

BACKGROUND

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3 At the time the educational assessments at issue in this
4 case were obtained, Plaintiff J.P. was a nine-year old student
5 eligible for special education services under the category of
6 Other Health Impairment (OHI), due to attention deficit
7 hyperactivity disorder (ADHD), tics, and dysgraphia. He was
8 enrolled in the fourth grade at Ripon Elementary School, a school
9 within the purview of Defendant Ripon Unified School District
10 ("District"). J.P. became eligible for Special Education
11 services as a second grader in December of 2004.

12 In August of 2006, after J.P. had been receiving special
13 education services for nearly two years, J.P.'s mother asked a
14 psychologist, Dr. David Rose to assess her son. Dr. Rose
15 concluded that J.P. was suffering from both Autism Spectrum
16 Disorder and Depression. J.P.'s mother forwarded Dr. Rose's
17 report to the District in September of 2006 and requested that
18 additional services be provided commensurate with Dr. Rose's
19 diagnosis.

20 In response both Dr. Rose's report and consistent with its
21 obligation to assess J.P., as a special needs student, at least
22 once every three years, the District's credentialed school
23 psychologist, Sean Henry, conducted a psychoeducational
24 assessment of J.P. in the Fall of 2006. Cheryl Ramey, a District
25 resource specialist program teacher, also administered academic
26 testing reflected within the actual psychoeducational assessment
27 report prepared by Mr. Henry and dated December 15, 2006.

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1 That 26-page report, contained within the Administrative Record
2 ("AR") at pages 106-131, concluded that J.P. was not autistic,
3 although it recommended that J.P. continued to qualify for
4 special education and related services under the OHI category.

5 In addition to the psychoeducational report, two District
6 speech and language pathologists, Judi Gladen and Sharon Filippi,
7 administered a speech and language assessment to J.P. on
8 October 2, 2006, and thereafter prepared a report summarizing
9 their findings. Given Dr. Rose's diagnosis of autism, Ms. Gladen
10 and Ms. Filippi were asked to determine whether J.P. exhibited
11 the difficulty in communicative social skills normally associated
12 with the disorder. They concluded that J.P. did not exhibit
13 pragmatic dysfunction in that regard despite the fact he had
14 difficulty in applying certain social skills. See AR 132-136.

15 J.P.'s mother did not agree with the conclusions reached in
16 either of the District's assessments and instead, pursuant to
17 34 C.F.R. § 300.502, requested Independent Educational
18 Evaluations ("IEEs") at the District's expense. She believed
19 that the district's testing did not validly measure J.P.'s unique
20 needs. The District refused to authorize the requested IEEs and
21 filed a due process hearing request, under 34 C.F.R.
22 § 300.502(b)(2), on February 26, 2007.

23 The hearing on that request was held over two separate days
24 in May of 2007, and was limited to two narrow issues: first,
25 whether the District's Fall 2006 psychoeducational assessment of
26 J.P. was appropriate and second, whether the concurrently
27 prepared speech and language assessment was also sufficient.

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1 See AR 97, 849, Reporter's Transcript ("RT"),¹ May 14, 2007,
2 22:2-6.

3 The finding in favor of the District on those two issues (AR
4 848-60) by the Administrative Law Judge ("ALJ") prompted the
5 present appeal.

6
7 **STANDARD**
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9 In adjudicating an appeal from an administrative decision
10 regarding the rights of students with disabilities, the court is
11 charged with receiving the record of the administrative
12 proceeding which, in essence, forms the undisputed facts of the
13 case. Though not a "true motion for summary judgment, the
14 appeal of an IDEA-based due process hearing decision is properly
15 styled and presented by the parties in a summary judgment format.
16 Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884, 892
17 (9th Cir. 1995).

18 The standard for district court review under the IDEA is set
19 forth in 20 U.S.C. § 1415(e)(2), which provides as follows:

20 "In any action brought under this paragraph the court
21 shall receive the records of the administrative
22 proceedings, shall hear additional evidence at the
23 request of a party, and, basing its decision on the
24 preponderance of the evidence, shall grant such relief
25 as the court determines is appropriate."
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27 ¹ The Reporter's Transcript consists of three separate
28 volumes: the first for the Pre-Hearing conducted on May 14, 2007,
and the second and third for the Hearing itself, held on May 29
and 30, 2007.

