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THE NINTH CIRCUIT'S REDUNDANT REMAND IN *E.M. v. PAJARO UNIFIED VALLEY SCHOOL DISTRICT* SENDS AN IMPORTANT MESSAGE

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Abstract: On July 14, 2011, in *E.M. ex rel. E.M. v. Pajaro Valley School District*, the U.S. Court of Appeals for the Ninth Circuit remanded a case because the district court applied an improper standard in determining whether a clinical psychologist's report constituted "additional evidence" under the Individuals with Disabilities Education Act. In so doing, the Ninth Circuit broadly defined the "additional evidence" courts must consider in hearing IDEA claims.

Introduction

In the summer before his fifth grade year, E.M. was diagnosed with a learning disability.[1] E.M.'s parents requested that the Pajaro Valley Unified School District ("School District") assess his eligibility for special education services under the Individuals with Disabilities Education Act (IDEA).[2] The School District assessed E.M. but denied him special education services because, according to the School District's assessment, he did not have a learning disability that warranted such services.[3] E.M. challenged this decision before the California Office of Administrative Hearings (OAH), but the presiding administrative law judge (ALJ) affirmed the School District's decision.[4] E.M. then appealed to the United States District Court for the Northern District of California where he moved to supplement the record with another set of tests that he took after the OAH hearing.[5] These tests supported the

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[1] E.M. *ex rel.* E.M. v. Pajaro Valley Unified Sch. Dist. (*E.M. III*), 652 F.3d 999, 1001–02 (9th Cir. 2011). E.M.'s parents hired Dr. Roslyn Wright, a psychologist, to evaluate him. *Id.* at 1001.

[2] *Id.* at 1002.

[3] *See id.*

[4] *See* E.M. *ex rel.* E.M. v. Pajaro Valley Unified Sch. Dist. (*E.M. I*), No. C 06-4694 JF, 2008 WL 4615436, at *2 (N.D. Cal. Oct. 17, 2008).

[5] *See E.M. III*, 652 F.3d at 1002.

conclusion that E.M. had a learning disability.[6] The district court denied E.M.'s motion, deeming the evidence unnecessary, but ultimately remanded the case to the ALJ for a more detailed finding.[7] The ALJ issued a revised opinion elaborating its decision in favor of the School District, and the district court granted the School District's motion for summary judgment.[8]

E.M. appealed to the United States Court of Appeals for the Ninth Circuit, arguing that the district court erred in finding that he failed to show a learning disability and that the School District "cherry picked" among his available test scores to reach its conclusion.[9] The Ninth Circuit held that the district court applied an improper standard in denying E.M.'s motion to supplement the record with additional test scores from 2007.[10] Although one test used in 2007 did not exist in 2004 when the School District initially assessed E.M., the Ninth Circuit concluded that the district court should nonetheless have considered the 2007 scores because they may have provided valuable information about E.M.'s condition in 2004.[11] In his dissent, Judge Bea observed that the Ninth Circuit's remand was redundant because the district court had already considered the relevancy of the evidence when the court excluded it.[12] Despite Judge Bea's criticism, the Ninth Circuit's redundant remand establishes an important precedent for special-education law because it broadly defines the "additional evidence" courts must consider in hearing IDEA claims.[13]

I. E.M.'s Diagnostic History and Initial Court Proceedings

E.M. first enrolled in the School District's regular education program in kindergarten.[14] After kindergarten, however, the school designated him "as being at risk of retention" and required him to attend summer school to improve his reading.[15] E.M.'s third grade teacher also

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[6] *See id.*

[7] *See E.M. III*, 652 F.3d at 1009 (Bea, J., dissenting); *E.M. I*, 2008 WL 4615436, at *3.

[8] *See* E.M. *ex rel.* E.M. v. Pajaro Valley Unified Sch. Dist. (*E.M. II*), No. C 06-4694 JF, 2009 WL 2766704, at *1 (N.D. Cal. Aug. 27, 2009).

[9] *See E.M. III*, 652 F.3d at 1001, 1003 (internal quotations omitted).

[10] *Id.* at 1005–06.

[11] *See id.*

[12] *See id.* at 1009–10 (Bea, J., dissenting).

[13] *See id.* at 1005–06 (majority opinion).

