 20, 2014. AR 999, 1222–23. Rather than complete the reevaluation, the
3 parents requested that the District pay for an IEE. *Id.* The District granted the parents'
4 request. AR 882–84, 1222–23.

5 The requested IEE was conducted in January 2015 by clinical neuropsychologist
6 Dr. Jennifer Blair, PhD. AR 1125–36. Among other evaluation procedures, Dr. Blair
7 administered the Wechsler Intelligence Scale for Children – Fifth Edition (“WISC-V”),
8 the Woodcock-Johnson III Normative Update Tests of Achievement (“WJ-III”), and the
9 Test of Written Language-third edition (“TOWL”). AR 1127. Her written report recited
10 the following areas of weakness:³

- 11 • On the WISC-V, the Student “earned a Full Scale IQ of 98 (45th percentile,
12 average range) and a General Ability Index of 105 (63rd percentile, average range).
13 AR 1128. The corresponding WISC-V subtests Dr. Blair performed identified
difficulties with the Student’s memory and ability to rapidly copy information—
categories that the Student scored in the “low average” on. AR 1129.
- 14 • On the WJ-III, the Student’s “ability to read quickly and efficiently (Reading
15 Fluency) remain[ed] an area of relative weakness . . .” AR 1130. Dr. Blair
noted, however, that this did “not represent an area of specific disability, *per se.*”
AR 1130. The WJ-III also identified certain writing skills—including spelling,
16 editing, and handwriting—as areas of weakness for the Student. AR 1131.
- 17 • Likewise, the TOWL-3 uncovered the Student’s difficulties “with handwriting,
18 spelling, punctuation, and capitalization.” AR 1131. “On a measure of math
fluency, . . . [the Student] scored much lower than expected. His ability to
19 calculate and write down single digit math facts was an area of weakness for him.
When not required to write down the math facts but to say them aloud, [the
20 Student] scored better . . . but still lower than expected for his intellectual
capacity.” AR 1132.

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22 ³ Dr. Blair’s report also reported on other various areas where the Student performed averagely and
23 above-averagely. These were not areas of concern.

1 Dr. Blair concluded that the Student’s “troubles with writing meet Washington
2 Administrative Code guidelines for a Specific Learning Disability in the area of Basic
3 Writing. Disorders of written expression are sometimes referred to as ‘dysgraphia,’ a
4 general term that includes difficulties with fine motor control and handwriting, spelling
5 and conventions, grammar, and various disorders of written expression.” AR 1134.⁴
6 “His writing disability appears limited to the underlying basics of handwriting and
7 conventions.” *Id.*

8 On February 27, 2015, the Student’s parents and their attorney met with the
9 Student’s IEP team to review Dr. Blair’s IEE and amend the Student’s IEP.⁵ AR 1149–
10 65 (the 2015 IEP Amendment); AR 887. Among other things, the IEP meeting
11 considered the Student’s parents’ concerns with his “writing, proofreading, and editing
12 skills, as well as his spelling and ability to copy words down from the board in a
13 classroom situation.” AR 1153. At the meeting, the participants amended the Student’s
14 present level of educational performance, annual goals, and general education
15 accommodations. AR 1156, 1162; AR 875–76.

16 The District issued a Prior Written Notice on April 1, 2015, to implement the
17 agreed upon amendments. The Notice stated in relevant part:

18 We are amending [the Student’s] IEP upon the completion of his
19 independent educational evaluation with Dr. Blair and the team’s
discussion of changes to the accommodations, as well as Parents’ request to

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21 ⁴ Dr. Blair later testified that she did not diagnose the Student with dysgraphia under the Diagnostic and
Statistical Manual of Mental Disorders, 5th Edition (“DSM-V”). AR 966.

22 ⁵ At this time the IEP team included school psychologist Jacque Ter-Veen, special education teacher Julia
Smith, occupational therapist Janet Prendergast, nurse Dee Allaway, general education teacher Pamela
Sutton, and school principal “Sebastian Z.Z.” AR 1188.
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1 amend the annual goals in light of Dr. Blair's findings of [the Student's]
2 strength in essay writing and struggles with grammar, punctuation and
3 spelling. We are also proposing a re-evaluation to consider the results of
4 the IEE and to further evaluate fine motor skills and assistive technology
5 needs.

6 AR 1162. The Notice gave the following reasons for the proposed amendments:

7 [Dr. Blair's] assessment resulted in average scores in reading and math, and
8 written expression but noted areas of concern in basic writing, math fluency
9 and handwriting. Based upon the updated assessment information, we are
10 recommending some changes to [the Student's] current IEP and we are also
11 recommending a re-evaluation based upon the concerns in fine motor skills.
12 We are also going to consider the need for assistive technology as per
13 previous recommendations of the IEP team and further recommendation in
14 Dr. Blair's report.

15 *Id.* The Notice did not evaluate the suitability of any of Dr. Blair's testing or otherwise
16 suggest any shortcomings in her analysis. It also did not discuss whether the areas of
17 concern identified by Dr. Blair fell within the "Written Expression" category of SLD.⁶

18 On May 8, 2015, the Student's parents and IEP team met to review the District's
19 reevaluation results. AR 1184. As planned in the IEP amendments, the results included a
20 review of Dr. Blair's assessments, the Student's academic history and performance, and
21 reports and recommendations from various District personnel who conducted additional
22 assessments—including the Student's school occupational therapist, Janet Prendergast,
23 and school psychologist Jacque Ter-Veen. AR 1180–1201.

24 Pursuant to the IEP team's review of the Student's data, the District concluded that
25 R.Z.C. did not meet the eligibility criteria and no longer qualified for special education

26 ⁶ Pursuant to the IEP amendments, the District also issued a Reevaluation Notification / Consent to
27 R.Z.C.'s parents, notifying them that the District would be reevaluating the Student to "review Dr. Blair's
28 assessment and complete additional testing in the following areas: fine motor skills, assistive technology,
29 age-appropriate transition and observation." AR 1182.

1 services because his areas of weakness did not adversely impact his general education
2 classes. AR 1186 (citing Dr. Blair's evaluation). Notwithstanding this decision, the
3 evaluation team determined that the following accommodations might be helpful:
4 1) additional time on assignments and tests; 2) a calculator; 3) a change in class setting
5 for test taking; 3) no loss in credit for spelling/grammar errors in writing; 4) use of a
6 classroom computer to produce essays and pieces of written work expected to be over a
7 paragraph long, if requested; 5) provided with a hard copy of notes to copy from when
8 class is taking notes from the whiteboard; 6) access to a laptop; and 7) use of word-
9 prediction or voice-to-text software. AR 1187.

10 In May 2015, the District began developing a written "Section 504" plan for the
11 Student "based on the recommendations made in [the Student's] comprehensive
12 reevaluation." Declaration of Elizabeth Methot, docket no. 22 ("Methot Decl."), at ¶ 2,
13 6–7. At his parents' request, District personnel met with the Student to help set up a
14 laptop and Co:Writer program discussed in the Section 504 plan. AR 836–39; AR 1780–
15 99. The Student completed the school year on June 17, 2015. AR 1206.

16 The Student began high school in the fall of 2015, where he was enrolled in a full
17 schedule of general education classes selected by the Student and his parents the previous
18 spring. Methot Decl., at ¶ 5; Declaration of Lisa Carson, docket no. 18 ("Carson Decl."),
19 at ¶ 4, Ex. J. The Student's class load was supported by his Section 504 plan, which was
20 administered by the Student's high school counselor. Carson Decl., at ¶ 4–5. The
21 Section 504 plan called for technology to assist the Student with self-editing, spelling,
22 grammar, and handwriting. *Id.* at Ex. B. In response to the Student's parents' requests
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1 and teacher input, the District modestly amended the Section 504 plan in January 2016 to
2 allow the Student to submit assignments in writing or online. *Id.* at Ex. D.