1 This standard requires that "due weight" be given to the
2 administrative proceedings. Hendrick Hudson Central Sch. Dist.
3 v. Rowley, 458 U.S. 176, 206 (1982). The amount of deference so
4 accorded is subject to the court's discretion. Gregory K. v.
5 Longview Sch. Dist., 811 F.2d 1307, 1311 (9th Cir. 1987). In
6 making that determination, the thoroughness of the hearing
7 offer's findings should be considered, with the degree of
8 deference increased where said findings are "thorough and
9 careful." Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d
10 884, 892 (9th Cir. 1995), citing Union Sch. Dist. v. Smith,
11 15 F.3d 1519, 1524 (9th Cir. 1994). Such deference is
12 appropriate because "if the district court tried the case anew,
13 the work of the hearing officer would not receive 'due weight,'
14 and would be largely wasted." Capistrano, 59 F.3d at 891.

15 Because of the deference potentially accorded the
16 administrative proceedings, complete *de novo* review is
17 inappropriate. Amanda J. v. Clark County Sch. Dist., 267 F.3d
18 877, 887 (9th Cir. 2001). Instead, the district court must make
19 an independent judgment based on a preponderance of the evidence
20 and giving due weight to the hearing officer's determination.
21 Capistrano, 59 F.3d at 892. After such determination, the court
22 is free to accept or reject the hearing officer's findings in
23 whole or in part. Ojai Unified Sch. Dist. v. Jackson, 4 F.3d
24 1467, 1473-73 (9th Cir. 1993).

25 While the petitioning party bears the burden of proof at the
26 administrative level, Schaffer v. Weast, 546 U.S. 49, 57 (2005),
27 the party challenging an administrative decision in federal
28 district court has the burden of persuasion on his or her claim.

1 Clyde K. v. Puyallup Sch. Dist. No. 3, 35 F.3d 1396, 1399 (9th
2 Cir. 2004).

3
4 **ANALYSIS**

5
6 The IDEA requires a student with a suspected disability to
7 be assessed in all areas related to such disability. See
8 20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4). Areas of
9 suspected disability may include, depending on the particular
10 student's circumstances, analysis of health development, vision,
11 hearing, language function, general intelligence, academic
12 performance, communicative status, motor abilities, career and
13 vocational abilities and interests, along with the student's
14 social and emotional status. See id. California Education Code
15 § 56320(g) further instructs that "special attention shall be
16 given to the unique educational needs" of a child as part of an
17 assessment. The objective of this regulatory framework is to
18 ensure that the team charged with fashioning the student's
19 Individualized Education Program ("IEP") has enough information
20 to determine the appropriate placement and related services for
21 the particular child, as well as the proper goals and objectives
22 for the child.

23 No single factor or testing tool can in itself determine
24 whether a student has a disability or is receiving an appropriate
25 educational program. 20 U.S.C. § 1414(b)(2)(B); 34 C.F.R.
26 300.304(b)(2).

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1 Instead, in performing a valid assessment in this regard, a
2 district must utilize a variety of tools and strategies to gather
3 relevant functional, developmental, and academic information to
4 determine whether the student is eligible for special educational
5 services. 20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).
6 Assessments must be administered by trained and knowledgeable
7 personnel and in accordance with any instructions provided by the
8 author of the assessment tools. 20 U.S.C. § 1414(b)(3)(A)(iv),
9 (v); 34 C.F.R. § 300.304(c)(1)(iv), (v).

10 In this case, Plaintiffs challenge the ALJ's decision
11 approving the assessments provided by the District, claiming that
12 those assessments were in fact inadequate in reflecting J.P.'s
13 individual needs. As indicated above, however, the Court's task
14 in ruling on that challenge is essentially to review the decision
15 of the ALJ, and the administrative record, on an appellate basis.
16 It must use its independent judgment to determine whether that
17 decision is supported by a preponderance of the evidence as
18 evinced by the record. Capistrano, 59 F.3d at 892.

