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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA
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7 L.B., et al.,

8 Plaintiffs,

9 v.

10 WEST CONTRA COSTA UNIFIED
11 SCHOOL DISTRICT, et al.,

12 Defendants.

Case No. [16-cv-04382-DMR](#)

**ORDER ON MOTIONS TO
SUPPLEMENT THE RECORD**

Re: Dkt. Nos. 53, 54

13 Plaintiffs L.B. and M.B. are the parents of S.B., a former student. They appeal the May
14 15, 2016 administrative decision of the California Office of Administrative Hearings pursuant to
15 the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 et seq. Plaintiffs and
16 Defendants West Contra Costa Unified School District and West Contra Costa Unified School
17 District Special Education Local Plan Area separately move to introduce additional evidence to
18 supplement the administrative record. [Docket Nos. 53 (Defs.’ Mot.), 54 (Pls.’ Mot.).] The
19 motions are suitable for resolution without a hearing pursuant to Civil Local 7-1(b). For the
20 following reasons, Defendants’ motion is granted and Plaintiffs’ motion is denied.

21 **I. BACKGROUND**

22 Plaintiffs make the following allegations in their complaint. S.B., who was born in 1994,
23 has multiple learning disabilities. She became eligible for special education and related services
24 starting in eighth grade, and graduated from high school in June 2015. At all relevant times,
25 S.B.’s school district of residence was West Contra Costa Unified School District (the “District”).
26 [Docket No. 45 (First Am. Compl., “FAC”) ¶¶ 12, 13.]

27 On July 25, 2013, S.B. filed a due process complaint with the Office of Administrative
28 Hearings (“OAH”) alleging that the District had failed to provide her with a free and appropriate

1 public education (“FAPE”) for the 2011-2012 and 2012-2013 school years. FAC ¶ 25. In August
2 2013, while the due process proceeding was pending, S.B. began attending Bayhill High School in
3 Oakland, California. Id. at ¶¶ 27, 29. S.B. and her parents settled their due process complaint
4 with the District on November 17, 2013. As part of the settlement, the District finalized S.B.’s
5 placement at Bayhill High School with specialized services. The parties also agreed that the
6 District would provide S.B. with “transportation to/from Bayhill in the form of reimbursement for
7 one round-trip per day of attendance at the current IRS rate.” Id. at ¶ 31. Plaintiffs allege that the
8 agreement provided that “[m]ileage reimbursement shall be provided within 30 days of the
9 District’s receipt of properly completed mileage reimbursement form(s),” and that “[m]ileage
10 reimbursement must be submitted by [S.B.] on a monthly basis.” Id.

11 Plaintiffs allege that after the settlement agreement was finalized, the District never
12 provided S.B. or M.B. with mileage reimbursement forms to complete. Id. at ¶¶ 32, 39. In April
13 2014, M.B. submitted a request for several months’ worth of mileage reimbursement to the
14 District on forms created by her attorney, but never received reimbursement for the mileage
15 claimed on these forms. Id. at ¶¶ 39, 40. In June 2015, M.B. submitted mileage reimbursement
16 forms for the period August 27, 2013 through June 5, 2015. Plaintiffs allege that the District
17 never processed the forms. Id. at ¶ 43. S.B. graduated from Bayhill High School on June 7, 2015.
18 Id. at ¶ 12.

19 According to Plaintiffs, at S.B.’s March 5, 2014 individualized education program (“IEP”)
20 meeting, her attorney requested that the District provide independent educational evaluations
21 (“IEEs”) in the areas of psychoeducation, speech and language, and occupational therapy. Id. at ¶
22 37. Plaintiffs allege that although the District advised that it would respond to the request “at a
23 later time,” they never received a letter from the District regarding their request for the IEEs. Id.
24 at ¶¶ 37, 41. Additionally, Plaintiffs allege that at the March 5, 2014 IEP meeting, S.B.’s attorney
25 requested District-provided transportation for S.B. because it was burdensome for M.B. to make
26 two round trips per day to transport S.B. to and from school. According to Plaintiffs, the District
27 responded that “it would only provide reimbursement pursuant to the settlement agreement.” Id.
28 at ¶ 38.

