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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

L.S., a minor by and through her
Guardian Ad Litem, VICTORIA
_____,

Plaintiff,

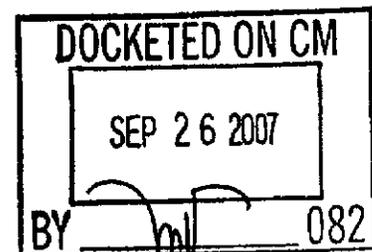
vs.

TUSTIN UNIFIED SCHOOL
DISTRICT

Defendant.

Case No.: SACV 06-649 CJC (RNBx)

MEMORANDUM OF DECISION



I. INTRODUCTION

This is an administrative appeal from a decision by an Administrative Law Judge (“ALJ”) in the Office of Administrative Hearings (“OAH”). The ALJ determined that the Defendant Tustin Unified School District (“TUSD”) met its “child-find” obligations and therefore TUSD did not violate any duty to provide Plaintiff a Free Appropriate Public Education (“FAPE”) for the school years 2001-2005, as required by the Individuals with

1 Disabilities Education Act ("IDEA"), 20 U.S.C. §§ *et seq.* Having reviewed the
2 administrative record, this Court reaches the same conclusion. During the 2001-2004
3 school years, TUSD met its duty to identify disabled students in both public and private
4 schools by "actively and systematically seeking out all individuals with exceptional
5 needs." Cal. Educ. Code §§ 56300-56302. When Plaintiff L.S.'s mother requested an
6 assessment for special education services in May 2004, TUSD responded in a timely and
7 appropriate manner, and arranged for an Individualized Education Program ("IEP")
8 meeting upon receipt of proof of L.S.'s residency within the school district. Accordingly,
9 TUSD met its duty to provide L.S. with a FAPE for the 2005-2006 school year.

11 II. FACTUAL BACKGROUND

12
13 L.S. presently resides with her mother in Mission Viejo, California. Her due
14 process claims arise from a period when she resided within TUSD's boundaries. She was
15 never enrolled in a public school.

16
17 L.S. was born on June 22, 1995. Soon after her birth, she was referred to the
18 Regional Center of Orange County ("RCOC") as an at-risk child for developmental
19 delay. RCOC was responsible for monitoring L.S.'s development until she turned three
20 years of age. RCOC often refers its students to TUSD if it believes they are in need of
21 further services as they approach their third birthday. In this case, however, RCOC
22 terminated L.S.'s services shortly before her third birthday because L.S.'s assessment
23 scores indicated that she was functioning at age level. RCOC indicated to L.S.'s mother,
24 Victoria [REDACTED] that TUSD could provide services for L.S. upon her termination, but
25 Ms. [REDACTED] erroneously assumed that services would be provided automatically and that
26 it was not necessary to seek out services from TUSD.

1 Ms. ██████ arranged for L.S. to attend preschool at home, where she was taught
2 by a former teacher from Waldorf School, a private school located within the boundaries
3 of TUSD. During the 2001-2002 school year, Ms. ██████ enrolled L.S. at Waldorf
4 School for kindergarten, and L.S. continued to attend school there through the 2003-2004
5 school year.

6
7 While L.S. attended Waldorf School, Ms. ██████ became concerned that L.S.'s
8 reading and writing skills were delayed and arranged for Dr. Chris Davidson, a private
9 educational psychologist, to assess L.S. After Dr. Davidson conducted standard
10 intelligence tests and observed L.S. in school, he recommended that L.S. attend Prentice
11 School, a non-public school located within the boundaries of TSUD that serves students
12 with language learning deficits. Ms. ██████ enrolled L.S. at Prentice School in August
13 2004.

14
15 In November of 2002 and 2004, the Orange Unified School District ("OUSD")
16 Special Education Local Plan Area ("SELPA"), acting on behalf of all of the Orange
17 County school districts, sent out letters to all of the private schools in Orange County
18 alerting the private schools to the districts' "child-find" obligations and providing contact
19 information for OUSD. Attached to the letters were surveys intended to locate children
20 attending private schools who had already been determined to need special education
21 services. The SELPA directors used the telephone book, general knowledge, and a list
22 developed by the Orange County Department of Education ("OCDE") of private schools
23 to identify the schools that would receive the letters and surveys. Waldorf School and
24 Prentice School were on the compiled list of private schools to which letters were sent.
25 OUSD then distributed the survey responses it received to the appropriate school
26 districts.

1 TUSD also cooperated with OCDE in carrying out additional child find activities:
2 First, TUSD, in conjunction with OCDE and other SELPAs, placed annual
3 advertisements in general circulation newspapers that described the districts'
4 responsibility to assess all children in the various districts who were suspected of having
5 educational disabilities. The advertisements also provided contact information for
6 TUSD. Second, TUSD provided pamphlets with similar contact information to doctors,
7 hospitals, and businesses in the community. Third, TUSD developed a Community
8 Action Group ("CAG") made up of parents, community members, and 17 district staff
9 members. The CAG provides 10 presentations per year to the public regarding special
10 education programs and services. Fourth, TUSD has maintained a website since 2001
11 which provides information about the special education department, a copy of the TUSD
12 Special Education Local Plan Area Notice regarding parent rights, and information
13 regarding the CAG, including their meeting dates. Fifth, during the spring of the 2004-
14 2005 school year, Capistrano Unified School District, acting on behalf of all Orange
15 County school districts, invited all private schools in Orange County to attend a general
16 meeting to discuss changes to the child-find procedures brought about by the IDEA's
17 2004 amendments, to become effective in July 2005. Ms. Stone, Assistant
18 Superintendent for Special Education and the SELPA director for TUSD from January
19 2003-July 2005, testified at the Due Process Hearing that staff from Prentice School
20 attended the meeting. Dr. Stillings, then Director of Special Education for TUSD, also
21 attended the meeting and testified that Karen Lerner, a Prentice administrator, attended
22 the 2005 meeting. Sixth, TUSD representatives regularly met with doctors, hospitals, and
23 other health providers to alert them to the district's "child-find" responsibilities. The
24 OCDE established a program called Grand Rounds in which a doctor, parent, and the
25 director of OCDE visit Children's Hospital of Orange County and UCI Medical Center to
26 discuss children at risk and the importance of referring those children to the school
27 districts for special education evaluations. The Grand Rounds are conducted twice a
28 year. Seventh, in January 2005, TUSD launched a publication entitled "Roll Call" which