3 At the start of the 2015 school year, the Student’s parents asked the District to
4 reimburse certain expenses incurred for private services secured for the Student by the
5 Student’s parents. AR 1841–43. The District declined and, instead, referred the
6 Student’s parents to Ms. Carson to review the Section 504 plan. AR 891–92. The
7 parents declined and, instead, filed an IDEA administrative hearing request against the
8 District on October 19, 2015. AR 1337; AR 362–66. The essence of the parents’ request
9 was a challenge to the District’s decision to exit the Student from special education.⁷

10 The District filed a due process hearing request in January 2016 to defend its
11 May 8, 2015 reevaluation. AR 294–95. The Office of Administrative Hearings (OAH),
12 on behalf of the Office of Superintendent of Public Instruction (OSPI) consolidated the
13 requests and held a four day hearing on January 19–22, 2016. AR 273; AR 2–27.
14 Administrative Law Judge (“ALJ”) Matthew D. Wacker heard testimony from twelve
15 witnesses (AR 1, 4) and issued 56 Findings of Fact and 43 Conclusions of Law. *See*
16 AR 2–27. The ALJ found that the Student had not met his burden on any claims.
17 Specifically, the ALJ found that the May 8, 2015, reevaluation was appropriate, that any
18 defects in the May 8, 2015, reevaluation did not deny the Student a FAPE, and that the
19 District’s decision to exit the Student from special education was legally correct. *See*
20 AR 2–27. This lawsuit followed.

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23 ⁷ In the weeks leading up to the hearing, the Student filed another request for another IEE at the District’s expense. AR 282–83.

1 **Discussion**

2 **A. Standard of Review**

3 **Count One—Petition for Review of Administrative Action under the IDEA:**

4 The Court’s review of the ALJ decision under the IDEA is a “mixture of discretion and
5 deference.” *J.S. v. Shoreline Sch. Dist.*, 220 F. Supp. 2d 1175, 1184 (W.D. Wash. 2002)
6 (citing *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1472 (9th Cir. 1993)). The Court
7 must give “due weight” to the ALJ’s findings, but the due weight given is within the
8 Court’s discretion. *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1126
9 (9th Cir. 2003). Two factors the Court should address in exercising its discretion are
10 (1) the thoroughness of the administrative findings of fact and conclusions of law; and
11 (2) whether the ALJ’s findings are based on credibility determinations of live witness
12 testimony. *J.S.*, 220 F. Supp. at 1184 (citing *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995); *Amanda J. ex rel. Annette J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 887–89 (9th Cir. 2001)). “The Court gives deference to an
15 ALJ’s decision ‘when it evinces his or her careful, impartial consideration of all the
16 evidence and demonstrates his or her sensitivity to the complexity of the issues
17 presented.’” *J.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 438–39 (9th Cir. 2010)
18 (quoting *Cty. of San Diego v. California Special Educ. Hrg. Off.*, 93 F.3d 1458, 1466 (9th
19 Cir. 1966)).

20 Recognizing the administrative agency’s expertise, the Court “must consider the
21 findings carefully and endeavor to respond to the hearing officer’s resolution of each
22 material issue. After such consideration, the court is free to accept or reject the findings

1 in part or in whole.” *Ms. S. ex rel. G.*, 337 F.3d at 1126 n.16 (quoting *Gregory K. v.*
2 *Longview Sch. Dist.*, 811 F.2d 1307, 1311 (9th Cir. 1987)). The Court reviews the ALJ’s
3 legal conclusions *de novo*. *Id.* at 1127 (citing *Clyde K. v. Puyallup Sch. Dist. No. 3.*, 35
4 F.3d 1396, 1401 (9th Cir. 1994); *Seattle Sch. Dist., No. 1, v. B.S.*, 82 F.3d 1493, 1499
5 (9th Cir. 1996); *Amanda J.*, 267 F.3d at 889 n.11). Although mixed questions of fact and
6 law are also reviewed *de novo*, “when the question is primarily factual, a more deferential
7 approach is appropriate.” *S.J. v. Issaquah Sch. Dist. No. 411*, No. C04-1926RSL, 2007
8 U.S. Dist. LEXIS 67735, at *4 (W.D. Wash. Sept. 12, 2007) (citing *R.B. v. Napa Valley*
9 *Unified Sch. Dist.*, 496 F.3d 932, 937 (9th Cir. 2007)). The party challenging the ALJ’s
10 decision bears the burden of proof. *Id.*

11 **Count Two—Section 504:** The remaining claims under Section 504 are subject
12 to the normal summary judgment rules. The Court should grant summary judgment if no
13 genuine issue of material fact exists and the moving party is entitled to judgment as a
14 matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of
15 demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*,
16 477 U.S. 317, 323 (1986). A fact is material if it might affect the outcome of the suit
17 under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
18 Once the moving party meets its initial burden, the burden shifts to the non-moving party
19 to present “significant probative evidence” supporting their claims. *Richards v. Neilson*
20 *Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987). While “all justifiable inferences” are to
21 be drawn in favor of the non-moving party, *id.* at 255, when the record, taken as a whole,
22 could not lead a rational trier of fact to find for the non-moving party, summary judgment
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1 is warranted. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587
2 (1986) (citations omitted).

3 **B. Whether the ALJ erred in concluding that the District did not deny the
4 Student a FAPE**

5 **a. Legal Framework under the IDEA**

6 “School districts may deny a child a free appropriate public education [FAPE] by
7 violating either the substantive or procedural requirements of the IDEA.” *Timothy O. v.*
8 *Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1118 (9th Cir. 2016) (citing *M.M. v.*
9 *Lafayette Sch. Dist.*, 767 F.3d 842, 852 (9th Cir. 2014)). “A school district denies a child
10 a free public education by violating IDEA’s substantive requirements when it offers a
11 child an IEP that is not reasonably calculated to enable the child to receive educational
12 benefits.” *Id.* (citing *J.W. ex rel. J.E.W.*, 626 F.3d at 432–33). “The school district may
13 also, however, deny the child a free appropriate public education by failing to comply
14 with the IDEA’s extensive and carefully drafted procedures.” *Id.* (citing *Doug C. v.*
15 *Hawaii Dep’t of Educ.*, 720 F.3d 1038 (9th Cir. 2013)). “While some procedural
16 violations can be harmless, procedural violations that substantially interfere with the
17 parents’ opportunity to participate in the IEP formulation process, result in the loss of
18 educational opportunity, or actually cause a deprivation of educational benefits ‘clearly
19 result in the denial of a [free appropriate public education].’” *Id.* (quoting *Amanda J. ex*
20 *rel. Annette J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2007)).

21 **b. Level of Deference**

22 As a threshold matter, the parties dispute what level of deference should be given
23 to the hearing officer’s decision. Without specifying any of the ALJ’s conclusions, the

1 Student argues that “[t]he hearing officer completely omitted discussion of considerable
2 factual evidence that contradicts his findings.” Motion at 7. In support of this argument,
3 the Student cites to five pages of testimony (in the approximately 1900 page
4 administrative record) that the Student claims the hearing officer failed to consider. *Id.*
5 But a close reading of the administrative record demonstrates that this evidence doesn’t
6 actually conflict with the ALJ’s findings when examined in context.