[14] *See* E.M. *ex rel.* E.M. v. Pajaro Valley Unified Sch. Dist. (*E.M. II*), No. C 06-4694 JF, 2009 WL 2766704, at *1 (N.D. Cal. Aug. 27, 2009). E.M. was a bilingual student and his mother indicated to the School District that Spanish was his first language. *Id.* at *1 n.3.

[15] *Id.* at *1.

designated him as at risk, but later dropped the designation and instead described him as capable and intelligent but "easily distracted."[16] E.M. continued to exhibit similar difficulties in the fourth grade but, despite these persistent issues, E.M.'s teachers did not consider him a candidate for special education.[17]

The summer before his fifth grade year, E.M.'s parents hired Dr. Roslyn Wright to evaluate him for a learning disability.[18] During her evaluation, Dr. Wright administered two disability assessments: the Wechsler Intelligence Scale for Children, Third Edition (WISC-III), which measures innate cognitive ability; and the Woodcock-Johnson Tests of Achievement-III (WJ-III), which measures the capability to assess and process information.[19] E.M.'s test results displayed a discrepancy between his cognitive ability and his actual achievement, revealing a "'[m]ild' impairment . . . in the areas of listening comprehension and oral language."[20] Dr. Wright therefore diagnosed E.M. with a learning disability.[21]

Upon receiving Dr. Wright's report, E.M.'s mother requested that the School District assess his eligibility for special education.[22] Leslie Viall, the School District's psychologist, assessed E.M. based on tests similar to those administered by Dr. Wright, with one notable exception—she used the Kaufman Assessment Battery for Children (K-ABC) instead of the WISC-III to measure cognitive ability.[23] The School District did not dispute that using E.M.'s K-ABC score would have shown a "severe discrepancy" between his intellectual ability and his achievement score.[24] This severe discrepancy may have made E.M. eligible for special education services, but Ms. Viall decided not to use the K-ABC score.[25] Ms. Viall instead decided that the WISC-III score was the most

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[16] *See id.* (internal quotations omitted).

[17] *See id.*

[18] *Id.* at *2. E.M.'s parents hired Dr. Wright at the suggestion of their immigration attorney because a finding of a learning disability could assist in the family's immigration status. *Id.* at *2 n.5. If Dr. Wright's report were to show, for example, that a move to Mexico would affect E.M.'s development adversely because of his disability, it might affect E.M.'s ability to stay in the country. *See id.* at *2, *2 n.5.

[19] *E.M. II*, 2009 WL 2766704, at *2.

[20] *See id.*

[21] *Id.*

[22] *See id.* at *3.

[23] *See id.*

[24] E.M. *ex rel.* E.M. v. Pajaro Valley Unified Sch. Dist. (*E.M. III*), 652 F.3d 999, 1003 (9th Cir. 2011).

[25] *See id.*; *E.M. II*, 2009 WL 2766704, at *3. The Ninth Circuit identified that California's codification of IDEA defined a "specific learning disability," in part, as a "severe discrepancy" between a child's intellectual ability and achievement "due to a disorder in one

reliable, that E.M. did not show a severe discrepancy that warranted special education services, and that he would continue to improve through general classroom intervention.[26]

E.M.'s parents requested that the School District perform a second assessment.[27] Dr. Wright also wrote a letter to the School District explaining that if Ms. Viall had used the K-ABC score instead of the WISC-III score, she would have found a severe discrepancy likely warranting special education services.[28] The School District did not dispute Dr. Wright's assertion and agreed to administer another series of tests later that year.[29] After these tests, the School District again concluded that E.M. did not qualify for special education services.[30]

E.M. showed some significant academic progress the following year, but he continued to have trouble completing his homework.[31] E.M.'s parents hired an audiologist, Dr. Ruth Kaspar, to evaluate him.[32] Dr. Kaspar concluded that E.M. suffered from an auditory processing disorder and a "probable learning disability."[33] E.M.'s parents presented these findings to the School District, and the School District hired its own audiologist, Dr. Jody Winzelberg, to review the report.[34] Dr. Winzelberg disagreed with Dr. Kaspar's opinion and concluded that E.M.'s test results exhibited "some weaknesses in the auditory system," but that he did not suffer from any disorder.[35]

On December 5, 2005, E.M. filed a complaint with the Special Education Division of the OAH, challenging the School District's denial of special education services.[36] After a six-day due process hearing, the ALJ issued a decision in favor of the School District on every issue.[37]

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or more of the basic psychological processes . . . ." *See E.M. III*, 652 F.3d at 1003 (citing Cal. Educ. Code § 56337 (West 2008)).