1 includes articles from every school in TUSD along with general and contact information
2 for TUSD. Roll Call is provided free to TUSD schools and Tustin businesses and
3 restaurants. Additionally, after each printing, a specific neighborhood in Tustin is
4 targeted and each residence in that neighborhood receives a copy. At least one edition of
5 Roll Call contained special education services information. Eighth, TUSD offers a
6 special education preschool program whose students and staff members go into the
7 community every Friday. Staff members provide brochures regarding special education
8 programs to community members who often approach them during the community
9 outings. Ninth, in response to the 2004 amendments to the IDEA, which increased the
10 scope of districts' child-find obligations with respect to children attending private
11 schools, TUSD and other SELPAs in Orange County held a meeting in July 2005. At the
12 meeting, they determined that each SELPA would participate in sending out letters to
13 private schools regarding child-find and recent changes to the IDEA. A master list of
14 private schools, including Waldorf School and Prentice Schools, was disseminated to all
15 SELPA directors to aide them in sending out the letters. The list had previously been
16 used during the 2004-2005 school year when OUSD sent out the child-find letters and
17 surveys on behalf of all school districts in Orange County.

18
19 On May 18, 2004, L.S. first made contact with TUSD by way of a letter from
20 L.S.'s attorney requesting that TUSD send a copy of L.S.'s "cumulative record and
21 confidential file" within five days. The letter requested that an IEP meeting be held
22 within 30 days and provided the name of L.S.'s mother along with L.S.'s name and birth
23 date. Although the letter implied that L.S. was enrolled within the district, TUSD was
24 unable to locate any record of L.S. or any referral indicating that L.S. was an individual
25 in need of special education services.

26
27 On September 15, 2004, L.S.'s attorney sent another letter to TUSD stating the
28 L.S. had lived in the District for the last ten years, but the letter failed to provide any

1 documentation of this fact. It also stated that within 10 days, Ms. [REDACTED] would provide
2 L.S. with an "independent educational program that adequately addresses [L.S.'s]
3 documented educational deficits," and that Ms. [REDACTED] would seek reimbursement for
4 all costs incurred. As TUSD is only responsible for providing special education services
5 for children residing in its jurisdiction, TUSD demanded proof of residency before it
6 offered assessment services to L.S. TUSD sent letters to L.S.'s attorney requesting proof
7 of residency on September 21, 2004, December 6, 2004 and again on January 4, 2005.
8

9 On April 20, 2005, L.S.'s attorney finally provided TUSD with a copy of an
10 electric bill as proof of residency. TUSD provided an assessment plan to L.S.'s mother
11 on May 4, 2005, and the mother signed it on May 12, 2005. TUSD acted quickly to
12 complete the assessments prior to the end of the 2004-2005 school year. The assessment
13 indicated that L.S. was in need of articulation therapy and vision therapy services. TUSD
14 offered L.S.'s attorney several dates to convene an IEP meeting during the summer of
15 2005, but the attorney rejected the meeting dates. Dr. Stillings contacted Ms. [REDACTED] by
16 telephone and letter to encourage her to attend the IEP meeting, but Ms. [REDACTED] stated
17 that, in accordance with her attorney's advice, she would not attend the meeting. The IEP
18 meeting was convened in accordance with TUSD's guidelines for timeliness on
19 September 6, 2005, without L.S.'s parents in attendance. Shortly after the September IEP
20 meeting, L.S. moved out of the District.
21

22 On October 21, 2004, L.S. filed a request for a Due Process Hearing, alleging that
23 TUSD violated its "child-find" requirements under the IDEA and the California
24 Education Code with respect to L.S. At the Due Process Hearing, L.S. alleged that
25 TUSD's failure to meet its child-find duty denied her a free appropriate public education
26 ("FAPE") for the school years 2001-2005 and therefore she was entitled to
27 reimbursement for private school tuition at Waldorf and Prentice Schools, vision therapy
28 services, physical therapy, occupational therapy, tutoring services while at Waldorf, and

1 all private expert assessments. The ALJ took evidence from the parties and heard five
2 days of testimony. On May 16, 2006, he issued a decision ruling in favor of the District,
3 finding that TUSD had not violated its "child find" requirements and that L.S. was not
4 entitled to any form of reimbursement. This administrative appeal followed.

6 III. STANDARD OF REVIEW

7
8 "When a party challenges the outcome of an IDEA due process hearing, the
9 reviewing court receives the administrative record, hears any additional evidence, and,
10 'basing its decision on the preponderance of the evidence, shall grant such relief as the
11 court determines is appropriate.'" *R.B. ex rel F.B. v. Napa Valley Unified Sch. Dist.*, ---
12 F.3d ----, 2007 WL 2028132 at *3 (9th Cir. Jul. 16, 2007) (quoting 20 U.S.C. §
13 1415(i)(2)(B)). In reviewing the administrative record, courts are to give "due weight" to
14 the state administrative proceedings. *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*,
15 481 F.3d 770, 775 (9th Cir. 2007) (quoting *Bd. of Educ. of Hendrick Hudson Cent. Sch.*
16 *Dist., Westchester Cty. v. Rowley*, 458 U.S. 176, 206 (1982)). Courts must be careful not
17 to "substitute their own notions of sound educational policy for those of the school
18 authorities which they review." *Id.* (quoting *Rowley*, 458 U.S. at 206). This review
19 requires the district court to carefully consider the administrative agency's findings.
20 *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751,758 (3rd Cir. 1995). Where the hearing
21 officer's findings are "thorough and careful," the court gives those findings "particular
22 deference." *R.B.*, 2007 WL 2028132 at *3 (quoting *Union Sch. Dist. v. Smith*, 15 F.3d
23 1519, 1524 (9th Cir. 1994)). After such consideration, "the court is free to accept or
24 reject the findings in part or in whole." *Susan N.*, 70 F.3d at 758. When the court has
25 before it all the evidence regarding the disputed issues, it may make a final judgment in
26 what "is not a true summary judgment procedure [but] a bench trial based on a stipulated
27 record." *Ojai Unified School District v. Jackson*, 4 F.3d 1467, 1472(9th Cir. 1992).