7 The Student goes on to state that the hearing officer failed to consider “evidence
8 that the District itself considers basic writing skills as a component to Written
9 Expression.” *Id.* at 7–8. But again, the Student does not point to any place in the ALJ
10 decision where these alleged failures somehow rendered his conclusions erroneous. The
11 mere fact that the Student’s general education teacher, Ms. Sutton, previously gave the
12 student special education focused on conventions and mechanics does not undercut the
13 IEP’s determination that the Student no longer needed any SDI. The Student’s position
14 erroneously ignores large parts of the decision making process leading up to the 2015
15 reevaluation.

16 Finally, the Student cites to *Hawaii v. Rita L.* for the proposition that a hearing
17 officer must explain his credibility determinations. No. 14-00034 DKW-RLP, 2014 U.S.
18 Dist. LEXIS 173034 (D. Haw. Dec. 15, 2014). Glaringly, the Student does not identify
19 any evidence that is actually in conflict. To the extent any evidence does conflict, it is
20 immaterial to the key issues in dispute. This is in stark contrast to *Hawaii*, where the
21 conflicting pieces of evidence and the credibility assessments made by the hearing officer
22 were of “critical importance” to “her ultimate findings.” *Id.* at *16.

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1 Comparatively, the record shows that the ALJ heard testimony from the members
2 of the Student's IEP team and the District personnel that had observed the Student in the
3 classroom setting. The testimony transcripts demonstrate that the ALJ actively
4 participated in questioning the witnesses and seeking clarification on points of confusion.

5 In his opinion, the ALJ expressly noted any evidentiary shortcomings and detailed
6 his analysis in weighing the available evidence in reaching his legal conclusions.⁸
7 Nothing in the record suggests that the ALJ's findings were not impartial or that he was
8 in any way insensitive to the complexity of the issues presented. Instead, the ALJ's
9 findings relating to each of the material issues on appeal appear careful, thorough, and
10 well-reasoned. *See generally* AR 5–14 (Findings of Fact); AR 14–26 (Conclusions of
11 Law). Absent any real evidence to the contrary, and in light of the detailed nature of his
12 findings and the agency's expertise in the area of education, the ALJ's decision should be
13 given due deference.

14 **c. Procedural Violations**

15 The Student argues that the hearing officer erred by concluding that any
16 procedural violations committed by the District in conducting the Student's May 2015
17 reevaluation did not result in denying the Student a FAPE. The Student correctly
18 observes that WAC 392-172A-02000(2)(a) required the District to reevaluate the Student
19 before revoking the Student's special education services. “[S]chool districts must
20 evaluate a student eligible for special education in accordance with WAC 392-172A-

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22 ⁸ For example, the ALJ noted that the Student's parents did not give any testimony about what occurred
23 during the reevaluation meeting. AR 13; *see also* AR 14 (noting that the evidence supporting the
Student's argument that the District failed to properly implement the IEE was “undeveloped”).

1 03020 through 392-172A-03080 before determining that the student is no longer eligible
2 for special education services.” WAC 392-172A-03030. The Student argues that the
3 District did *not* comply with these procedural requirements in at least five respects.

4 **i. Violations of WAC 392-172A-03020 through 392-172A-03080**

5 WAC 392-172A-03020(1). The Student argues that the District’s “Prior Written
6 Notices” (or “PWNs”) failed to comply with WAC 392-172A-03020 in two ways. First,
7 the Student argues that two PWNs the District issued on March 16, 2014, and April 1,
8 2014, failed “to document the District’s rejection of and refusal to consider the results of
9 the WJ-III-‘basic writing skills’ subtest and the TOWL.” Second, the Student asserts that
10 “[t]he District also failed to indicate its rejection of and refusal to consider [the WJ-III
11 and TOWL] in PWNs issued after the evaluation process . . . , in the evaluation report
12 itself . . . , and in the Answer to the Parents’ Due Process Complaint”

13 Both of these arguments fail. WAC 392-172A-03020(1) requires the District to
14 “provide prior written notice of the parents of a student, in accordance with WAC 392-
15 172A-05010, that describes any evaluation procedures the district proposes to conduct.”
16 Among other things, WAC 392-172A-05010(2)(a)–(c) requires a description of the
17 proposed action, an explanation of why the agency proposes that action, and “[a]
18 description of each evaluation procedure, assessment, record, or report the agency used as
19 a basis for the proposed . . . action[.]”

20 Importantly, these provisions do not explicitly require the District to provide the
21 Student with a description of any procedures or assessments that the District did *not* use
22 as a basis for the proposed action. *See generally* WAC 392-172A-05010. Furthermore,
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1 the preponderance of the evidence suggests that the District did in fact consider the WJ-
2 III and TOWL-3 test results in completing its evaluation. When asked about the
3 District's use of the Student's scores on the WJ-III, the Student's school psychologist
4 testified that "[f]or determining eligibility we look at all pieces of the puzzle. So [the
5 WJ-III scores] would be one component that we would look at . . ." AR 433-34.

6 The school psychologist was also asked "well, how did you use the results of the
7 Test of Written Language [TOWL] in determining eligibility for Student?" AR 439. She
8 responded: "Because it's not a test under our SLD criteria I . . . it as data." *Id.*; *see also*
9 AR 457. The psychologist went on to confirm that "[i]n every circumstance I use all the
10 data to" determine whether a student has a specific learning disability. AR 456. "So I
11 would be looking at test scores, teacher feedback, grades, file review, student interview,
12 all the pieces that would make up the assessment." *Id.*

13 This testimony is consistent with the District's reevaluation report: "Based on the
14 private evaluation results provided by Jennifer R. Blair, PhD., file review, observation,
15 interview, consultation, review of previous and current academic performance, and
16 results of statewide standardized testing, [the Student] does not require specially designed
17 instruction in any academic area at this time." AR 1186.

18 The Student provides no evidence contradicting this fact. Every single place in the
19 record cited by the Student (AR 01162-63; AR 01182; AR 01198; AR 00325-328)
20 explicitly references Dr. Blair's evaluation and confirms that Dr. Blair's findings formed
21 the basis for the District's proposed action. At one point, the District goes so far as to
22 "refer [the Student's parents] to the private evaluation report for a comprehensive
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1 discussion of Ms. Blair's findings. Results are briefly summarized below and a copy of
2 the private evaluation report is attached." AR 1185. Dr. Blair's report expressly
3 discusses the Student's scores on the WJ-III Basic Writing and TOWL-3 tests, and
4 provides a proposed course of action premised on the Student's performance on each test
5 Dr. Blair administered. *See generally* AR 1125–36.⁹ The Student has failed to
6 demonstrate the ALJ erred in finding the District's PWN were sufficient.

7 WAC 392-172A-03020(3). The Student argues that the District's reevaluation did
8 not assess the Student in all areas of suspected disability as required under WAC 392-
9 172A-03020(3). WAC 392-172A-03020(3)(e) requires the District to ensure that "[t]he
10 student is assessed in all areas related to the suspected disability, including, if
11 appropriate, health, vision, hearing, social and emotional status, general intelligence,
12 academic performance, communicative status, and motor abilities."

13 Here, the Student suggests that the District violated this provision in two respects:
14 1) the District did not assess the Student for "basic writing skills or his ability to compose
15 written works beyond the sentence level[;]" and 2) failed to attribute the Student's
16 handwriting to anything other than a motor dysfunction. The Student's first argument
17 fails for the same reason his PWN-related arguments fail. Again, the Student does not
18 cite to a single place in the record suggesting that the District did not assess the Student
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23 ⁹ The ALJ's findings of fact concerning Dr. Blair's IEE and corresponding report are very thorough. *See*
AR 6–9 (issuing 17 Findings of Fact concerning Dr. Blair's evaluation).