1 Plaintiffs filed a due process complaint against the District on August 26, 2015, alleging
2 that the District had failed to provide S.B. with a FAPE for the 2013-2014 and 2014-2015 school
3 years by failing to reimburse S.B. and/or her parents for round trip mileage to and from Bayhill
4 High School. Id. at ¶ 44. At a September 8, 2015 resolution session, the District informed S.B.’s
5 attorney that it could not accept the mileage reimbursement request previously submitted by M.B.
6 because the request was not submitted on District forms. S.B.’s attorney and her sister then
7 completed the District’s mileage reimbursement forms for the period August 27, 2013 to June 5,
8 2015. Id. at ¶ 45. Plaintiffs allege that their attorney “was told M.B.’s signature was not required
9 [on the forms] because her signature was on the other forms.” Id. Plaintiffs further allege that on
10 or around October 8, 2015, their attorney “was told by District Counsel that M.B. needed to come
11 in and sign the mileage forms before they could be processed,” even though “the attorney had
12 inquired on September 8[, 2015].” Id. at ¶ 46. M.B. signed the forms on October 9, 2015 and was
13 told she would receive the check within 30 days. Id.

14 S.B. amended her due process complaint in October 2015, challenging the District’s failure
15 to 1) reimburse S.B. and/or her parents for round trip mileage to and from Bayhill High School
16 through March 5, 2014; 2) provide transportation to and from school for S.B. after Plaintiffs’
17 March 5, 2014 request; and 3) provide the three IEEs following Plaintiffs’ counsel’s March 5,
18 2014 request. Id. at ¶ 48. The matter was tried on March 22-24, 2016. Id. at ¶ 56. Plaintiffs
19 allege that at a March 11, 2016 prehearing conference, counsel for the District informed Plaintiffs’
20 counsel for the first time that the District had notified M.B. that it had granted the request for the
21 IEEs in a letter dated March 27, 2014. Counsel further stated that the District had already mailed
22 M.B. and L.B. a check for the mileage reimbursement. Id. at ¶ 53. Plaintiffs never received a
23 check in the mail. Id. at ¶ 54. On March 23, 2016, the second day of trial, the District provided
24 M.B. with a check for mileage reimbursement from August 27, 2013 to June 5, 2016. Id. at ¶ 62.

25 The Administrative Law Judge (“ALJ”) issued a decision in May 2016. FAC Ex. 1 (OAH
26 Decision). In relevant part, the ALJ found that 1) OAH lacked jurisdiction over the issue of
27 whether the District denied S.B. a FAPE by failing to reimburse Plaintiffs for mileage for one
28 round trip per day from August 28, 2013 through March 5, 2014, since the reimbursement was

1 required by a settlement agreement and OAH lacks jurisdiction to enforce settlement agreements;
2 2) even if OAH had jurisdiction over the August 2013-March 2014 mileage reimbursement
3 dispute, the issue was moot because S.B. received full reimbursement on March 23, 2016; and 3)
4 S.B. did not establish that she was denied a FAPE based on the District’s failure to provide IEEs,
5 since S.B. had failed to pursue the IEEs after the District granted her request. *Id.*

6 Plaintiffs bring three claims for relief. The first asserts that the District violated the IDEA,
7 20 U.S.C. § 1415(c)(2)(B)(i)(I), by failing to respond to L.B. and M.B.’s due process complaint
8 within 10 days, which “resulted in unnecessary and protracted litigation considering that the
9 District paid the mileage reimbursement during the second day of [the] hearing.” *Id.* at ¶¶ 87-89.
10 The second claim for relief challenges the ALJ’s finding that Plaintiffs were entitled to
11 reimbursement for two round-trips per day instead of the actual costs of transportation for
12 transporting S.B. to and from Bayhill High School.¹ *Id.* at ¶ 91. The third claim for relief asserts
13 that the ALJ erred in finding that the District did not deny S.B. a FAPE based on its failure to
14 provide IEEs. *Id.* at ¶¶ 97-113.

15 The parties now move separately to supplement the administrative record. The District
16 asks to supplement the record with a declaration by its counsel, Shawn Olson Brown, to which
17 three exhibits are attached. [Docket No. 51-1 (Olson Brown Decl., Jan. 27, 2017).] According to
18 the District, the Olson Brown declaration contains evidence that contradicts certain allegations in
19 the FAC.

20 Plaintiffs move to supplement the record with an “expert declaration” by transportation
21 provider Brenda Saunders, which they submitted with their reply. [Docket No. 57-1 (Saunders
22 Decl., Oct. 5, 2017).]

23 **II. LEGAL STANDARD**

24 Congress enacted the IDEA “to assist state and local agencies financially in educating
25 students with disabilities.” *M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634, 642 (9th Cir. 2005).

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¹ The ALJ found that Plaintiffs were entitled to two round trips per day, but awarded them reimbursement for only one round trip per day because Plaintiffs had already been reimbursed for one round trip per day for that specific time period.