1
2 **IV. LEGAL ANALYSIS**
3

4 The IDEA provides that the State has an obligation to ensure that “[a] free
5 appropriate public education is available to all children with disabilities residing in the
6 State between the ages of 3 and 21, inclusive.” 20 U.S.C. § 1412(a)(1)(A). In order to
7 ensure that states meet this goal, the IDEA creates an affirmative obligation on the part of
8 states to “find all children with disabilities residing in the State, including children...with
9 disabilities attending private schools, regardless of the severity of their disabilities” so
10 that such students “who are in need of special education and related services, are
11 identified, located, and evaluated.” 20 USC § 1412(a)(3)(A).¹ To ensure this access to a
12 free appropriate public education, school districts are charged with the dissemination of
13 information to the local community “to create awareness that public services exist for
14 disabled students.” *Student v. Saddleback Valley Unified School District*, (2005) SEHO
15 Case No. 05-1261, p.5. This duty is often referred to as “child-find.”
16
17
18

19 ¹ The IDEA was amended in 2004. Provisions added to 20 U.S.C. section 1412 (a)(10)(A)(ii), effective
20 July 1, 2005, extended the scope of school districts’ child-find obligations to include students that attend
21 private schools located within a school district, even if those students reside outside of the school
22 district’s jurisdiction. Prior to the amendment, the child-find obligations only extended to children
23 residing within a school district’s jurisdiction. The amendments also provide that child-find activities
24 undertaken to locate children attending private schools should be similar to those intended to locate
25 children attending public schools within the district. See 20 U.S.C. § 1412(a)(10)(A)(ii), stating “the
26 local educational agencies...shall undertake activities similar to those activities undertaken for the
27 agency’s public school children.” Finally, the amendments require meaningful and timely consultation
28 between a local educational agency and private school representatives and representatives of parents of
parentally placed private school children with disabilities. *Id.* These amendments do not affect the
analysis in the instant case, however, as TUSD provided an assessment plan to Ms. Schlicht in May
2005, prior to the effective date of the Amendments. Given that the purpose of the child-find
obligations is to ensure that children are provided a FAPE, and TUSD met its duty to provide a FAPE to
L.S. prior to the effective date of the Amendments, any subsequent change in TUSD’s duty to locate
private school students is irrelevant to this analysis. Thus, this Court will analyze TUSD’s child-find
activities under the version of the IDEA that existed prior to the 2004 amendments.

1 California law echoes the requirements of the IDEA, requiring that “all children
2 with disabilities residing in the state, including...children with disabilities
3 attending...private elementary and secondary schools, regardless of the severity of their
4 disabilities, and who are in need of special education and related services, shall be
5 identified, located, and assessed as required by paragraph (3) and clause (ii) of paragraph
6 (10) of subsection (a) of Section 1412 of Title 20 of the United States Code.” Cal. Ed.
7 Code § 56301. “Each District...shall actively and systematically seek out individuals
8 with exceptional needs, ages 0 through 21 years, including children not enrolled in public
9 school programs, who reside in the school district or are under the jurisdiction of a
10 special education local plan area or a county office.” Cal. Ed. Code § 56300.

11
12 In 1997, Congress amended the IDEA to limit the circumstances in which parents
13 who have unilaterally placed their child in a private school² can receive reimbursement
14 for that placement. *Greenland Sch. Dist. V. Amy N.*, 358 F.3d 150, 157 (1st Cir. 2004).
15 Because L.S. was enrolled at a private school, Prentice, when she filed her due process
16 hearing request, her rights under the IDEA are governed by 20 U.S.C. section
17 1412(a)(10). *Miller v. San Mateo-Foster City Unified Sch. Dist.*, 318 F. Supp. 2d 851,
18 862 (D. Cal. 2004). Section 1412(a)(10)(C)(i) provides that the IDEA does not “require a
19 local education agency to pay for the cost of education, including special education and
20 related services, of a child with a disability at a private school or facility if that agency
21 made a free appropriate public education available to the child and the parents elected to
22 place the child in such private school or facility.” To determine if L.S. is entitled to
23 compensation, the Court must decide if TUSD violated its “child-find” requirements in
24 failing to locate, identify, and evaluate L.S. as required by federal and state law, such that
25 L.S. was denied a FAPE for the school years 2001-2005.

26
27
28 ²“Unilateral placement” means that parents placed their children in private school on their own
initiative, rather than while acting in conjunction with a school district to meet the terms of a child’s
Individualized Education Plan, for example.

1
2 As child-find serves as the method by which districts identify which children are in
3 need of special education services, the duty to child-find necessarily arises before the
4 duty to provide a FAPE. *See Student v. Saddleback Valley Unified School District*,
5 (2005) SEHO Case No. 05-1261, p.5, stating that “a school district’s child-find
6 obligations are a precursor to the district’s responsibility to offer and provide a disabled
7 student with FAPE.” In other words, the requirement to provide a FAPE does not arise
8 unless and until a child is found in need of services, or unless the school district does not
9 meet its child-find responsibilities. The Court must therefore address two distinct but
10 related legal issues: (1) Did TUSD meet its child-find obligation? (2) Was L.S. denied a
11 FAPE from 2001-2005?³

12 13 **A. Did TUSD Meet Its Child-Find Duty From 2001-2005?**

14
15 While it is clear that districts must engage in child-find activities for all children
16 residing in their jurisdiction, including those attending private schools, the IDEA and the
17 California Education Code do not specify which activities are sufficient to meet a
18 district’s child-find duty. There is no specific requirement that districts set up meetings
19 with private school representatives as part of the child-find process, for example.⁴
20 Hearing officers interpreting the statute have fashioned their own requirements in state
21 administrative law cases, however. In *Saddleback*, the hearing officer determined that
22 the respondent district had met its duty to locate, identify, and evaluate the petitioner
23 while he attended private school based on the following activities: (1) The district

24
25 ³ It was stipulated that L.S. was vision impaired at all relevant times in litigation. It was also stipulated
26 that TUSD provided L.S. with a FAPE at the September 6, 2005 IEP. Therefore, the issue remaining is
27 whether TUSD conducted appropriate “child find” efforts prior to the September 6, 2005 IEP and
28 whether Ms. [REDACTED] is entitled to reimbursement. ALJ Decision ¶ 5.