[26] *See E.M. II*, 2009 WL 2766704, at *3–4. Ms. Viall realized that there was a discrepancy between E.M.'s K-ABC and WISC-III scores, so she conducted a third test. *Id.* at *12. The third test corroborated the WISC-III score, and therefore Ms. Viall concluded that the WISC-III score was the more accurate assessment of E.M.'s cognitive ability. *Id.*

[27] *Id.* at *4.

[28] *Id.*

[29] *See E.M. III*, 652 F.3d at 1003; *E.M. II*, 2009 WL 2766704, at *5.

[30] *E.M. II*, 2009 WL 2766704, at *4–5.

[31] *See id.* at *5.

[32] *Id.* at *6.

[33] *Id.* (internal quotations omitted). Dr. Kaspar qualified her diagnosis as "probable" because, as an audiologist, she was not properly trained to diagnose learning disabilities. *See id.*

[34] *Id.*

[35] *See E.M. II*, 2009 WL 2766704, at *6.

[36] *Id.*

[37] *Id.*

E.M. appealed the ALJ's decision to the district court pursuant to IDEA, which allows parents to challenge an administrative agency's findings in federal court.[38] E.M. argued that the School District and the ALJ improperly ignored probative evidence because neither had considered his K-ABC score, and that the disparity between his K-ABC and WJ-III scores corroborated Dr. Kaspar's finding that he had an auditory processing disorder.[39]

In addition to challenging the School District's and the ALJ's decisions not to consider his K-ABC score, E.M. moved to supplement the record with new evidence—a 2007 report from Dr. Cheryl Jacques.[40] Dr. Jacques is a clinical psychologist who administered new tests for E.M., including the WISC-IV, a newer version of the WISC-III.[41] Based on these tests and her review of E.M.'s records, Dr. Jacques diagnosed E.M. with a "specific learning disability," as defined by IDEA.[42] Therefore, although E.M. took these tests after the OAH hearing under review in the district court, he moved to add them to the record because the new tests corroborated Dr. Kaspar's original diagnosis.[43]

The district court denied E.M.'s motion, stating that Dr. Jacques's 2007 report was "not necessary to evaluate the ALJ's determination . . . ."[44] The district court nonetheless agreed with E.M. that the ALJ did not adequately articulate how he reached his conclusion and remanded the case for revision.[45] On remand, the ALJ explained that he found in favor of the School District because Ms. Viall persuasively testified that

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[38] *See* E.M. *ex rel.* E.M. v. Pajaro Valley Unified Sch. Dist. (*E.M. I*), No. C 06-4694 JF, 2008 WL 4615436, at *1 (N.D. Cal. Oct. 17, 2008) (citing Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1415(i)(2)(A)(2006)). In considering its role in reviewing an administrative decision, the district court differentiated IDEA cases from other administrative appeals in the Ninth Circuit that are typically held to a "highly deferential standard of review." *See id.* (internal quotations omitted). In contrast, the standard in IDEA cases allows for the district court to make its own factual findings while giving appropriate deference to the administrative agency's findings where they are carefully considered and supported by a preponderance of the evidence. *See id.*

[39] *See E.M. II*, 2009 WL 2766704, at *6, *11.

[40] *E.M. III*, 652 F.3d at 1002.

[41] *Id.*

[42] *Id.* IDEA defines a "specific learning disability" as "a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations." 20 U.S.C. § 1401(30)(A). Dr. Jacques further noted that it was "puzzling" that the School District did not find E.M. eligible for special education in 2004. *E.M. III*, 652 F.3d at 1002 (internal quotations omitted).

[43] *See id.* at 1002–03, 1006.

[44] *See id.* at 1009 (Bea, J., dissenting).