19 Significantly, as also set forth above, it would be
20 inappropriate for this Court to try the case anew, and due weight
21 must be given to the hearing officer's decision commensurate with
22 the level of careful consideration demonstrated by the decision
23 itself. Capistrano, 59 F.3d at 891-92.

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1 **A. Psychoeducational Testing**

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3 Turning first to Sean Henry's psychoeducational testing,
4 Plaintiffs do not dispute that Henry was qualified to administer
5 that testing. Nor is there any question that a variety of
6 testing methodologies were employed. Mr. Henry administered the
7 Wechsler Intelligence Scale for Children- 4th Ed. ("WISC IV") to
8 determine J.P.'s current educational level. A Developmental Test
9 of Visual Motor Integration ("VMI") was obtained in order to
10 assess J.P.'s social and emotional functioning. Mr Henry further
11 administered a Connor's ADHD rating scale ("Connor's") to examine
12 attention issues, a Behavior Rating Inventory of Executive
13 Functioning ("BRIEF") to scrutinize executive functioning, and a
14 Childhood Autism Rating Scale ("CARS") to determine whether J.P.
15 exhibited any characteristics associated with autism.

16 In addition to this battery of standardized testing, each of
17 which was designed to assess different types of functional
18 ability (and consequently J.P.'s areas of suspected disability),
19 Sean Henry's assessment also included his own observations of
20 J.P., interviews with J.P.'s mother and his teachers, and a
21 review of records. The District maintained that Henry
22 consequently addressed all areas of J.P.'s suspected disability,
23 and the Hearing Officer agreed.

24 In attempting to meet their burden of establishing that the
25 ALJ's decision in that regard was contrary to the law, Plaintiffs
26 rely largely on the argument that Henry impermissibly relied on a
27 single testing modality, CARS, in ruling out autism.

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1 Plaintiffs also claim that the CARS assessment, which
2 unequivocally found that J.P. was not autistic,² was not
3 consistent with other behaviors identified by Henry elsewhere in
4 his report, and cite testimony from Dr. Rose that additional
5 testing should have been administered. See Plaintiffs'
6 Undisputed Fact ("PUF") 31.³

7 Despite these claims, the ALJ in fact determined that Sean
8 Henry did not rely upon a single testing instrument to explore
9 J.P.'s potential for autism. As his decision states:

10 "Student's claim that Mr. Henry inappropriately relied
11 solely on the CARS to find that Student did not have
12 autistic-like behaviors is not supported by the
13 evidence. Mr. Henry's psychoeducational assessment
14 included a review of Student's file, observations of
15 Student, and interviews of Student's Mother and GE
16 teacher. In addition, other test instruments used by
17 Mr. Henry, including the BASC and the BRIEF, solicited
18 information from Mother and Student's teachers, and
19 provided additional information as to whether Student
20 exhibited autistic-like behaviors. It is clear that
21 Mr. Henry's finding did not impermissibly rely on a
22 single instrument."

23 See AR 852.

24 Significantly, although Dr. Rose disagreed with that
25 assessment, the ALJ could and did weigh Rose's testimony and
26 ultimately found it to be unpersuasive.

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29 ² CARS employs a 15-item behavioral rating scale developed
30 to assist in identifying children with autism. J.P.'s testing
31 score was 23, putting him squarely within the non-autistic
32 category determined to be between 15 and 29.5. Even mild autism
33 would not have been identified until the testing subject reached
34 a rating of 30. See Henry Report, AR 119.

35 ³ Even Dr. Rose, admitted, however, that CARS testing
36 generally "has pretty good reliability and validity." RT, May
37 30, 1997, 156:11-157:20.