⁴ As explained in footnote 1, the amended version of the IDEA does require that local educational
agencies engage in “meaningful and timely consultation” with representatives of private schools, but
those amendments are not applicable to this analysis

1 engaged in a joint effort with the Orange County Department of Education and other
2 Special Education Local Plan Areas ("SELPA") to publish annual notices in local
3 newspapers; (2) The SELPA engaged in meetings with local physicians, including those
4 at UCI and CHOC; (3) The South Orange County SELPA participated in annual meetings
5 with representatives of private schools in Orange County regarding the IDEA and the
6 availability of special education services; (4) The OUSD, on behalf of all the SELPAs in
7 Orange County, sent letters in 2002 and 2004 informing private schools of the districts'
8 obligation to find and identify all children with disabilities, including those attending
9 private schools; (5) District staff testified that they informed staff at Prentice school, the
10 private school attended by petitioner, on several occasions that Prentice staff should refer
11 children with suspected disabilities to the District; (6) The District maintained a website
12 that provided information regarding special education; (7) The District provided
13 pamphlets with similar information at its offices; (8) The District had a Community
14 Advisory Committee which sought out parents of children with disabilities; and (9) the
15 District issued an annual notification to parents of children enrolled in the District that
16 included a brief explanation of special education. *Student v. Saddleback Valley Unified*
17 *School District*, (2005) SEHO Case No. 05-1261, p. 6. The hearing officer found that
18 this broad array of outreach activities met the child-find duty because the district ensured
19 that "[i]nformation was disseminated through a variety of different sources to parents,
20 private schools, and the community as a whole to create an awareness that special
21 education services existed." *Id.*

22
23 In the case *Student v. San Mateo-Foster City School District*, (2002) SEHO
24 Case No. 02-2682, the hearing officer clarified the child-find standard by finding that a
25 single, passive child-find activity such as an annual newspaper publication is insufficient
26 to meet a district's child-find duty. In that case, the district argued that it had met its
27 child-find duty by posting notices in newspapers, sending approximately 250 notices to
28 private schools, and distributing brochures to doctors' offices and others that serve the

1 disabled population of school-aged children. *Id.* at p. 7. The district had decided not to
2 send a notice to the particular private school attended by petitioner, however. Because
3 the petitioner's school functioned primarily to serve children with disabilities, the district
4 presumed that school staff must be aware of the district's assessment services.
5 Consequently, the only activities that could have reasonably located petitioner were the
6 annual newspaper notice and the distribution of brochures to doctors' offices. The
7 hearing officer determined that while a newspaper notice "is a reasonable step" towards
8 the goal of informing parents, it is "not necessarily sufficient in and of itself to satisfy the
9 child-find obligation." *Id.* at p. 8. The hearing officer noted that the activity of mailing
10 notification directly to private schools is the type of conduct "reasonably calculated to
11 meet the child-find obligation." *Id.* The district's failure to include petitioner's school in
12 the list of schools it contacted, in conjunction with the lack of other outreach activities,
13 led the hearing officer to conclude that the district had failed to fulfill its child-find
14 obligation. *Id.*

15
16 Here, TUSD engaged in a broad array of child-find activities comparable to the
17 respondent district in *Saddleback* and easily distinguished from the conduct of the district
18 in *San Mateo-Foster City School District*. Like the Saddleback Valley Unified School
19 District, TUSD acted in conjunction with the OUSD to send letters in 2002 and 2003 to
20 all private schools in Orange County, informing them of the districts' obligation to find
21 and identify all children with disabilities, including those attending private schools.
22 TUSD, like the district in *Saddleback*, engaged in a joint effort with the OCDE and other
23 SELPAs in Orange County to publish notices in local newspapers on an annual basis.
24 TUSD similarly met with local doctors on a regularly basis, established a Community
25 Advisory Group, maintained a website that provides information about the special
26 education department, and provided a copy of Parent/Student Rights and Responsibilities
27 that contained information regarding special education to all enrolled students annually.
28 TUSD also reached out to the community through its Grand Rounds program, the

1 publication of its "Roll Call" magazine, distribution of brochures, and its special
2 education preschool program.

3
4 Unlike the respondent school district in *San Mateo-Foster City School District*,
5 TUSD has made efforts to actively engage with staff at the private schools attended by
6 L.S. As discussed, TUSD provided letters to Prentice and Waldorf in 2002 and 2004 that
7 stated that the IDEA requires school districts to find, identify, and evaluate all children
8 with qualified disabilities residing within the school district, including those who attend
9 private schools, to determine if they qualify for special education and related services.
10 Ex. R at 522. Sending notices to private schools is the type of activity "reasonably
11 calculated to meet the child-find obligation." *San Mateo-Foster City School District*,
12 (2002) SEHO Case No. 02-2682, p. 8. TUSD again reached out to Prentice and Waldorf
13 by acting in conjunction with Capistrano Unified School District to invite all private
14 schools in Orange County to attend the spring 2005 meeting to discuss changes in the
15 child-find procedures brought about by the 2004 Amendments to the IDEA. Ms. Stone
16 and Dr. Stillings' testimony credibly establishes that staff from Prentice School attended
17 the meeting. TUSD has also made efforts to meet its expanded duties to private schools
18 under the 2004 Amendments by participating in sending out letters to all private schools
19 in Orange County regarding the effect of the Amendments.