[45] *See E.M. I*, 2008 WL 4615436, at *3.

using E.M.'s WISC-III score was the best measure of his cognitive ability.[46] Ms. Viall testified that she realized there was a discrepancy between E.M.'s K-ABC and WISC-III scores, so she conducted a third test.[47] The third test corroborated the WISC-III score, and therefore Ms. Viall concluded that the WISC-III score was the more accurate assessment of E.M.'s cognitive ability.[48]

The district court ultimately held that the ALJ's reasoning was adequately supported and that his judgment concerning witness credibility was entitled to deference.[49] The court further noted that school systems maintain the right to use their discretion in selecting which diagnostic tests will determine special education eligibility, and that the School District's choice to use the WISC-III score was not unreasonable.[50] The district court granted the School District's motion for summary judgment, concluding that E.M. failed to establish that he suffered from a learning disability.[51] E.M. appealed, and the Ninth Circuit partially reversed and remanded the case to the district court.[52] The Ninth Circuit remanded because "the district court applied an incorrect standard for admission of after-acquired evidence" when it excluded Dr. Jacques's 2007 report.[53] On remand, the Ninth Circuit in-

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[46] *See E.M. II*, 2009 WL 2766704, at *12–13. The ALJ found Ms. Viall's testimony more persuasive because of her experience in applying special education concepts in her work, whereas Dr. Wright admitted that she was unfamiliar with many basic special education concepts. *Id.* at *12. Ms. Viall testified that she administered the K-ABC test during her own evaluation, despite her opinion that the WISC-III test was a better measure of cognitive ability, because Dr. Wright had recently administered the WISC-III to E.M. *Id.*

[47] *See id.* The third test Ms. Viall conducted was the Test of Nonverbal Intelligence-3 (TONI), which also measures cognitive ability. *Id.* at *3, *12.

[48] *See id.* at *12. Ms. Viall testified that E.M.'s WISC-III score (104) and his TONI score (98) were more consistent with each other than his K-ABC score (111). *See id.*

[49] *See id.* at *13.

[50] *See id.* (citing Ford *ex rel.* Ford v. Long Beach Unified Sch. Dist., 291 F.3d 1086, 1088–89 (9th Cir. 2002)). The *Ford* court held that a school district's assessment of a student for special education services met the legal standard when it applied standardized tests instead of a traditional IQ test to measure cognitive ability. *See* 291 F.3d at 1088–89. The district court rejected E.M.'s argument that the School District failed to properly assess him in all related areas to his potential disability, noting that the School District performed at least one auditory processing test during its evaluation. *See E.M. II*, 2009 WL 2766704, at *16. The district court agreed with the School District's assertion that it administered an auditory processing test when it conducted a test which "*arguably* addresses auditory processing through a *subtest* involving sentence repetition." *Id.* (emphasis added).

[51] *See E.M. II*, 2009 WL 2766704, at *17.

[52] *E.M. III*, 652 F.3d at 1006.

[53] *Id.*

structed the district court to reconsider whether the School District complied with IDEA in light of Dr. Jacques's report.[54]

II. The Ninth Circuit's Redundant Remand

The Ninth Circuit recognized that the critical question was whether the School District met its obligation to properly assess E.M.'s eligibility for special education services.[55] The court scrutinized E.M.'s assessments but ultimately remanded this critical question back to the district court.[56] In so doing, however, the Ninth Circuit broadly defined IDEA's mandate that courts "shall hear additional evidence at the request of a party . . . ."[57]

The Ninth Circuit began its inquiry into whether the School District met its obligation to properly assess E.M. by scrutinizing E.M.'s assessments.[58] The court stated that despite the district court's finding that the School District administered at least one auditory processing test, the only formal auditory assessment came from Dr. Kaspar's evaluation which resulted in a diagnosis of a disorder.[59] Although the School District had hired its own audiologist to review Dr. Kaspar's diagnosis, the court indicated that this did not adequately support the School District's finding that E.M. did not suffer from a "disorder in a basic psychological process."[60] Therefore, the Ninth Circuit held that the district court improperly concluded that E.M. failed to establish that he suffered from such a disorder.[61]

Regarding the "severe discrepancy" between E.M.'s cognitive ability and achievement scores, the court considered whether IDEA would allow the School District "to exclude the valid results of a test the district itself selected and administered[.]"[62] The court recognized that school systems have discretion in selecting diagnostic tests to determine special education eligibility, and that "[t]his question touches on a fundamental tension in special education law—that between ensuring that

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[54] *Id.*

[55] *See* E.M. *ex rel.* E.M. v. Pajaro Valley Unified Sch. Dist. (*E.M. III*), 652 F.3d 999, 1007 (9th Cir. 2011).