1 In addition to noting that the bare fact that Dr. Rose reached a
2 different conclusion than Mr. Henry did not make Henry's
3 assessment inappropriate, the ALJ specifically found after
4 listening to Dr. Henry's testimony that his "credibility was
5 diminished by the level of bias he displayed." Id. It would be
6 inappropriate for this Court to reweigh the credibility
7 determinations reached by the ALJ over the course of a two-day
8 hearing involving multiple witnesses and the introduction of
9 voluminous evidence. Amanda J., 267 F.3d at 888-89. To revisit
10 that weighing process would remove any deference accorded to the
11 OAH decision, and be tantamount to trying the case anew, an
12 approach specifically rejected by the Ninth Circuit. Capistrano,
13 59 F.3d at 891-92.

14 Additionally, even Dr. Rose conceded that J.P.'s symptom
15 complex was problematic because any number of things, or a
16 combination of several factors, could explain J.P.'s underlying
17 problem. RT, May 30, 2007, 168:13-16. He also admitted that the
18 testing employed by Sean Henry was itself appropriate. Id. at
19 175:12-176:21.

20 Plaintiffs have consequently not met their burden in showing
21 that the Henry Report was legally deficient in that it
22 impermissibly made findings based on a single testing modality.
23 Nor is Plaintiffs' claim that Henry failed to adequately consider
24 J.P.'s available records any more persuasive. In support of that
25 contention, Plaintiffs argue that Henry failed to consider a 2004
26 Mental Health Referral by his predecessor, Bobbie Ables-Smith.
27 Plaintiffs further assert that Henry failed to comprehensively
28 review J.P.'s disciplinary history.

1 With respect to the Mental Health Referral, Henry did
2 testify that he reviewed Ms. Able's December 2004 Assessment
3 Report, which contained the same information set forth in the
4 Referral except in greater detail. RT, May 29, 2007, 219, 231-
5 232. In addition, Mr. Henry summarized the Ables-Smith report in
6 his own December 6, 2006 assessment. AR 108. The importance of
7 Ms. Ables-Smith's findings in any event is minimized by the fact
8 that they were prepared some two years before Mr. Henry's own
9 assessment, at a point in time when J.P. had not yet begun to
10 receive special education services from the District. According
11 to the record, J.P.'s difficulties diminished after he began to
12 receive services. See AR 108-09.

13 Turning next to J.P.'s disciplinary history, Plaintiffs take
14 issue with the fact that the Ables-Smith report contained
15 additional information concerning in that regard that Sean Henry
16 should have taken into account when preparing his own assessment.
17 Again, however, the evidence shows that Henry unquestionably did
18 review Ms. Ables-Smith's later and more detailed December 2004
19 Assessment. He also reviewed all recent documentation concerning
20 J.P.'s discipline. Even Plaintiffs' expert, Cheri Worcester,
21 admitted that J.P.'s disciplinary history was "pretty well
22 covered." Defendant's Undisputed Fact ("DUF) 33. Moreover, as
23 indicated above, Mr. Henry's assessment included both interviews
24 and substantial independent assessment of J.P.'s behavior in a
25 variety of settings. The Henry Report contains almost seven
26 pages of detailed information about J.P.'s behaviors, based on
27 observations both in classroom, at lunch, and during recess, on
28 seven different dates. See AR 122-29, 854.

1 It is disingenuous for Plaintiff to argue that J.P.'s overall
2 disciplinary history was not taken into account by Sean Henry in
3 preparing his psychoeducational assessment.

4
5 **B. Functional Behavior Assessment**

6
7 The Functional Behavior Assessment ("FBA") portion of Sean
8 Henry's December 15, 2006 report is nine pages long and includes
9 both a summary of J.P.'s disciplinary history, a summary of
10 Henry's interviews with J.P.'s mother and his teacher, and an in-
11 depth compilation of Henry's own observations of J.P. on eleven
12 different occasions spanning seven different days. As indicated
13 above, those observations occurred in a variety of different
14 educational and social settings at different parts of the day.
15 At the conclusion of the FBA portion of his report, Sean Henry
16 analyzed four different behavior functions with the evidence he
17 had obtained and pointed to specific areas of concern.