1 Congress stated the goal of the IDEA as follows:
2 to ensure that all children with disabilities have available to them a
3 free appropriate public education that emphasizes special education
4 and related services designed to meet their unique needs and prepare
5 them for further education, employment, and independent living[.]
6 20 U.S.C. § 1400(d)(1)(A). To that end, the IDEA contains numerous procedural safeguards,
7 including parental notification requirements and complaint procedures “with respect to any matter
8 relating to the identification, evaluation, or educational placement of the child, or the provision of
9 a free appropriate public education to such child.” 20 U.S.C. §§ 1415(b)(3), 1415(b)(6)(A). After
10 filing a complaint, a child’s parents are entitled to “an impartial due process hearing.” 20 U.S.C. §
11 1415(f)(1)(A). Any party may appeal the result in a civil action in state or federal court. *Ojai*
12 *Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1469 (9th Cir. 1993) (citation omitted).

13 In a civil action seeking review of an administrative decision, the IDEA provides that a
14 court “shall receive the records of the administrative proceedings; . . . shall hear additional
15 evidence at the request of a party; and . . . basing its decision on the preponderance of the
16 evidence, shall grant such relief as the court determines is appropriate.” 20 U.S.C. §
17 1415(i)(2)(C). “Thus, judicial review in IDEA cases differs substantially from judicial review of
18 other agency actions, in which courts generally are confined to the administrative record and are
19 held to a highly deferential standard of review.” *Ojai*, 4 F.3d at 1471. However, complete de
20 novo review is inappropriate. “Because Congress intended states to have the primary
21 responsibility of formulating each individual child’s education, [courts] must defer to their
22 ‘specialized knowledge and experience’ by giving ‘due weight’ to the decisions of the states’
23 administrative bodies.” *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1126 (9th Cir. 2003),
24 superseded by statute in non-relevant part, *M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634 (9th Cir.
25 2005). “How much deference to give state educational agencies, however, is a matter for the
26 discretion of the courts[.]” *Ojai*, 4 F.3d at 1472 (emphasis in original) (quoting *Gregory K. v.*
27 *Longview Sch. Dist.*, 811 F.2d 1307, 1311 (9th Cir. 1987)).

28 As noted, the IDEA provides that a court reviewing an administrative decision may
consider “additional evidence.” However, “not all evidence is ‘additional evidence.’” *E.M. v.*
Pajaro Valley Unified Sch. Dist., 652 F.3d 999, 1004 (9th Cir. 2011). For example, “a district

1 court need not consider evidence that simply repeats or embellishes evidence taken at the
2 administrative hearing, nor should it admit evidence that changes ‘the character of the hearing
3 from one of review to a trial de novo.’” Id. (quoting Ojai, 4 F.3d at 1473); see also Ojai, 4 F.3d at
4 1472-73 (“[w]e construe ‘additional’ in the ordinary sense of the word to mean supplemental.”
5 (citation and quotation omitted)). “[E]vidence that is non-cumulative, relevant, and otherwise
6 admissible constitutes ‘additional evidence’ that the district court ‘shall’ consider pursuant to 20
7 U.S.C. § 1415(i)(2)(C)(ii).” E.M., 652 F.3d at 1004.

8 **III. DISCUSSION**

9 **A. The District’s Motion**

10 The District seeks to supplement the record with the Olson Brown Declaration, to which
11 three partially redacted email exhibits are attached.² The District asserts that in the declaration and
12 supporting documentation, Olson Brown provides evidence directly refuting three allegations in
13 the FAC related to Plaintiffs’ first claim for relief, which is that the District’s failure to respond to
14 L.B. and M.B.’s due process complaint within 10 days unreasonably and unnecessarily protracted
15 litigation with respect to the issue of transportation reimbursement. With respect to this claim,
16 Plaintiffs first allege that the District and/or its counsel failed to communicate with Plaintiffs about
17 how they could request mileage reimbursement and never provided them with mileage forms to
18 complete. See FAC ¶¶ 32, 39, 40, 43. In her declaration, Olson Brown states that she contacted
19 Plaintiffs’ counsel on November 17, 2013 and informed her that Plaintiffs “should turn in District
20 mileage reimbursement forms each month,” and that they “[could] get the forms from the special
21 education office.” Olson Brown Decl. ¶ 2, Ex. A.