[56] *See id.* at 1003–04, 1006–07.

[57] *See* Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1401, 1415(i)(2)(C)(ii) (2006); *E.M. III*, 652 F.3d at 1005.

[58] *E.M. III*, 652 F.3d at 1003–04.

[59] *See id.*; E.M. *ex rel.* E.M. v. Pajaro Valley Unified Sch. Dist. (*E.M. II*), No. C 06-4694 JF, 2009 WL 2766704, at *16 (N.D. Cal. 2009).

[60] *See E.M. III*, 652 F.3d at 1003 (internal quotations omitted).

[61] *See id.*

[62] *See id.* at 1004.

all disabled children have access to educational opportunity and ensuring that non-disabled children are not improperly identified as disabled."[63] School systems have a duty to take the appropriate measures to ensure that children with disabilities have access to a "successful educational experience" while simultaneously ensuring that children without disabilities are not improperly diagnosed.[64]

In support of this duty, IDEA mandated that "no single procedure shall be the sole criterion for determining an appropriate educational program for a child."[65] California's codification of IDEA adhered to this mandate by instructing school systems to consider "all relevant material which is available on the pupil" in determining the existence of a "specific learning disability."[66] In accordance with this language, the Ninth Circuit held that a school district must make a "reasonable choice" when confronted with conflicting test results.[67] Therefore, whether IDEA allows a school district to exclude valid test results from a test the district itself selected and administered depends on whether the exclusion was a "reasonable choice."[68]

The Ninth Circuit refrained from expressly declaring the School District's exclusion of E.M.'s K-ABC score unreasonable, and instead focused on the district court's exclusion of Dr. Jacques's 2007 report as a misapplication of the standard required by IDEA.[69] IDEA allows district courts to make their own factual findings in reviewing administrative holdings, but mandates that courts "shall hear additional evidence at the request of a party . . . ."[70] IDEA does not provide a functional definition for "additional evidence," but the Ninth Circuit explained that "under [its] precedent, evidence that is non-cumulative, relevant, and

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[63] *Id.* "This tension is particularly salient for minority students, who historically have been over-identified as disabled and disproportionally placed in segregated educational settings, due in part to biased IQ tests." *Id.* IDEA stresses the importance of addressing this tension by calling for greater efforts "to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities." *See* 20 U.S.C. § 1400(c)(12)(A).

[64] *See* 20 U.S.C. § 1400 (c)(2)(C), (c)(12)(A); *see also E.M. III*, 652 F.3d at 1004 (recognizing that these duties are in tension); Larry P. *ex rel.* Lucille P. v. Riles, 793 F.2d 969, 983 (9th Cir. 1984) (acknowledging the discriminatory removal of black children from regular education classes).

[65] *See E.M. III*, 652 F.3d at 1004 (quoting 20 U.S.C. § 1412(a)(6)(B)) (internal quotations omitted).

[66] *Id.* (quoting Cal. Code Regs. tit. 5, § 3030(j) (2011)) (internal quotations omitted).

[67] *Id.*

[68] *See id.* at 1004–06.

[69] *See id.*

[70] 20 U.S.C. § 1415(a), (i)(2)(C)(ii); *see E.M. II*, 2009 WL 2766704, at *7.

otherwise admissible constitutes 'additional evidence' . . . ."[71] The Ninth Circuit held that the district court applied the wrong standard in excluding Dr. Jacques's 2007 report.[72] Instead of determining that the report was not necessary to evaluate the ALJ's finding, the district court should have considered whether the report constituted "relevant, noncumulative, and otherwise admissible" evidence.[73] The Ninth Circuit explained that while evidence accrued in hindsight should not be used exclusively, subsequent events "may provide significant insight into the child's condition, and the reasonableness of the school district's action, at the earlier date."[74] The Ninth Circuit remanded the issue, instructing the district court to evaluate the relevance of the 2007 report in the context of the School District's actions in 2004 using the correct standard.[75]