1 for writing skills.¹⁰ Without more, the Student has failed to meet his burden of proving
2 that the District did not assess the Student's writing skills.

3 Concerning the Student's second argument, the Student seems to suggest that the
4 District's reevaluation was not comprehensive because it did not consider whether the
5 Student's poor handwriting was caused by something other than a motor issue.¹¹ Again,
6 the Student's position conflicts with the record. Dr. Blair testified during the hearing that
7 the Student's handwriting difficulties were "not related to fine motor dysfunction" and
8 were instead "[m]ore of a language processing problem and/or a working memory issue."
9 AR 953. Dr. Blair tested the Student's language processing and memory abilities, and
10 she expressly discussed the results of those tests in her report. *See, e.g.*, AR 1128–29.

11 Beyond Dr. Blair's report, the District also considered input on the Student's
12 handwriting from his teachers (AR 972–73, 975, 980–81), his parents (AR 1147–48), and
13 a private OT assessment performed by a handwriting specialist (AR 1177–79; AR 577;
14 AR 742–44). In evaluating this information, the District concluded that the Student did
15 not qualify for SDI, but nonetheless supported the Student's general education with a
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18 ¹⁰ The record also contradicts this argument in numerous instances. For example, the Student's General
19 Education Report provided by the Student's school psychologist states in the "Significant Findings"
20 section that while the Student's "spelling and editing skills were assessed to fall in the low average range . . . , there does not appear to be an adverse educational impact of his general education classes." AR 1193. The District reiterated this observation verbatim in the PWN it furnished the Student's parents after completing its May 2015 reevaluation. *See* AR 1198.

21 ¹¹ The Student's argument on this point is unclear. In one breathe, the Student argues that the District's
22 reevaluation solely relied on motor ability assessments. In the next breathe, the Student admits that Dr.
23 Blair testified that she did not attribute the Student's handwriting difficulties to any motor-related issue. Yet the District expressly relied on Dr. Blair's report in reevaluating the Student. Consistent with her testimony, Dr. Blair's report reflects an array of non-motor related testing.

1 laptop equipped with word prediction software. AR 1187.¹² The ALJ’s decision on this
2 issue was not in error.

3 WAC 392-172-03040. The Student next argues that the District’s failure to
4 consider his scores on the WJ-III and TOWL tests violated WAC 392-172-03040. In
5 determining eligibility for special education, WAC 392-172-03040(3) requires the
6 District to “(a) Draw upon information from a variety of sources, including aptitude and
7 achievement tests, parent input, and teacher recommendations, as well as information
8 about the student’s physical condition, social or cultural background, and adaptive
9 behavior; and (b) Ensure that information obtained from all of these sources is
10 documented and carefully considered.”

11 The District’s evaluation report shows that the District drew upon information
12 from the Student’s aptitude and achievement tests (*see* AR 1184–86), parent input (*see*,
13 *e.g.*, AR 1189–90), teacher recommendations (AR 1192–93), the Student’s physical
14 condition (AR 1189; AR 1194–95), social background (AR 1186), and adaptive behavior
15 (*see, e.g.*, AR 1196). Live testimony provided at the hearing corroborates the fact that the
16 District’s IEP team did consider the Student’s WJ-III and TOWL scores in reaching its
17 eligibility determination. The Student has not presented any evidence to the contrary,
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21 ¹² As the ALJ correctly notes, “[n]o one, including the Parents, identified any need for new or additional
22 cognitive or academic achievement assessments given Dr. Blair’s IEE report” AR 10. And even if
23 the District did somehow violate WAC 392-172A-03020(3), such a procedural violation would be
harmless.

1 and has failed to meet its burden of demonstrating a procedural violation under WAC
2 392-172-03040(3) for the District's failure to draw from a variety of sources.¹³

3 WAC 392-172A-03035 and -03080. The Student next argues that the District's
4 reevaluation report violated WAC 392-172A-03035 and -03080. WAC 392-172A-03035
5 sets forth the minimum requirements that must be included in an evaluation report.¹⁴
6 WAC 392-172A-03080(1) requires, in relevant part, an evaluation report to include a
7 statement of: "(a) Whether the student has a specific learning disability; (b) The basis for
8 making the determination, including an assurance that the determination has been made
9 in accordance with WAC 392-172A-03040;" and "(e) Whether: (i) The student does not
10 achieve adequately for the student's age or meet state grade level standards in one or
11 more of the areas described in WAC 392-172A-03055(1)[.]"

12 The Student maintains that the District's May 2015 reevaluation report violates
13 these provisions in two ways. First, the Student argues that the report "provides no
14 relevant discussion of the data it relied on in making the eligibility determination and
15 provides no indication that any of the documented data was rejected." Motion at 13. The
16 face of the report flatly contradicts this statement, and expressly confirms that the
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18 ¹³ The Student does not meaningfully argue that the District failed to "document or carefully consider" the
19 information gathered from these sources under WAC 392-172-03040(3)(b), and the record does not
otherwise indicate a violation of this provision. *Accord M.M.*, 2014 U.S. App. LEXIS 19879, at *22-24.

20 ¹⁴ "(a) A statement of whether the student has a disability that meets the eligibility criteria in this chapter;
21 (b) A discussion of the assessments and review of data that supports the conclusion regarding eligibility
including additional information required under WAC 392-172A-03080 for students with specific
22 learning disabilities; (c) How the student's disability affects the student's involvement and progress in the
general education curriculum . . .; (d) The recommended special education and related services needed
23 by the student; (e) Other information, as determined through the evaluation process and parental input,
needed to develop an IEP; (f) The date and signature of each professional member of the group certifying
that the evaluation report represents his or her conclusion."

1 eligibility determination was made pursuant to Dr. Blair's report, a review of the
2 Student's file, observation, interview, consultation, review of previous and current
3 academic performance, and results of statewide standardized testing. AR 1186.
4 Likewise, nothing in the report—nor any other evidence in the record—suggests that the
5 District “rejected” any documented data.

6 Second, the Student suggests that the report “fails to indicate the professional
7 judgment to use [the Student's] general ability index to determine severe discrepancy
8 [sic], [the Student's] criterion score or the District's rejection of Dr. Blair's assessments
9 and ultimate conclusion.” Motion at 13. Although unclear, the Student appears to argue
10 that the District's failure to discuss the Student's “criterion score” alongside its
11 discussion of the Student's General Ability Index (“GAI”) “cognitive score” is a violation
12 of either WAC 392-172A-03035 or WAC 392-172A-03080.

13 Neither of these provisions requires an evaluation report to include a statement of
14 professional judgment. The Student does not otherwise articulate how a failure to include
15 such a statement violates any requirement in either of these provisions. To the contrary,
16 the report states that the Student did not have a disability that met the eligibility criteria
17 (AR 1186), discussed the assessments and data used by the District supporting its
18 eligibility determination (AR 1184–85; AR 1189–97), the recommended services needed
19 by the student (AR 1187), the date and signature of each group member certifying the
20 report (AR 1188), an assurance that the determination was made in accordance with the

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1 Washington Administrative Code (AR 1187),¹⁵ and statements concerning whether the
2 Student met state grade level standards (AR 1186, 1190–93).

3 As the ALJ correctly observed, the only shortcoming in the reevaluation report is
4 its failure to include “a statement of whether the student does not achieve adequately for
5 the student’s age or meet state grade level standards in one or more of the areas identified
6 in WAC-172A-03055(1).” AR 23. But the ALJ concluded that this was a harmless error
7 that did not amount to a FAPE denial. *Id.* Beyond this harmless violation, the
8 preponderance of the evidence demonstrates that the District’s May 2015 reevaluation
9 report complied with WAC 392-172A-03035 and WAC 392-172A-03080.