22 Plaintiffs next allege that after they learned that they needed to request mileage
23 reimbursement on the District’s forms, the District told their attorney on September 8, 2015 that
24 M.B.’s signature was not required on the forms in order for them to be processed. According to
25 Plaintiffs, the District reversed course one month later and informed counsel that M.B.’s signature

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28 ² Olson Brown states that the three emails are “redacted to preserve privilege.” Olson Brown
Decl. ¶¶ 2-4.

1 was in fact required before it could process the forms. FAC ¶¶ 45, 46. Olson Brown disputes this.
2 She states that Plaintiffs’ counsel and S.B.’s sister “were informed that M.B. . . . would need to
3 sign the mileage reimbursement forms” at the parties’ September 8, 2015 Resolution Session, and
4 that on September 30, 2015, Plaintiffs’ counsel emailed Olson Brown and confirmed her
5 understanding “that [M.B.] needs to come sign [the forms].”³ Olson Brown Decl. ¶ 3, Ex. B.

6 Finally, Plaintiffs allege that although the District included a copy of the mileage
7 reimbursement check in the hearing exhibit binder on March 15, 2016, it “made no effort to give
8 the check to M.B. or S.B. prior to the hearing in order to avoid proceeding to trial on that issue.”
9 FAC ¶ 55. However, Olson Brown states that District witnesses testified at the hearing that the
10 mileage reimbursement check had been returned as undeliverable and that they had “called
11 Plaintiffs multiple times that the check was ready.” Olson Brown Decl. ¶ 4. She also states that
12 on March 16, 2016, several days before the hearing started on March 22, 2016, she informed
13 Plaintiffs’ counsel by email that the District had mailed the check on December 16, 2015 and that
14 it had been returned as undeliverable; that a District employee had left several messages in
15 Spanish for M.B. that the check “was ready for pick up at the downtown District Office”; and that
16 as the check was “still there . . . [M.B.] can pick it up, in person, anytime.” Id. at Ex. C.

17 The District argues that the Olson Brown declaration and exhibits are evidence that is non-
18 cumulative and “relevant to this Court’s understanding of the underlying due process matter.”
19 Defs.’ Mot. 2.

20 Plaintiffs oppose the motion. Their opposition does not address Olson Brown’s statements
21 in her declaration; rather, it focuses solely on the emails attached to the declaration. Plaintiffs do
22 not argue that the emails fail to satisfy the “additional evidence” standard from E.M., but instead
23 assert that the emails are incomplete excerpts and thus lack context. To that end, Plaintiffs submit
24 copies of what they claim are the full emails.⁴ They also dispute the District’s assertions about
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26 ³ In her declaration, Olson Brown states that the date of the Resolution Session was September 8,
27 2014, and that Plaintiffs’ counsel’s email was dated September 30, 2014. Brown Olson Decl. ¶ 3.
28 These dates appear to be typos, as the email attached to the declaration is dated September 30,
2015, not 2014. See id. at Ex. B.

⁴ Plaintiffs did not submit a declaration authenticating the emails.

1 what the emails establish with respect to the parties' actions, and contend that the emails do not
2 actually contradict the allegations in the FAC. For example, with respect to Olson Brown's
3 emailed statement that Plaintiffs could get the mileage reimbursement forms "from the special
4 education office," Plaintiffs argue that "[t]his email DOES NOT prove that District provided
5 Plaintiffs with copies of the District mileage logs." Pls.' Opp'n 3. Plaintiffs also assert that the
6 full email thread which she provides as Exhibit A shows that the communications were for the
7 purpose of "finaliz[ing] the settlement terms." According to Plaintiffs, "[t]here would be no
8 reason for Plaintiffs['] attorney to remember the details of the mileage forms while she was
9 focused on finalizing settlement terms." Id. They also argue that March 16, 2016 email does not
10 disprove their allegations, because it was the District's "first email communication about the
11 check," even though the check had been at the District's office since December 2015.⁵ Id.

12 Here, the District seeks to supplement the record with evidence that is relevant to
13 Plaintiffs' claim that the District unnecessarily protracted the litigation with respect to the issue of
14 transportation reimbursement. Reasons for supplementing the record in IDEA proceedings may
15 include "gaps in the administrative transcript owing to mechanical failure, unavailability of a
16 witness, an improper exclusion of evidence by the administrative agency, and evidence concerning
17 relevant events occurring subsequent to the administrative hearing." *Ojai*, 4 F.3d at 1473
18 (emphasis added) (quoting *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773, 790 (1st Cir.
19 1984)). Although Olson Brown was not "unavailable" to testify or offer the emails at the hearing
20 before the ALJ, the District had no reason to present such evidence at that time, because it was not
21 relevant to those proceedings. The due process complaint that the parties tried before the ALJ in
22 March 2016 covered only the District's alleged failure to 1) reimburse Plaintiffs for round trip
23 mileage; 2) provide S.B. with transportation to and from school for a certain period of time; and 3)
24 provide IEEs. See FAC ¶ 48. Plaintiffs did not claim that the District had unnecessarily
25 prolonged the parties' litigation with respect to the issue of transportation reimbursement until
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27 ⁵ Plaintiffs do not challenge or discuss Olson Brown's statement that District witnesses testified
28 that they mailed Plaintiffs the reimbursement check but it was returned as undeliverable and that
the District called Plaintiffs "multiple times that the check was ready." Olson Brown Decl. ¶ 4.