20
21 Additionally, the record demonstrates that staff at both Prentice and Waldorf
22 Schools knew that TUSD offered assessment services for children with special needs.
23 Holly Derheim, an administrator for Waldorf School, testified that she was aware that
24 school districts assessed students for special education eligibility. Tr. Vol. II., 25:18-24
25 (Testimony of Holly Derheim). There is substantial evidence that staff at Prentice School
26 were also aware of the referral process and of the assessment services offered by TUSD.
27 Carol H. Clark, Executive Director at Prentice School, testified that she knew about
28 TUSD's child find obligations, including the duty to assess students. Tr. Vol. I., 181:2-7;

1 Tr. Vol. I., 178:20-22 (Testimony of Carol Clark). Ms. Clark stated that she was aware
2 that local school districts could provide assessments for students. She stated that she
3 knew of students currently attending Prentice who had obtained an IEP through their
4 local school district and whose tuition was funded by the school district. Tr. Vol. I.,
5 174:12-175:3; Tr. Vol. I., 176:3-10 (Testimony of Carol Clark).

6
7 Prentice School does not normally refer its students to the local school district
8 unless they have never undergone an assessment or their parents indicate that they cannot
9 afford the tuition at Prentice, however. Tr. Vol. I., 183:11-19; Tr. Vol. I., 186:6-18
10 (Testimony of Carol Clark). Ms. Clark explained that even if Prentice staff believe that
11 one of their students has special educational needs, Prentice' policy is generally not to
12 refer that child to the local school district for an IEP because Prentice believes that it can
13 appropriately service these children through its "Slingerland" method. Tr. Vol. I.,
14 222:18-223:10 (Testimony of Carol Clark). Prentice believes that it is a parent's choice
15 to seek services at Prentice rather than at their local public school, and thus up to the
16 parent to seek out services from a public school. Tr. Vol. I., 183:11-19 (Testimony of
17 Carol Clark). Additionally, other staff at Prentice School had been aware for the last
18 several years that TUSD was able to provide assessments of their students. *See Student v.*
19 *Saddleback Valley Unified School District*, SEHO Case No. 05-1261, pp. 6-7.

20
21 The fact that the private schools attended by L.S. had knowledge of the referral and
22 assessment process is significant because public schools rely heavily on private schools
23 and other community members such as parents, physicians, and child care providers to
24 provide referrals to the school districts. Tr. IV: 134:9-135:18 (Testimony of Dr.
25 Stillings). Although a district's child-find activities put these groups on notice of the
26 district's obligations, if these various entities fail to respond to these efforts and make no
27 referrals, then a district would have no way of knowing that a child with special needs
28 outside of the public school system existed. Tr. IV: 135:19-21. (Testimony of Dr.

1 Stillings). The actions of a school district cannot be judged in light of information that
2 the district did not know or have reason to know at the relevant time. *See Adams v. State*
3 *of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999) (citing *Fuhrmann v. East Hanover Bd.*
4 *Of Educ.*, 993 F.2d 1031, 1041 (3rd Cir. 1993)). In this case, neither Waldorf nor
5 Prentice Schools referred L.S. to TUSD for an assessment while she attended those
6 schools, and TUSD had no way of knowing of L.S.'s existence until her attorney
7 contacted TUSD in May of 2004.

8
9 The Court finds that by engaging in such a wide variety of both active and passive
10 activities from 2001-2005, TUSD met its duty to actively and systematically seek out all
11 individuals with exceptional needs, including those not enrolled in public school
12 programs, who reside in the school district or are under the jurisdiction of a special
13 education local plan area or a county office. Cal. Ed. Code § 56300.

14 15 **B. Evidentiary Issues**

16
17 L.S. objects to the ALJ's reliance on the letters that the Orange Unified School
18 District ("OUSD") sent to private schools in 2002 and 2004, acting on behalf of TUSD
19 and other school districts. L.S. argues that the letters should not have been considered
20 because they were sent by OUSD, not TUSD, because TUSD failed to lay a proper
21 foundation for the letters, and because the letters are inadmissible hearsay. With regard
22 to the fact that the letters were ultimately mailed by OUSD rather than TUSD, the Court
23 finds that nothing in the IDEA or California Education Code prevents SELPAs or school
24 districts from working together to meet their child-find obligation. L.S. has presented no
25 evidence contradicting Anne Stone's testimony that TUSD collaborated with OUSD to
26 avoid duplication of efforts and that OUSD sent out the letters on behalf of all school
27 districts in Orange County. Tr. Vol. IV, 97:22-98:10 (Testimony of Anne Stone).

1 As to L.S.'s evidentiary objections, the Court notes that California law provides
2 that special education hearings shall not be conducted according to the rules of evidence
3 used in court proceedings. 5 Cal. Code Regs. § 3082(b). In particular, § 3082(b)
4 provides:

5
6 Any relevant evidence shall be admitted if it is the sort of evidence on which
7 responsible persons are accustomed to rely in the conduct of serious affairs,
8 regardless of the existence of any common law or statutory rule which might make
9 improper the admission of such evidence over objection in civil actions. Hearsay
10 evidence may be used for the purpose of supplementing or explaining other
11 evidence but shall not be sufficient in itself to support a finding unless it would be
12 admissible over objection in civil actions.

13 The Court finds that the letters and surveys are extremely relevant because they
14 demonstrate that TUSD actively reached out to the private schools attended by L.S.
15 during the relevant time period and informed these schools that TUSD had a duty to
16 locate, identify, and assess L.S., along with other private school students with a qualified
17 disability. Given that the letters were supported by the testimony of Anne Stone and that
18 L.S. did not provide evidence impeaching this portion of the testimony, the letters are
19 "the sort of evidence on which responsible persons are accustomed to rely in the conduct
20 of serious affairs."