10 The District cites to WAC 392-172A-03070(2) for the requirement that a report
11 contain a statement of professional judgment. That provision allows—but does not
12 require—an IEP group to apply professional judgment. When the IEP group applies
13 professional judgment, it must analyze the available data and information to determine if
14 a severe discrepancy exists. *Id.* “[T]he group shall document in a written narrative an
15 explanation as to why the student has a severe discrepancy, including a description of all
16 data used to make the determination through the use of professional judgment.” *Id.*

17 Here, nothing in the record indicates that the evaluation results were somehow
18 inaccurate, thereby triggering the need for the Student’s IEP group to apply professional
19 judgment. *See* AR 23. Because the Student has not established that the group did apply
20 professional judgment, the corresponding reporting requirements in WAC 392-172A-

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23¹⁵ Insofar as the report’s failure to pin cite WAC 392-172A-03040 amounts to a procedural violation, such a violation is harmless.

1 03070(2) would not be prompted. Thus, the Student's challenge to the IEP team's failure
2 to document its use of professional judgment is moot. *See Plaintiff's Reply at 9 n. 6.*
3 And even if the IEP group applied professional judgment, the evidence shows that they
4 adequately met the "written narrative" requirement in the statute.

5 **ii. FAPE Denial**

6 The Student argues that the District's procedural violations denied the Student a
7 FAPE "by erroneously exiting him from special education . . . and also significantly
8 impeded the Parents' opportunity to participate in the decision making process."

9 First, the Student maintains that because the District did not conduct the May 2015
10 reevaluation in accordance with the above-discussed procedural requirements, its
11 decision to exit the Student from special education was erroneous. This argument is
12 unpersuasive. Because the District did not commit any harmful procedural violations, it
13 did not deny the Student a FAPE. *Timothy O.*, 822 F.3d at 1124. No procedural violation
14 committed by the District denied the Student any educational opportunity. The Student
15 has not presented any evidence of any alternative educational possibilities that the
16 District didn't consider. *See Doug C.*, 720 F.3d at 1047. Nor has the Student
17 demonstrated that the District would have "better considered" any of those undefined
18 possibilities absent any of the alleged procedural violations.

19 Next, the Student posits that the District's "failure to provide adequate PWN
20 together with providing an insufficient evaluation report significantly impeded the
21 Parents' ability to participate in the process." The Student's reliance on *Union Sch. Dist.*
22 *v. Smith*, 15 F.3d 1519 (9th Cir. 1994) to support this point is misplaced. In that case, the
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1 Ninth Circuit affirmed a district court’s entry of summary judgment awarding expense
2 reimbursement to a family who placed their handicap child in private counseling after the
3 school district denied that child a FAPE. *Id.* at 1527. In contrast to the instant dispute,
4 the issue in *Smith* was whether the district denied the student a FAPE by failing to
5 provide *any* PWN to the student’s parents. *Id.* at 1525–26. In discussing the importance
6 of a PWN, the Ninth Circuit emphasized that “[t]he requirement of a formal, written offer
7 creates a clear record that will do much to eliminate troublesome factual disputes many
8 years later Furthermore, a formal specific offer from a school district will greatly
9 assist parents in ‘presenting complaints with respect to any matter relating to the . . .
10 educational placement of the child.’” *Id.* (quoting 20 U.S.C. § 1415(b)(1)(E)).

11 As a threshold matter, *Smith* is inapplicable here because the District did provide
12 parents with the requisite PWNs each time a decision was made. On March 16, 2015, the
13 District sent (and the parents signed) correspondence confirming that the District planned
14 to conduct a reevaluation that would “review Dr. Blair’s assessment and complete
15 additional testing” in specified areas. AR 1182–83; *see also* AR 1142.

16 On April 1, 2015, the District furnished a PWN confirming that it was amending
17 the Student’s “IEP upon the completion of his [IEE] with Dr. Blair and the team’s
18 discussion of changes to the accommodations, as well as the Parent’s request to amend
19 the annual goals in light of Dr. Blair’s findings” AR 1162. On May 8, 2015, the
20 District submitted a PWN confirming the results of its reevaluation, which was expressly
21 premised on Dr. Blair’s evaluation results, among other things. AR 1198–99.

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1 Outside of these PWNs, the record contradicts any argument that the Student’s
2 parents were somehow impeded in fully participating in the evaluation process. The
3 Student’s parents selected Dr. Blair to administer the IEE. *See* AR 883, 1125–36, 1142–
4 46. The mere fact that the Student’s parents now disagree with the results of the agreed-
5 upon evaluation after the eligibility determination was made is insufficient to establish a
6 procedural violation. *Miller v. Monroe Sch. Dist.*, 131 F. Supp. 3d 1107, 1115–16 (W.D.
7 Wash. 2015); *see also* *Ms. S.*, 337 F.3d at 1133.

8 Beyond the Student’s allegations, nothing in the record suggests that the District
9 withheld any information from the Student’s parents in reaching its eligibility
10 determination. To the contrary, the record shows that the District conferred with the
11 parents at every step of the way—beyond its disclosure obligations imposed in the
12 regulations—in designing and completing the May 2015 reevaluation. The
13 preponderance of the evidence establishes that the District took every reasonable step to
14 ensure the Student’s parents had the opportunity to meaningfully participate in the
15 decision making process at each juncture. More importantly, the record shows that the
16 Student’s parents did actually participate, and that the District incorporated the parents’
17 input into reaching its decision to exit the Student from special education. The mere fact
18 that the parents now disagree with that decision is insufficient to demonstrate that any
19 procedural violation amounted to the District denying the Student a FAPE. The ALJ’s
20 decision on this issue was not in error. *See* AR 35.

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d. Substantive Violations

2 The Student also argues that the District's eligibility determination violates the
3 IDEA's substantive prong in two main respects. First, the Student asserts that the
4 preponderance of the evidence shows that he has a disability within an IDEA SLD
5 category. Second, the Student asserts that the preponderance of the evidence shows that
6 accommodations alone will not remediate his deficiencies.¹⁶

i. Whether the Student has an SLD

8 First, the Student argues that Dr. Blair’s report is evidence that the Student was
9 eligible for SDI in “Written Expression.” As is the case here, “[i]f a school district uses a
10 severe discrepancy model, it will use the OSPI’s published discrepancy tables for the
11 purpose of determining a severe discrepancy between intellectual ability and academic
12 achievement.” WAC 392-172A-03065(1). The IEP group “may determine that a student
13 has a specific learning disability if . . . the group finds that the student has a severe
14 discrepancy between achievement and intellectual ability in one or more of the areas
15 identified in subsection (1) of this section[.]” WAC 392-172A-03055(2)(a). Subsection
16 (1) lists “Written Expression” as an identified area of disability.

17 The OSPI discrepancy table compares a student's General Ability Index IQ¹⁷ to
18 the Criterion Score attained in an OSPI-recognized test. *See* AR 1520, 1522. To find a

20 ¹⁶ The Student also argues that “the preponderance of the evidence shows [the Student] continues to need
21 SDI in written expression.” Motion at 21. The Student does not cite any evidence in support of this
22 argument. *Id.* The evidence shows the opposite: The Student’s IEP team determined that the Student did
not qualify for SDI and, to the extent that he had any remaining difficulties, they could be remedied with
the accommodations offered by the District.

¹⁷ The parties do not appear to contest that the “IQ” column in the OSPI discrepancy table reflects the “General Ability Index” instead of the “Full Scale IQ.”