18 Plaintiffs admit that a FBA is determined on a case by case
19 basis. DUF 31. They nonetheless claim that Henry's FBA fails to
20 pass muster because it did not identify all of J.P.'s maladaptive
21 behaviors so that an IEP relying on his assessment could properly
22 target those behaviors with appropriate intervention techniques.
23 As such, Plaintiffs contend that the FBA failed to properly
24 consider J.P.'s unique educational needs.

25 Plaintiffs' arguments, which largely mirror their
26 contentions with regard to the efficacy of the Henry Assessment
27 as a whole as discussed above, fare no better as a means of
28 attacking the FBA.

1 Sean Henry's report contains data on J.P. pulled from a wide
2 variety of sources, including Henry's own substantial
3 observation. In arguing that Henry's report was not adequate,
4 Plaintiffs point to the testimony of Cheri Worcester, their
5 expert witness with respect to FBA issues, who opined that Henry
6 did not include specific antecedent and consequence conditions,
7 and did not identify either appropriate alternative behaviors or
8 appropriate functions in that regard. The ALJ specifically
9 determined, however, that he did not find Ms. Worcester's
10 testimony to be persuasive. He pointed to the fact that
11 Worcester had met with J.P. for only two and a half or three
12 hours shortly before the hearing, and unlike Henry had never
13 observed him in a school setting. He also felt that Worcester's
14 reliance on a period of time before J.P. began receiving special
15 education and related services presented an inaccurate picture of
16 J.P.'s current needs. AR 854-55. The ALJ's well-reasoned
17 determinations in that regard are entitled to deference.

18 The Court cannot say that the ALJ's criticism of
19 Ms. Worcester's testimony is unfounded; indeed, given the
20 comprehensiveness of Sean Henry's assessment his conclusions
21 appear well taken. Additionally, it would be inappropriate for
22 this Court in any event to question the ALJ's credibility
23 determination, having heard Ms. Worcester's testimony. The Court
24 declines to do so, just as it declined to question the ALJ's
25 similar credibility assessments with regard to Dr. Rose's
26 testimony, as discussed above.

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1 The Court finds the FBA, like the remainder of Sean Henry's
2 psychoeducational assessment, to be legally sufficient. It
3 identified J.P.'s problematic behaviors, included data collection
4 through record review, interviews and observations, and contained
5 an analysis based on all that information. AR 122-129.

6
7 **C. Speech and Language Assessment**
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9 J.P.'s Fall 2006 Speech and Language Assessment was prepared
10 by two speech and language pathologists with a combined total of
11 nearly thirty years of experience. In challenging the propriety
12 of that assessment, Plaintiffs again do not challenge either the
13 credentials of the two speech pathologists, Judith Gladen and
14 Sharon Filippi, or the manner in which the testing was
15 administered.

16 Substantively, it is also undisputed that Ms. Gladen and
17 Ms. Filippi gave J.P. a battery of tests in order to evaluate his
18 pragmatic language skills. They administered the programmatic
19 portions of the Diagnostic Evaluation of Language Variation
20 ("DELV) and the Comprehensive Assessment of Spoken Language
21 ("CASL"), as well as the Children's Communication Checklist 2
22 ("CCC-2), the Clinical Evaluation of Language Fundamentals
23 ("CELF) and the Social Language Thinking Sample. See Report, AR
24 132-36. Ms. Gladen and Ms. Filippi both observed J.P.'s skills
25 themselves in multiple environments (AR 133-34), and obtained
26 parental input though the CCC-2. RT, May 29, 2006, 33-35, 88.

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1 Plaintiffs do not challenge the manner in which the testing
2 done by Judith Gladen and Sharon Filippi was administered. See
3 DUF 50-51, 54-57. Significantly, they further admit that the
4 tests were tailored to assess J.P.'s specific areas of need and
5 in fact assess all areas of his suspected disability. DUF 55.
6 Even Plaintiffs' Speech and Language expert, Theresa Fagundes,
7 could identify nothing inappropriate with respect to the testing.
8 RT, May 30, 2007, 120:11-15. Plaintiffs nonetheless argue that
9 the Speech and Language Assessment failed to account for J.P.'s
10 unique needs because his parents were not directly interviewed
11 and because some of the observations noted in the report seemed
12 to be contradictory.