21 While the letters are hearsay, they were not the sole basis of the ALJ's decision, as
22 his conclusions of law relied upon all of the child-find activities engaged in by TUSD.
23 Accordingly, the Court finds that the letters were properly considered by the ALJ and this
24 Court may rely on them as well.⁵

25
26 ⁵ L.S. also argues that the letters and surveys should not have been construed as a child-find activity
27 because they were not intended to locate children who had not already been identified as in need of
28 special education services, but rather were only intended to keep track of children who had already
received an IEP. While the surveys attached to the letters do instruct the private school staff to include
only students already identified by a public school district through the special education IEP process, the
letters themselves summarize the district's obligations with respect to all children with disabilities, not

1
2 In addition to the evidentiary objection made by L.S., the Court must also address
3 an evidentiary objection made by Defendant TUSD. L.S. attached new evidence to her
4 reply brief entitled "Exhibit A," which is a summary of compliance complaints against
5 TUSD regarding special education rights violations. "[U]nder 20 U.S.C. §
6 1415(i)(2)(B)(ii) and *Ojai Unified Sch. Dist. V. Jackson*, 4 F.3d 1467 (9th Cir. 1993), a
7 court may, if requested, admit only such evidence as would supplement the record of the
8 administrative proceeding. The requesting party bears the threshold burden of
9 demonstrating at the time of the request, that the supplemental evidence should be
10 admitted..." *Gulbrandsen v. Conejo Valley Unified Sch. Dist.*, 2001 U.S. Dist. LEXIS
11 26095, at *64 (D. Cal. 2001) (quoting *Brandon H. v. Kennewick Sch. Dist. No. 17*, 82 F.
12 Supp. 2d 1174, 1179 (E.D. Wash. 2000)). The federal rules of evidence govern this
13 proceeding and the admission of any additional evidence, unless the rules are superseded
14 by the evidentiary rules set forth in 20 U.S.C. § 1415(i)(2). *Brandon H.*, 82 F. Supp. 2d
15 at 1180. "There are no evidentiary rules in 20 U.S.C. § 1415(i)(2) itself. However, *Ojai*
16 effectively imports rules of evidence to a 20 U.S.C. § 1415(i)(2) review by allowing
17 evidence to be admitted that was...for certain reasons, unavailable at the time of the
18 hearing...Fairness dictates that the reviewing court...apply [the evidence rules that bound
19 the Hearing Officer] when considering the admission of evidence that was
20 unavailable...at the time of the administrative hearing." *Id.*

21
22 TUSD objects to Exhibit A on the grounds that it is not part of the stipulated
23 administrative record for review, not of probative value, not relevant, and lacks
24 foundation. Exhibit A is a fax sent to L.S.'s counsel by the California Department of
25 Education ("CDE") containing evidence of 56 CDE compliance complaints and 106
26 allegations regarding special education rights violations against TUSD from 2001

27
28 just those who have already been identified as in need of special education services. The Court is
therefore not persuaded by this additional objection.

1 through July 2005 – the tenure of TUSD’s Director of Special Education, Anne Stone.
2 L.S. provided Exhibit A in rebuttal to Anne Stone’s testimony during the Due Process
3 Hearing. Ms. Stone was asked the following question and gave the following answer:
4

5 Q: And to the best of your knowledge, has there ever been a compliance complaint
6 against the District regarding their parent rights?

7 A: No.

8 Tr. Vol. III., 91:11-14 (Testimony of Anne Stone).
9

10 The Court finds that Exhibit A may be properly admitted as evidence that would
11 supplement the record of the administrative proceeding because the compliance history
12 provides evidence that TUSD received complaints that it had violated the rights of
13 parents of special education students, contradicting Anne Stone’s testimony. For
14 example, one of the complaints is that TUSD “fail[ed] to ensure that parents are informed
15 of pupil progress as often as parents of non-disabled peers (report cards as often as
16 peers).” Exh. A at 15. Using the more lenient evidentiary standards employed by an
17 Administrative Law Judge during a Due Process Hearing (as described *supra*, p. 15),
18 Exhibit A may appropriately be considered by this Court.
19

20 After having considered this evidence, however, the Court does not find that
21 Exhibit A undermines Ms. Stone’s credibility. Prior to the statement at issue, Ms. Stone
22 was asked about the IDEA’s requirement that districts provide parents with a copy of
23 their special education rights, in the following exchange:
24

25 Q: Did the 1997 IDEA require the districts provide parents with a copy of their
26 special education right?

27 A: Yes.
28

1 Q: And to the best of your knowledge, has there been a compliance complaint
2 against the District regarding their parent rights?

3 A: No.
4

5 Ms. Stone's response was directed to the specific question of whether TUSD had
6 failed to provide parents with a copy of their special education rights, not to the more
7 general question of whether TUSD had ever received a complaint that it violated the
8 rights of parents of children receiving special education services. Exhibit A does not
9 demonstrate that TUSD received complaints with respect to this particular obligation, and
10 therefore it does not significantly challenge Ms. Stone's testimony.
11

12 **C. Did TUSD Improperly Deny L.S. a FAPE, Entitling Her to**
13 **Reimbursement?**

14 The final issue to be addressed is whether TUSD improperly denied L.S. a FAPE,
15 which may entitle her to reimbursement for tuition and other services. When faced with a
16 violation of the IDEA, the statute "directs the court to 'grant such relief as [it] determines
17 is appropriate.' The ordinary meaning of these words confers broad discretion on the
18 court." *Sch. Committee of Burlington v. Department of Educ.*, 471 U.S. 359, 369 (1985).
19 "Appropriate relief" may include retroactive reimbursement to parents in a proper case.
20 *Id.* at 370. In the Ninth Circuit, if the school district has failed to provide a FAPE,
21 parents have an equitable right to reimbursement for the cost of compensatory education.
22 *W.G. v. Bd. Of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1485 (9th Cir.
23 1992). A mere procedural violation, however, may not result in the denial of a FAPE
24 unless the violation results in the loss of an educational opportunity or seriously infringes
25 upon the parent's ability to participate in the IEP process. *Id.* at 1484.
26

27 From 2001-2005, the relevant time period for this case, TUSD met its child-find
28 duties with respect to L.S., based on the plethora of child-find activities discussed above.

1 From 2001 until May of 2004, all of the adults who were in a position to respond to these
2 efforts failed to do so; Ms. [REDACTED], the private consultants that assessed L.S., and staff at
3 Waldorf and Prentice Schools all failed to refer L.S. for an assessment, despite their
4 belief that she had special needs. Consequently, TUSD had no reason to suspect that L.S.
5 was a student with a disability. As a school district's obligation to provide a FAPE does
6 not arise unless and until a child is found in need of services, or unless the school district
7 does not meet its child-find responsibilities, TUSD did not have any obligation to provide
8 a FAPE to L.S. until her attorney requested an assessment in May of 2004.