1 severe discrepancy for a student with a General Ability Index of 105 (as was the GAI
2 reflected in Dr. Blair's report for the Student (*see* AR 1129)), the OSPI discrepancy table
3 requires a Criterion Score of 86. AR 1522.

4 The Student argues that a severe discrepancy exists "as measured by the WJ-III
5 'basic writing skills' subtest." This argument fails for at least three reasons. First, "Basic
6 Writing Skills" is not an area identified in WAC 392-172A-03055(1).¹⁸ Second, the
7 Student's WJ-III score of 92 in "Written Expression"—an area that *is* listed WAC 392-
8 172A-03055(1)—does not qualify as a severe discrepancy under the OSPI discrepancy
9 table for an individual with a 105 GAI. *Compare* AR 1130, *with* AR 1520. Finally,
10 insofar as a severe discrepancy does exist, nothing in the regulations required the IEP
11 group to conclude that the Student had an SLD. *See* WAC 392-172A-03055(2)(a). The
12 Supreme Court has directed that "we are not free 'to substitute [our] own notions of
13 sound educational policy for those of the school authorities which [we] review.'"
14 *Amanda J.*, 267 F.3d at 887 (quoting *Rowley*, 458 U.S. at 206). District officials gave
15 substantial testimony indicating that the IEP group no longer believed the Student needed
16 SDI because his basic writing difficulties—irrespective of which OSPI category they
17 might fit into to—were not adversely affecting his performance. *See, e.g.*, AR 451–453,
18 535, 745–46, 876–880, 978–81.

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21 ¹⁸ The Student argues unpersuasively that the "Basic Writing Skills" subtest of the WJ-III should be
22 construed as a component of the "Written Expression" category identified in WAC 392-172A-03055(1).
23 *See* Motion at 16–18. The Student provides no evidence or legal authority for this conclusion. Likewise,
the mere fact that the OSPI Guidelines contemplate the use of supplemental subtests—and that Dr. Blair
testified that other subtests could be appropriate in various instances—does not alter the IEP group's
determination that the Student did not qualify for an SLD under WAC 392-172A-03055.

1 Beyond Dr. Blair's report, the Student appears to argue that his prior IEPs and
2 evaluations support continuing eligibility for "Written Expression" SDI.¹⁹ This position
3 directly conflicts with WAC 392-172A-02000(2)(a) which states that "[a] student
4 determined eligible for special education services shall remain eligible until . . . [a] group
5 of qualified professionals and the parent of the student . . . determines the student is no
6 longer eligible for special education[.]" This is precisely what happened here.

7 The Student next attacks the school psychologist's failure to consider the
8 Student's academic performance while observing him in his general education classroom
9 under WAC 392-172A-03075(2)(b). *See* AR 461 (Q. Did you consider Student's
10 academic performance while you were observing him? A. No.). The testimony leading
11 up to this question—as well as the reevaluation report itself—demonstrates that no such
12 violation occurred. Prior to this question, the psychologist testified that she observed the
13 Student in his English class "in the area of concern which was English and written
14 expression." AR 459. The psychologist's report included in the reevaluation (AR 1196)
15 also shows that she did observe the student in his general English class and took detailed
16 notes about the student's performance occurring at that time—down to the very minute.
17 *Id.* The preponderance of the evidence is that the psychologist did in fact observe the
18 student's academic performance in compliance with WAC 392-172A-03075(2)(b).²⁰

19 Next, the Student argues that the District failed to properly weigh the Student's
20 prior accommodations and SDI in determining his ongoing eligibility. The Student cites

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22¹⁹ This section of the Student's Motion appears to have been truncated.
23²⁰ And even if this were a violation, the Student does not identify how this shortcoming implicates any
substantive aspect of the IDEA or was otherwise a harmful procedural violation.

1 to *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1375 (8th Cir. 1996) for the proposition
2 that “an adverse impact must be found ‘if the child’s educational performance would
3 have been adversely affected but for the specialized instruction that the child was
4 receiving.’” Motion at 19.

5 *Yankton* has limited applicability here. In that case, the Eighth Circuit stated that
6 “[t]he record here establishes that but for the specialized instruction and services
7 provided by the school district, [the student’s] ability to learn and do the required class
8 work would be adversely affected by her [disability].” 93 F.3d at 1375. The court found
9 that the student still required special education services, and required the school district to
10 continue providing those services. *Id.* at 1375–76.

11 As the District correctly points out, the record here is replete with evidence that
12 the Student’s ability to learn and class work did not depend on the SDI he was receiving
13 prior to the May 2015 reevaluation. *See, e.g.*, AR 452–53, 535, 979, 1190–1193.²¹
14 Conversely, the Student cites to testimony describing the SDI the Student received prior
15 to the May 2015 reevaluation. AR 792, 797, 806, 808, 977, 1192. But nothing in this
16 evidence—nor anything else in the record—demonstrates that but for the SDI the Student
17 received, his ability to learn and perform would have suffered.

18 Next, the Student relies on *W.H. v. Clovis Unified Sch. Dist.* in arguing that the
19 IEP team placed undue weight on the Student’s grades in making their decision. No. CV
20 F 08-0374 LJO DLB, 2009 U.S. Dist. LEXIS 47736 (E.D. Cal. June 8, 2009). *W.H.* does

21 In light of the evidence discussed here, the Student’s suggestion that the “basic” rating the Student
receiving on his state writing test in 7th grade is insufficient to meet his burden of proof. *See* Motion at
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1 not support this conclusion. In that case, the court found that the record established
2 written expression as an area of disability for the student. *Id.* at *49–50. In reversing the
3 ALJ’s contrary finding “that writing was not a suspected need,” the court observed that
4 the ALJ placed too much weight on the student’s grades because the grades “were
5 inflated and did not assess Student’s written expression.” *Id.* at *50. Specifically, the
6 student’s Section 504 plan only required the student to complete 50% of all work. The
7 evidence showed that, in fact, he “only finished 10%–30% of the assigned work for his
8 grade.” *Id.* Because the Student’s grade was not impacted by assignments he did not
9 finish, and because he did not turn in written assignments, the student’s grades were not
10 an accurate reflection of the student’s performance. *Id.* at *50–51.

11 Here, the record shows that some of the Student’s grades were not impaired by
12 any “spelling or grammar errors in writing[.]” AR 1192. Other parts of the record
13 suggest that, in utilizing his other accommodations, the Student was actually “able to
14 show self-correction on many of his own errors . . .” AR 977. To the extent the Student
15 was able to self-correct any spelling or grammar errors, his corresponding grades would
16 be an accurate reflection of his performance, independent of any grade-specific
17 accommodations similar to the ones considered in *W.H.* Either way, *W.H.* does not
18 dictate that the IEP group’s decision to consider the Student’s grades here was somehow
19 improper. The evidence shows that the IEP group considered the conditions unique to
20 the Student’s grades when making their determination. The Student provides no
21 evidence that the IEP group gave these grades undue weight in reaching their decision.

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ii. Whether accommodations will remediate the Student's difficulties

The Student next argues that the accommodations proffered by the District will not remediate the Student’s deficiencies. The Student correctly cites to *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 992 (2017) for the principle that “[t]o meet its obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s curriculum.” The Ninth Circuit recently clarified this standard in *M.C. v. Antelope Valley Union High Sch. Dist.*: “In other words, the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities so that the child can ‘make progress in the general education curriculum,’ taking into account the progress of his non-disabled peers, and the child’s potential.” 858 F.3d 1189, 1201 (9th Cir. 2017) (citations omitted) (quoting *Endrew F.*, 137 S. Ct. at 994).