In his dissent, Judge Bea criticized this remand because Dr. Jacques's 2007 report could not have had any bearing on the School District's decision in 2004.[76] The test Dr. Jacques administered in 2007, the WISC-IV, did not exist in 2004 and therefore could not have been relevant to the School District's determination at that time.[77] As a result, Dr. Jacques's report was not evidence that could inform the court's assessment of the reasonableness of the School District's exclusion of E.M.'s K-ABC score.[78] Furthermore, the district court had already considered the evidence when it concluded that the report was unnecessary.[79] Remanding to reconsider its relevance would be "wasting time and resources" just "so that the district court [could] again make a determination it [had] already made."[80] The Ninth Circuit nevertheless remanded E.M.'s case to determine whether the School District met its obligation to test E.M. for an auditory processing disorder, and whether

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[71] *E.M. III*, 652 F.3d at 1005; *see* 20 U.S.C. § 1401. The Ninth Circuit referred to two cases as "our precedent." *See E.M. III*, 652 F.3d at 1004–05; Adams v. Oregon, 195 F.3d 1141 (9th Cir. 1999); Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467 (9th Cir. 1993). In *Ojai*, the district court admitted evidence of an event that occurred subsequent to the administrative hearing, and the Ninth Circuit ruled that this was a proper admission of "additional evidence." *See* 4 F.3d at 1473. In *Adams*, the Ninth Circuit held that intervention measures implemented subsequent to the event in question "may shed light on the adequacy of" the school district's actions during the relevant time period. *See* 195 F.3d at 1149.

[72] *E.M. III*, 652 F.3d at 1006.

[73] *Id.*

[74] *Id.*

[75] *See id.*

[76] *Id.* at 1007–08 (Bea, J., dissenting).

[77] *See E.M. III*, 652 F.3d at 1008 (Bea, J., dissenting).

[78] *See id.* at 1009.

[79] *See id.*

[80] *Id.* at 1009–10.

Dr. Jacques's 2007 report was relevant to the reasonableness of the School District's actions in 2004.[81]

III. The Importance of the Ninth Circuit's Remand

Judge Bea's dissent logically questioned the purpose of ordering a district court to consider evidence it has already considered.[82] By denying its admission, the district court determined that the report was irrelevant to the reasonableness of the School District's 2004 decision to exclude E.M.'s K-ABC score.[83] The district court's finding that the 2007 report was irrelevant meant that it did not constitute "additional evidence" under the Ninth Circuit's definition because "additional evidence" must be non-cumulative, otherwise admissible, *and* relevant.[84] Therefore, according to Judge Bea, the majority's remand was redundant.[85]

The disagreement about whether the district court erred in this case highlights the concern that school systems will be judged exclusively in hindsight.[86] Embedded in this concern is the possibility that a party might undercut the expertise of an administrative agency by saving its best evidence for the district court proceeding.[87] Hindsight could play a greater role in the execution of justice than perhaps it should when "additional evidence" is admitted that the administrative agency did not have an opportunity to hear.[88]

Yet the purpose of IDEA's "additional evidence" mandate is to create a safeguard for parents of children with disabilities who disagree with an administrative agency's findings.[89] Although this safeguard was not intended to transform the nature of a district court hearing from one of review to one of de novo, IDEA's "additional evidence" mandate

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[81] *See id.* at 1006–07 (majority opinion).

[82] *See* E.M. *ex rel.* E.M. v. Pajaro Valley Unified Sch. Dist. (*E.M. III*), 652 F.3d 999, 1009–10 (9th Cir. 2011) (Bea, J., dissenting).

[83] *See id.* at 1009.

[84] *See id.* at 1005 (majority opinion); *id.* at 1009 & n.3 (Bea, J., dissenting).

[85] *See id.* at 1009–10 (Bea, J., dissenting).

[86] *See id.* at 1006 (majority opinion) (citing Adams v. Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999)). *Adams* held that a school system's actions cannot be judged exclusively in hindsight because a disability assessment is a "snapshot" of a child's condition at the time it is administered, and thus any judgment as to the reasonableness of a school system's actions must take this into account. *See* 195 F.3d at 1149–50 (internal quotations omitted).