9
10 Once L.S.'s attorney requested an assessment, TUSD responded in a timely and
11 appropriate manner. School districts' duty to evaluate private school students suspected
12 of having disabilities only extends to those students residing in their jurisdiction. 34
13 C.F.R. 300.451. School districts have the right to require proof of residency from
14 students enrolling in the district. *Winokur v. Ann Arbor Public Schools*, 1990
15 U.S.App.LEXIS 19511 (E.D. Mich. 1990); *Winokur v. Ann Arbor Public Schools*, 1991
16 U.S.App.LEXIS 3110 (6th Cir. 1991). Given this limitation on a school districts'
17 obligations under the IDEA, it was appropriate for TUSD to respond to the letters from
18 L.S.'s attorney with a request for proof of residency before it offered assessment services
19 to L.S. TUSD sent letters to L.S.'s attorney requesting proof of residency on September
20 21, 2004, December 6, 2004 and again on January 4, 2005.⁶

21
22
23
24 ⁶ During the bench trial, L.S.'s attorney argued that he waited until April 2005, to respond to TUSD with
25 proof of residency because TUSD did not demand such proof until January 2005, and TUSD's initial
26 letter demanded that Ms. [REDACTED] enroll L.S. at TUSD before she could receive an IEP. L.S.'s
27 attorney's version of the chronology of this case is erroneous. TUSD's letter to L.S.'s counsel, dated
28 9/21/04, states in the second paragraph "Please request that [L.S.'s] parents come to the Office of
Special Education located at Tustin Unified School District...with proof of residency." Exh. 31 at 391.
While the letter does request that L.S.'s parents "bring any previous assessments and IEPs with them
when they register [L.S.] for school," this statement in no way indicates that TUSD refused to assess
L.S. unless her parents enrolled her at TUSD.

1 It was not until April 20, 2005, that L.S.'s attorney finally provided TUSD with a
2 copy of an electric bill as proof of residency. TUSD quickly responded by providing an
3 assessment plan to Ms. [REDACTED] on May 4, 2005, which she signed on May 12, 2005.
4 TUSD acted quickly to complete the assessments prior to the end of the 2004-2005
5 school year, and made several attempts to convene an IEP meeting at Ms. [REDACTED]'s
6 convenience during the summer of 2005. Ms. [REDACTED] stated that she was unable to
7 attend and the meeting was held in her absence. TUSD thus provided L.S. with a FAPE
8 for the 2005-2006 school year.

9
10 As L.S. was not entitled to a FAPE from 2001 until 2004, and TUSD provided L.S.
11 with a FAPE in a timely manner after her May 2004 request for an assessment, the Court
12 finds that TUSD did not improperly deny L.S. a FAPE. Accordingly, L.S.'s mother is not
13 entitled to reimbursement for the expenses incurred in placing L.S. at Prentice and
14 Waldorf Schools.⁷

15
16 The Court also finds that L.S. is not entitled to reimbursement for tutoring services,
17 independent assessments, and vision therapy services. A parent may obtain an
18 independent educational evaluation performed by a qualified specialist at public expense
19 if the parent disagrees with an evaluation obtained by the educational agency, and the
20 educational agency is unable to show at a due process hearing that its evaluation was
21 appropriate. 34 C.F.R. § 300.502(b); Cal. Educ. Code § 56329(b). Here, there was no
22

23
24 ⁷ The Court also finds that Ms. [REDACTED] is not entitled to reimbursement for private school tuition for
25 two additional reasons. First, Ms. [REDACTED]'s unilateral placement of L.S. in private schools from pre-
26 school until now weighs against a finding that she is entitled to reimbursement for the private school
27 tuition. 20 U.S.C. § 1412(a)(1)(C)(ii); *Baltimore City Board of School Commissioners v. Isobel*
28 *Taylorch*, 395 F. Supp. 2d 246, 250 (D. Md. 2005). Additionally, TUSD contends that L.S.'s tuition at
Waldorf was funded solely by Mr. [REDACTED], who was divorced from Ms. [REDACTED] at the time of L.S.'s
enrollment and who is not a party to this matter. L.S. has not offered any evidence to contradict this
assertion. Because a judgment cannot be given against or in favor of one who is not party to the action
or proceeding (*see Overall v. Overall*, 18 Cal.App.2d 499, 502-503 (1937)), the Court also rests its
decision on this ground.

1 district assessment with which Ms. [REDACTED] could have disagreed at the time she obtained
2 the independent assessment and other services for L.S. Furthermore, TUSD had no
3 obligation to provide L.S. with special education services at this time because it had
4 received no information that should have prompted an evaluation of L.S. *See*
5 *Saddleback*, p. 7. Accordingly, L.S. is not entitled to reimbursement for these additional
6 services.

7
8 In addition to the fact that TUSD met its child-find duties and provided L.S. a
9 FAPE for the 2005-2006 school year, the Court also finds that L.S. is not entitled to any
10 reimbursement because she suffered no compensable educational loss. *See Miller v. San*
11 *Mateo-Foster City Unified Sch. Dist.*, 318 F. Supp. 2d 851, 863 (D. Cal. 2004). In *Miller*,
12 the district court upheld the hearing officer's decision that although the school district
13 had violated its child-find duties, the petitioner student was not entitled to reimbursement
14 for private school tuition because the student suffered no compensable loss. *Id.* The
15 court relied upon the hearing officer's finding that after the plaintiff's parents had
16 removed him from public school and placed him in a private school, the parents had no
17 intention of re-enrolling their child in a public school. *Id.* The record showed that the
18 parents removed their child because they were dissatisfied with the district's handling of
19 their son's problems. *Id.* Because of their dissatisfaction, they had no intention of
20 removing him from the private school he was attending. *Id.* Furthermore, the court was
21 convinced by evidence that the parents failed to contact the district about their son until
22 after they learned that they might have a right to seek reimbursement. *Id.* Based on this
23 evidence of the parents' state of mind, the court concluded that the hearing officer's
24 determination that the student suffered no compensable loss was correct, and thus the
25 student was not entitled to any reimbursement. *Id.*