13 As already indicated, J.P.'s parents had input into the
14 assessment by way of the CCC-2. Plaintiffs' attempt to discredit
15 the Speech and Language Assessment on that ground accordingly
16 fails.⁴ In addition, the fact that some findings noted by Gladen
17 and Fillippi were contradictory does not render their report
18 inappropriate. As the ALJ noted, while the test and
19 questionnaire scores were mixed, the speech pathologists
20 conducted additional observation of J.P. himself in order to gain
21 additional information and insight into J.P.'s pragmatic language
22 skills. They determined that while J.P. possessed sufficient
23 pragmatic speech and language knowledge, his application of that
24 knowledge appeared inconsistent and/or lacking.

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26
27 ⁴ No witness, including Plaintiffs' speech expert,
28 Ms. Fagundes, offered any testimony that obtaining parental input
through formal questionnaires was in any way insufficient or
inappropriate.

1 Consequently, Gladen and Filippi continued to recommend that
2 special education services be provided to J.P. See AR 135-136.
3 Significantly, their recommendations were along the same lines
4 as those made by Plaintiffs' own speech and language expert,
5 Ms. Fagundes. See AR 856-57.

6 In sum, Plaintiffs have failed to meet their burden of proof
7 in showing that the ALJ erred in finding the District's Speech
8 and Language Assessment appropriate.

9
10 **D. Timeliness of Defendant's Due Process Request**

11
12 In addition to attacking the District's assessments on a
13 substantive basis as enumerated above, Plaintiffs also challenge
14 the due process proceedings that resulted in approval of the
15 District's assessments on timeliness grounds. Under 34 C.F.R.
16 § 300.502(b)(2), if a parent requests an IEE at public expense,
17 and the school district declines that request, the district must
18 file a due process request "without unnecessary delay." Here,
19 because J.P.'s mother requested independent assessments on
20 December 21, 2006, Plaintiffs allege that the District was tardy
21 in waiting until February 2006, more than two months later, to
22 file its due process complaint seeking to show that its
23 assessments were appropriate. As support for that proposition,
24 Plaintiffs cite Pajaro Valley Unified Sch. Dist. v. J.S., 2006 WL
25 3734289, (N.D. Cal. 2006), which found that the plaintiff
26 district waived its right to contest an IEE request by waiting
27 some three months before filing for due process. Id. at * 3.

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1 In Pajaro, however, unlike this case, the delay was
2 completely unexplained. Here, on the other hand, even after
3 Plaintiffs' IEE request was tendered, the parties continued to
4 discuss provision of an IEE through a series of letters. See AR
5 171-175. The evidence shows that the parties did not come to a
6 final impasse in that regard until February 7, 2007, less than
7 three weeks before the District's due process report was filed.
8 Id. at 174-75. Additionally, as also noted by Defendant, the
9 District's Winter Break also began immediately after the
10 Plaintiffs' IEE request on December 21, 2006, a factor that must
11 also be considered in determining the timeliness of the
12 District's due process request.

13 Whether or not unwarranted delay has occurred must be
14 determined given the facts of each particular case. Pajaro
15 Valley, 2006 WL 3734289 at * 3. Given the circumstances present
16 here, the Court cannot say that "unnecessary delay" was present
17 so as to invalidate the underlying due process request made by
18 the District in this matter. Plaintiffs' request that the
19 District's due process request be invalidated on timeliness
20 grounds is therefore denied.

21
22 **E. Plaintiffs' Request that Additional Evidence Be**
23 **Considered**

24 Both sides agree that this case should be resolved through
25 summary judgment. (See Def.'s Opening Memo, p. 3, fn. 1).⁵

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28 ⁵ Concurrently with the District's Motion, Plaintiffs filed
their own request that summary judgment be granted.

1 Plaintiffs, however, urge the Court to consider additional
2 evidence not submitted at the time of the administrative hearing,
3 in the form of the declaration of Keith Storey. In addition,
4 they request that the Court entertain further testimony from one
5 of the witnesses who testified at the administrative hearing,
6 Cheri Worcester.