The Student points to two pieces of testimony in support of his position that accommodations alone are inadequate to cure his difficulties in writing. First, he cites to Dr. Blair's testimony in which she opines that it would not "be appropriate to only provide accommodations for the Student." AR 944. She goes on to clarify that "accommodations are . . . not curative or remedial. . . . [I]n his case he needs to learn how to spell. He needs to learn how to make a proper letter, to form all his letters from the top to the bottom, for example, to capitalize at the beginning of sentences, to provide punctuation at the end just to make his writing more readable. And we are not always able to write with a keyboard. Although technology is moving in that direction it's not appropriate in all cases to use a keyboard with a spell check." AR 944-45. She proceeds

1 to testify that, “on a more-probable-than-not basis,” the Student’s basic writing skill
2 levels will not increase with accommodations alone. AR 945.

3 Second, he cites to Ms. Jewell’s testimony that “grammar and spell check” will
4 not remediate his writing difficulties. AR 644.

5 On its face, both Dr. Blair and Ms. Jewell’s testimony conflicts with the IEP
6 team’s conclusion—reflected in the reevaluation report and their testimony—that
7 accommodations alone would remediate the Student’s writing issues. But the ALJ’s
8 reliance on the IEP team’s testimony over Dr. Blair and Ms. Jewell is not necessarily
9 error. *See N.B. v. Hellgate Elementary Sch.*, 541 F.3d 1202, 1212 (9th Cir. 2008).

10 Instead, the evidence indicates that the ALJ’s decision was appropriate for several
11 reasons. First, Dr. Blair’s testimony is much more general and broad-sweeping than the
12 testimony given by IEP team members. *See* AR 442–43, 719. Second, unlike members
13 of the IEP team, Dr. Blair did not observe the Student in the classroom environment in
14 assessing his performance—unlike various members of the IEP group who had personal
15 knowledge of his in-class performance. Third, Dr. Jewell’s statement that “grammar and
16 spell check” will not cure the Student’s writing difficulties fails to consider the *other*
17 accommodations offered by the District. These additional accommodations (which the
18 evidence shows was considered by the IEP team) included additional time to finish
19 assignments, a change in class setting for test taking, no loss of credit for
20 spelling/grammar errors in writing, and the use of word prediction software. AR 1187.
21 Dr. Jewell’s testimony does not appear to meaningfully assess these other
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1 accommodations. The Student has not demonstrated that the ALJ erred when he gave
2 greater weight to the opinions of the IEP team staff.

3 The Student has not met his burden of showing that a preponderance of the
4 evidence establishes a substantive violation of the IDEA. Because the Student has failed
5 to prove a harmful procedural violation or a substantive violation of the IDEA—or
6 otherwise show that the ALJ committed any reversible error—the Student is not entitled
7 to another IEE at the District’s expense and may not recover on any other corresponding
8 relief he requests. *See* Motion at 21–22. Because the Student has not met his burden of
9 showing that the ALJ’s determination was in error, *see* AR 25, the Student’s request for
10 reversal of the administrative decision is denied.

11 **C. Whether the Student’s Section 504 Claim Should be Dismissed**

12 **a. Discrimination**

13 **i. Elements of Claim**

14 Section 504 “contains an implied right of action for damages to enforce its
15 provisions.” *Mark H. v. Lemahieu*, 513 F.3d 922, 935 (9th Cir. 2008). A plaintiff suing
16 under Section 504 for discrimination “must show (1) she is a qualified individual with a
17 disability; (2) she was denied ‘a reasonable accommodation that [she] needs in order to
18 enjoy meaningful access to the benefits of public services;’ and (3) the program
19 providing the benefit receives federal financial assistance.” *A.G. v. Paradise Valley*
20 *Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1204 (9th Cir. 2016) (quoting *Mark H. v.*
21 *Hamamoto*, 620 F.3d 1090, 1097 (9th Cir. 2010)).

22 A plaintiff can establish the second element in one of two ways. *Id.* First, a
23 plaintiff may show that a student was denied services “needed to enjoy meaningful access

1 to the benefits of a public education and that were available as reasonable
2 accommodations.” *Id.* Second, the plaintiff may show that the student was denied
3 “meaningful access to public education through another means, such as by violating a
4 regulation that implements section 504’s prohibitions.” *Id.* (citing *Lemahieu*, 513 F.3d at
5 938–39; *Alexander v. Choate*, 469 U.S. 287, 301 (1985)).

6 Finally, to prevail on a Section 504 claim, “plaintiffs must prove a *mens rea* of
7 ‘intentional discrimination’ . . . [and] that standard may be met by showing ‘deliberate
8 indifference,’ . . . not only by showing ‘discriminatory animus.’” *Lemahieu*, 513 F.3d at
9 938 (quoting *Duvall v. Cty. of Kitsap*, 260 F.3d 1124, 1136 (9th Cir. 2001)). “Deliberate
10 indifference requires both knowledge that a harm to a federally protected right is
11 substantially likely, and a failure to act upon that . . . likelihood.” *A.G.*, 815 F.3d at
12 1204 (quoting *Duvall*, 260 F.3d at 1139). “The plaintiff establishes the requisite
13 knowledge (or notice) on behalf of the defendant when she shows that she ‘alerted the
14 public entity to [her] need for accommodation (or when the need for accommodation is
15 obvious, or required by statute or regulation).’” *Id.*

16 At issue is: 1) whether the District violated 34 C.F.R. § 104.33 by improperly
17 exiting the Student from special education and denying him a FAPE;²² and 2) whether the
18 District acted with deliberate indifference.

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22 ²² The Student characterizes this argument as a “failure to accommodate” but, beyond the alleged failure
23 to provide the Student with continuing SDI, the Student does not actually discuss any other
accommodation that was not provided. Thus, this memorandum resolves this issue under the “Section
504 violation” framework.

ii. Violation of 34 C.F.R. § 104.33

The disputed provision defines an “appropriate education” as “the provision of regular or special education and related aids and services that . . . are designed to meet individual educational needs of handicapped persons as the needs of nonhandicapped persons are met” 34 C.F.R. § 104.33(b)(1); *see also* A.G., 815 F.3d at 1203.

“Section 504’s regulations gauge the adequacy of services provided to disabled individuals by comparing them to the level of services provided to individuals who are not disabled.” *A.G.*, 815 F.3d at 1203. “Plaintiffs who allege a violation of the [Section 504] FAPE requirement . . . may not obtain damages simply by proving that the IDEA FAPE requirements were not met.” *Lemahieu*, 513 F.3d at 933; *accord J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 570 F. Supp. 2d 1212, 1227 (E.D. Cal. 2008).

In support of his argument that the District violated 34 C.F.R. § 104.33, the Student states that “[a]t the time [the Student] was evaluat[e]d he was at an approximate 5th grade level in basic writing skills and at a third grade level in contextual conventions although he was a Freshman in high school.” Plaintiff’s Reply at 15 (citing AR 1130–31). While the Student’s limitations in basic writing skills and contextual conventions may be true, the Student fails to cite any evidence that the District’s decision to exit him from SDI somehow denied him meaningful access to education. To the contrary, the record evidence shows that he has achieved passing grades in all of his tenth grade classes. Carson Decl., Ex. J. The record further demonstrates that the Student played a role in selecting these general education classes and “has not been treated any differently than any non-disabled student in his class scheduling.” *Id.* at ¶ 16. These facts show that

1 the Student did have meaningful access to public education through the accommodations
2 provided by the District.