[87] *See* Ojai Unified Sch. Dist. v. Jackson, 4 F.3d 1467, 1473 (9th Cir. 1993) (citing Town of Burlington v. Dep't of Educ., 736 F.2d 773, 791 (1st Cir. 1984)).

[88] *See E.M. III*, 652 F.3d at 1006; *Ojai*, 4 F.3d at 1473 (citing *Burlington*, 736 F.2d at 791).

[89] *See* Individuals with Disabilities Education Act (IDEA), 20 U.S.C § 1415(a), (i)(2)(A), (i)(2)(C)(ii)(2006); *Ojai*, 4 F.3d at 1471–72; *Burlington*, 736 F.2d at 791, 793.

safeguards children with disabilities by allowing district courts the latitude, indeed the responsibility, to form judgments that are not completely bound by the administrative record.[90] Evidence that could further inform the court on a child's condition must be carefully considered because the possibility of incorrectly ruling on a child's educational future is IDEA's paramount concern.[91] Congress enacted IDEA because it found that the needs of children with disabilities were not being adequately met.[92] IDEA embodies "an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities."[93] Thus, IDEA's express purpose is to ensure that every child with a disability has equal access to education.[94] The Ninth Circuit's broad definition of "additional evidence" supports that purpose.[95]

In E.M.'s case, the district court did not consider the evidence as IDEA intended when the court determined that Dr. Jacques's 2007 report was unnecessary to assess the reasonableness of the School District's previous actions.[96] Instead of considering whether the report was necessary, the district court should have considered whether the report, when viewed in conjunction with the administrative record, could have helped inform a more complete finding.[97] The Ninth Circuit refrained from ruling that Dr. Jacques's report was "additional evidence" that should be admitted pursuant to IDEA, but instead remanded that determination to the district court.[98] While Judge Bea may have correctly predicted that on remand the district court will again find that Dr. Jacques's report is irrelevant, the Ninth Circuit established important precedent by broadly defining the "additional evidence" courts must hear in IDEA claims.[99]

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[90] *See* 20 U.S.C § 1415(a), (i)(2)(A), (i)(2)(C)(ii); *Ojai*, 4 F.3d at 1471–73; *Burlington*, 736 F.2d at 791, 793. In *Burlington*, the First Circuit held that the district court must resolve discrepancies in the record and "must make a finding as to the nature of the child's learning disabilities . . . ." *See* 736 F.2d at 793, 802.

[91] *See* 20 U.S.C. § 1400(d)(1)(A); *E.M. III*, 652 F.3d at 1004, 1006.

[92] *See* 20 U.S.C. § 1400(c)(2). Congress found that this inadequacy resulted in the exclusion of disabled children from the public school system and prevented them from having a "successful educational experience." *See id.*

[93] *See id.* § 1400(c)(1).

[94] *See id.*; *E.M. III*, 652 F.3d at 1004–06.

[95] *See* 20 U.S.C. § 1400(c)(1); *E.M. III*, 652 F.3d at 1004–06.

[96] *See E.M. III*, 652 F.3d at 1005–06.

[97] *See id.* at 1006.

[98] *See id.* at 1004–07.

[99] *See id.* (majority opinion); *id.* at 1009–10 (Bea, J., dissenting).

Conclusion

The Ninth Circuit effectively determined that the district court failed to adhere to IDEA's "additional evidence" mandate when the district court deemed Dr. Jacques's 2007 report unnecessary. The district court should have considered whether the report was "non-cumulative, relevant and otherwise admissible" evidence. The difference between an inquiry of necessity and one of "additional evidence" may seem technical, but it is far from trivial. IDEA's "additional evidence" mandate exists because Congress decided that it was important to give parents of children with disabilities an opportunity to challenge an adverse administrative ruling to an alternative forum. Without the ability to supplement the record, the appellate process would be limited to a review of the administrative record and courts would have less latitude in ensuring schools comply with Congress's mandates. IDEA's purpose is to ensure that children with disabilities have an equal opportunity to succeed in the classroom, and the Ninth Circuit's decision in *E.M. ex rel. E.M. v. Pajaro Unified Valley School District* supports that purpose.