7 In Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467 (9th Cir.
8 1993), the Ninth Circuit articulated the standards applicable to
9 determining whether additional evidence, outside that contained
10 in the underlying administrative record, should be permitted.

11 The Ojai court stated that such determination

12 "must be left to the discretion of the trial court,
13 which must be careful not to allow such evidence to
14 change the character of the hearing from one of review
15 to a trial de novo.... In ruling on motions for
16 witnesses to testify, a court should weigh heavily the
17 important concerns of not allowing a party to undercut
18 the statutory role of administrative expertise, the
19 unfairness involved in one party's reserving its best
20 evidence at trial, the reason the witness did not
21 testify at the administrative hearing, and the
22 conservation of judicial resources."

23 Id. at 1472-73. As the First Circuit noted in Roland M. v.
24 Concord Sch. Comm., 910 F.2d 983 (1st Cir. 1990), laxity in
25 permitting additional evidence would "reduce the proceedings
26 before the state agency to a mere dress rehearsal by allowing
27 appellants to transform the Act's judicial review mechanism into
28 an unrestricted trial de novo." Id. at 997.

With respect to the Storey Declaration, Plaintiffs present
no convincing reason or argument why the evidence in question was
not presented at the time of the administrative hearing.

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1 Indeed, Dr. Storey was listed as an expert witness in Plaintiffs'
2 initial disclosure pursuant to Federal Rule of Civil Procedure
3 26. See Ex. A to Decl. of Tamara Loughrey in Support of Reply to
4 Def's Opp. To Pls.' Mot. for Summ J. In addition, the proposed
5 declaration from Mr. Storey pertains to the propriety of the
6 District's FBA, a subject on which another of Plaintiffs'
7 experts, Cheri Worcester, already offered substantial testimony
8 at the time of the hearing.⁶ This Court agrees that allowing
9 Mr. Storey's declaration at this juncture would be improper and
10 denies Plaintiff's request in that regard.

11 Secondly, with regard to the Court entertaining additional
12 testimony from Ms. Worcester concerning the propriety of any
13 Behavior Support Plan ("BSP") reached by the District in reliance
14 on the assessments it generated, the Court agrees that the
15 present controversy only concerns the adequacy of the assessments
16 themselves. The BSP is not a component of the underlying
17 assessments; instead, it is a subsequent decision reached in
18 reliance on the FBA. Since the only issue adjudicated by the ALJ
19 concerned the assessments themselves, and not any use to which
20 the assessments might later be made, any additional testimony by
21 Ms. Worcester concerning the BSP is irrelevant and will not be
22 permitted.

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27 ⁶ While Plaintiffs claim that Ms. Worcester in fact was
28 unable to testify fully about the FBA at the time of the hearing,
any misapprehension in that regard on Plaintiffs' part does not
justify permitting further evidence at this time.

CONCLUSION

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3 After a two-day hearing, the ALJ issued a thorough and
4 detailed decision finding that the District's assessments were
5 appropriate. That well-reasoned determination is entitled to
6 deference by the Court, and Plaintiffs have not met their burden
7 of proof in convincing the Court otherwise. The Court finds by a
8 preponderance of the evidence that the assessments generated by
9 the District were appropriate, and that the District accordingly
10 had no obligation to provide Plaintiffs with an independent
11 educational assessment at public expense. The District's Motion
12 for Summary Judgment is accordingly GRANTED, and Plaintiffs'
13 cross-motion seeking a finding overturning the ALJ's decision
14 approving those assessments is DENIED. Plaintiffs' request that
15 additional evidence be permitted in the Court's review of the
16 underlying administrative decision is also DENIED.⁷

17 IT IS SO ORDERED.

18 Dated: April 14, 2009

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20 
21 MORRISON C. ENGLAND, JR.
22 UNITED STATES DISTRICT JUDGE

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27 _____
28 ⁷ Because oral argument was not of material assistance, the
Court ordered this matter submitted on the briefs. E.D. Cal.
Local Rule 78-230(h).