3 The District has met its burden of establishing the absent of any genuine issue of
4 material fact concerning whether the District violated 34 C.F.R. § 104.33 or otherwise
5 denied the Student a FAPE. The Student's unsupported assertions to the contrary
6 (Plaintiff's Reply at 14–15) are insufficient to withstand the District's request for
7 summary judgment on the Student's discrimination claim.²³

8 **iii. Deliberate indifference**

9 The Student presents two pieces of evidence in support of its argument that the
10 District acted with deliberate indifference. First, the Student cites excerpts from
11 evaluation reports prepared by the District for other students. *See* Plaintiff's Reply at 16
12 (citing Declaration of Angela Shapow, docket no. 25 ("Shapow Decl."), Ex. 18). The
13 Student relies on this evidence to suggest that the District deliberately chose not to
14 consider the Student's basic writing skills in determining that the Student no longer
15 qualified for an SDI.

16 The Court need not reach the District's argument that this evidence should not be
17 considered because it was not properly introduced pursuant to the IDEA's procedures
18 (*see* District's Reply at 12 n.7). Even if this evidence were properly admitted, the mere

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20 ²³ The sole case relied on by the Student in support of its discrimination argument, *Hamamoto*, is readily
21 distinguishable. In that case, the Ninth Circuit expressly held that “[t]here [wa]s evidence supporting
22 each of the[] allegations” concerning the movants’ inability to enjoy meaningful access to the benefit of a
23 public education. 620 F.3d at 1098. Here, no such evidence exists. Moreover, the Ninth Circuit found
that the defendant in *Hamamoto* was on notice that the movants needed reasonable accommodations but
failed to give them. *Id.* Here, the undisputed evidence demonstrates that the District is still providing the
Student with accommodations notwithstanding that he no longer receives SDI. *See, e.g.*, Carson Decl.,
Ex. D (“Student 504 Plan Details” summarizing the Student’s accommodations).

1 fact that the District chose to evaluate other students with other disabilities differently
2 than the Student does not mean it acted with deliberate indifference in exiting the Student
3 from SDI. Critically, nothing in this evidence demonstrates that the Student alerted the
4 District of a need for an additional accommodation, and the District failed to act on that
5 request. *A.G.*, 815 F.3d at 1204. Nor does this evidence suggest that the District was
6 aware of a substantial likelihood that the method it employed in evaluating the Student
7 would violate any protected right.

8 Second, the Student points to the District's own evaluation protocol. Plaintiff's
9 Reply at 16. To the extent this evidence is properly before the Court (*see* District's Reply
10 at 12 n.7), it is insufficient to create any issue of fact that the District acted with
11 deliberate indifference. The Student cites to a section in the protocol entitled
12 "Recommendations to IEP Committee" in arguing that the District acted intentionally in
13 failing to consider conventions in its assessment. This argument fails for at least two
14 reasons. First, the evidence does not show that the District failed to consider writing
15 conventions in deciding to exit the Student from SDI. To the contrary—and as
16 extensively discussed above—the record unequivocally demonstrates that Dr. Blair
17 assessed the Student's basic writing skills and that, in turn, the District relied on that
18 report in completing the May 2015 reevaluation. Second, even if the District did fail to
19 assess the Student's writing, nothing in this protocol required the District to do so. Nor
20 does the Student put forth any authority supporting the proposition that a district's failure
21 to follow its model protocol is sufficient to establish deliberate indifference.

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1 In sum, the District has met its initial burden of demonstrating an absence of
2 material fact as to whether the District discriminated against the Student when it exited
3 him from SDI. The Student, in turn, has failed to proffer any evidence creating any issue
4 of fact that the District violated Section 504 or acted with deliberate indifference.

5 **b. Retaliation**

6 To establish a *prima facie* retaliation claim, a claimant must show that (1) he
7 engaged in a protected activity; (2) the defendant subjected him to an adverse action; and
8 (3) a causal link exists between the protected activity and the adverse action. *Walker v.*
9 *City of Lakewood*, 272 F.3d 1114, 1128 (9th Cir. 2001). Concerning the third element,
10 the required nexus is the more stringent “but for” causation. *T.B. v. San Diego Unified*
11 *Sch. Dist.*, 806 F.3d 451, 473 (9th Cir. 2015). At issue is the third element—whether the
12 Student can demonstrate any causal connection between the District’s exit decision and
13 the Student’s pursuit of a due process complaint.

14 The District’s reliance on the *T.B.* case is persuasive. Like here, the plaintiff’s
15 retaliation claim was before the court on defendant’s motion for summary judgment. *See*
16 806 F.3d at 472–73. Also like here, the plaintiff charged the defendant with retaliating
17 against plaintiff’s “aggressive advocacy” on behalf of the student. *Id.* In affirming the
18 district court’s summary judgment dismissal of plaintiff’s claim, the Ninth Circuit
19 concluded that “[n]o reasonable jury could conclude that the [plaintiff] made out a *prima*
20 *facie* case of retaliation.” *Id.* More specifically, the court determined that no reasonable
21 jury could find that the defendant would have reached a different decision in carrying out

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1 its adverse action against plaintiff but for plaintiff's advocacy on the student's behalf. *Id.*
2 Instead, there were other plausible reasons supporting the defendant's adverse action.

3 Likewise here, no reasonable jury could conclude that the Student has made out a
4 *prima facie* retaliation claim. The Student's only argument in support of its retaliation
5 claim is that the District's decision to exit the Student from SDI was close in time to the
6 Student's settlement of his first due process request. Plaintiff's Reply at 17–18. While
7 the Student might be correct that the due process request and the exit decision were close
8 in temporal proximity, the Student has failed to put forth any evidence suggesting that,
9 but for the due process request and corresponding settlement, the District would have
10 decided to keep the Student in SDI. *T.B.*, 806 F.3d at 473.

11 Rather, the evidence demonstrates other legitimate reasons why the District chose
12 to exit the Student. The District decided to reevaluate the Student in October 2014—
13 months before the due process request was filed (in January 2015) and subsequently
14 settled (in April 2015). *See AR 1464*. Moreover, a student under the age of 18 who has
15 not yet graduated high school cannot be exited from special education without a
16 reevaluation. WAC 392-172A-02000(2). Accordingly, the Student's suggestion that the
17 District somehow acted improperly when it issued an April 1, 2015, PWN is
18 unconvincing. Plaintiff's Reply at 17. The District offered the Student continued special
19 education after Dr. Blair issued her report because it was required to do so. Importantly,
20 the District would have violated the IDEA by exiting the student in April 2015 without
21 completing its reevaluation, which was not done until May 2015.

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1 On February 27, 2015, the parties discussed the possibility of initiating the
2 reevaluation of the Student in response to Dr. Blair's findings. AR 1162. The Student's
3 parents proffered their consent to the reevaluation on March 16, 2015, and the District
4 completed the reevaluation on May 8, 2015. Beyond the sole fact that the parties settled
5 the Student's due process request between these two dates, the Student has failed to put
6 forth any evidence that the District's payment of settlement funds to Student had any
7 influence on the exit decision—let alone a “but for” influence on that decision.

8 The Student has failed to establish a *prima facie* case for retaliation. The Court
9 need not reach the parties' remaining arguments concerning the burden shifting analysis
10 under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The Student's
11 retaliation claim is dismissed.

12 | Conclusion

13 For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment,
14 docket no. 13, is DENIED, Defendant's Cross-Motion for Summary Judgment, docket
15 no. 16, is GRANTED, and this case is DISMISSED with prejudice.

16 || IT IS SO ORDERED.

17 || Dated this 27th day of October, 2017.

Thomas S. Bally

Thomas S. Zilly
United States District Judge