26
27 The *Miller* ruling stands for the proposition that if a child has not yet been denied a
28 FAPE and his parents unilaterally place him in a private school, with no intention of

1 enrolling him in public school, he has suffered no educational loss that would entitle him
2 to reimbursement. This Court finds that *Miller* is based on sound reasoning because the
3 IDEA places the burden of evaluating children with suspected special educational needs
4 upon school districts, not upon parents. School districts must be given an opportunity to
5 use their educational expertise to assess a student and to create an individualized
6 educational plan to meet that student's needs before the district can be held liable for the
7 cost of compensatory education. To permit parents whose child has not been denied a
8 FAPE to unilaterally place their child in a private school and then to demand tuition
9 reimbursement, when that placement may not have been the one the school district would
10 have identified as the most appropriate, would run counter to the purpose of the IDEA,
11 which is to ensure that "[a] free appropriate public education is available to all children
12 with disabilities residing in the State between the ages of 3 and 21, inclusive." (emphasis
13 added) 20 U.S.C. § 1412(a)(1)(A).

14
15 In this case, like *Miller*, there is substantial evidence that L.S.'s parents had no
16 intention of ever placing her in a public school. When L.S.'s father, Howard [REDACTED],
17 was asked if he ever considered placing L.S. in a public school, he said no. Tr. Vol. II,
18 169:15-17 (Testimony of Howard Schlicht). Mr. [REDACTED] explained that "Waldorf had
19 worked so well for [REDACTED] [L.S.'s brother], it just seemed so apparent to have both
20 children in the same place." Tr. Vol. II, 169:10-14 (Testimony of Howard [REDACTED]).
21 L.S.'s mother, Victoria [REDACTED], also expressed her commitment to the private school
22 system. When asked why she chose to send L.S. to Prentice School, she responded
23 "because it offered an academic program that was specific to her disability." Tr. Vol. I,
24 139:10-13 (Testimony of Victoria [REDACTED]). When Ms. [REDACTED] finally sought out an
25 attorney to make contact with TUSD, she did so not with the expectation that TUSD
26
27
28

1 would provide L.S. an appropriate education or assessment services, but only to get
2 reimbursement for the tuition costs she had incurred⁸:

3
4 Q: Now, I believe you also testified yesterday that Dr. Davidson told you the best
5 way to get services from the school district was through an advocate. Is that
6 correct?

7 A: Actually, what I was discussing with Dr. Davidson was [REDACTED] tuition. The
8 tuition at Prentice is a lot more than the tuition at Waldorf, and she did suggest —
9 when I explained the amount of tuition, she did suggest that the best way to get that
10 would be with an advocate...

11 Q: So your hope was that the school district would pick up the tuition at Prentice?

12 A: That was my hope.

13 Tr. Vol. III, 43:11-23 (Testimony of Victoria [REDACTED]).

14
15 With regard to the psycho-social assessment and other private services that Ms.
16 [REDACTED] obtained for L.S., the record reveals that while Ms. [REDACTED] wanted TUSD to
17 reimburse her for these services, she would not have been willing to settle for TUSD's
18 own evaluation/services in place of these private ones. When Ms. [REDACTED] was asked if it
19 was true that Dr. Davidson, the private psychologist that assessed L.S., had advised Ms.
20 [REDACTED] that she could refer L.S. to TUSD to have the district complete the assessment,
21 Ms. [REDACTED] responded: "I'm not saying that conversation didn't take place. I don't
22 remember that conversation. I remember, though, really getting it, that [L.S.] wasn't
23 progressing....So I went and talked to [Dr. Ballinger]...And she suggested Chris
24 Davidson. And I was in a rush at that point. I wanted [L.S.] — I wanted to know what
25 was going on and what needed to be done. And [Dr. Davidson] might very well have
26 told me that the school district could have done that. But also, up to this point, all of
27

28 ⁸ This conclusion is further supported by the fact that Ms. [REDACTED] declined to attend the 2005 IEP
meeting and moved out of district shortly after it was held.

1 [L.S.'s] care had been provided by highly specialized people. [REDACTED] is a special needs
2 child and I would have automatically sought out a specialist on my own. Tr. Vol. II,
3 288:12-289:16 (Testimony of Victoria [REDACTED]) (emphasis added).

4
5 As further evidence of the fact that L.S. suffered no compensable loss, the record
6 reflects that both Ms. [REDACTED] and private school administrators believed that L.S.'s
7 educational needs were being met while at Waldorf and Prentice. Ms. [REDACTED] testified
8 that L.S. received some educational benefit while enrolled at Waldorf because "it was an
9 academic program and [L.S.] began to start seeing letter forms and recognizing them."
10 Tr. Vol. I, 133:10-17 (Testimony of Victoria [REDACTED]). The testimony of Carol Clark,
11 Executive Director of Prentice, demonstrates that L.S. continued to benefit from private
12 school education while at Prentice. Ms. Clark testified that Prentice was a good fit for
13 L.S. and that she had benefited from Prentice. Tr. Vol. I, 214: 2-4, 165:12-13 (Testimony
14 of Carol Clark). She also agreed that L.S.'s report card from the 2004-2005 school year
15 demonstrated excellent progress and that Prentice was able to meet L.S.'s needs without
16 special education services. Tr. Vol. I, 207:23-25, 227:20-22 (Testimony of Carol Clark).

17
18 After careful consideration of the record, the Court finds that Mr. and Ms. [REDACTED]
19 chose to place L.S. in private schools because they believed it was the best way to meet
20 her special needs, and that they had no intention of enrolling her in TUSD or relying on
21 TUSD to assess and evaluate her. Mr. and Ms. [REDACTED] ultimately contacted TUSD not
22 because they were dissatisfied with the education she was receiving at Prentice, but in
23 order to receive reimbursement. Based on this evidence, this Court concludes that L.S.
24 suffered no compensable loss.

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