1 they filed this litigation challenging the ALJ’s decision.

2 Plaintiffs’ arguments about the meaning and import of the proffered evidence do not
3 address the question of whether the evidence should be added to the record; Plaintiffs’ arguments
4 go to the merits. Such arguments do not establish that the evidence is cumulative, irrelevant, or
5 otherwise inadmissible. See E.M., 652 F.3d at 1004. The District’s motion to supplement the
6 record is therefore granted.

7 Additionally, Plaintiffs assert that the emails attached to Olson Brown’s declaration are
8 incomplete. They argue that if the court grants the District’s motion, it should order the District to
9 introduce the entire email chains into evidence. Plaintiffs submit what they claim are the complete
10 email chains, but do not authenticate the documents in any way. The District is silent on this
11 issue. The court has reviewed the documents attached to Plaintiffs’ opposition. Assuming that the
12 documents are what Plaintiffs represent them to be, the court grants Plaintiffs’ request, as the full
13 email chains provide some additional context to the communications between the District and
14 Plaintiffs’ counsel.

15 Plaintiffs also argue that the District has disclosed Plaintiffs’ identities by not redacting
16 their names from the emails attached to Olson Brown’s declaration. However, Plaintiffs have not
17 moved for permission to proceed pseudonymously, even though the FAC includes a footnote that
18 they intend to seek leave to do so. See FAC ¶ 9 n.1. Since the court has never granted Plaintiffs
19 leave to proceed using pseudonyms, it declines to redact the emails.

20 **B. Plaintiffs’ Motion**

21 Plaintiffs move to supplement the record to include a declaration by their expert,
22 transportation provider Brenda Saunders (formerly Mason). Plaintiffs claim that the evidence is
23 relevant to their second claim for relief, which challenges the ALJ’s finding that Plaintiffs were
24 entitled to reimbursement for two round-trips per day. See FAC ¶ 91.

25 Plaintiffs allege in the FAC that they had planned on offering Saunders’s testimony at the
26 hearing before the ALJ, but that she “was not available until the afternoon of . . . March 25, 2016,”
27 and “[t]he parties would have been required to wait a few hours for Ms. [Saunders] to arrive.”
28 FAC ¶ 83. So that the parties could “conclude the trial,” Plaintiffs’ attorney obtained permission

1 from the ALJ “to submit quotes from three transportation providers in order to establish the cost
2 the District would have paid to transport S.B. to and from Bayhill.” Id. Plaintiffs submitted
3 quotes from Yellow Cab Express, Yellow Cab USA, and Taxi Fare Finder. They quoted costs of
4 \$110 round trip (Yellow Cab Express); \$70 one way or \$140 round trip (Yellow Cab USA); and
5 \$76.59 one way or \$153.18 round trip (Taxi Fare Finder) to transport S.B. Id. at ¶ 84. According
6 to Plaintiffs, Steve Collins, the “person most knowledgeable for the District in regards to
7 transportation, did not know the mileage rates to transport [S.B.] to and from Bayhill High
8 School,” and that he “purposely withheld this information to prevent OAH from appropriately
9 compensating Plaintiffs.” Id. at ¶ 95.

10 Plaintiffs now seek to offer Saunders’s declaration as evidence of “the actual cost of the
11 transportation that the District would have paid if they had actually provided the transportation” to
12 S.B. Pl.’s Mot. 1. In her declaration, Saunders states that she is the owner and operator of A Car
13 4 Kids and Adults, LLC. Her company has contracted with West Contra Costa School District
14 and other institutions, school districts, and parents to provide transportation for children and adults
15 in the Bay Area. Saunders Decl. ¶ 3. Saunders states that she has reviewed the quotes provided
16 by Yellow Cab Express, Yellow Cab USA, and Transportation Taxi-Fare Finder, and that she
17 would have quoted the District \$80 per day to transport S.B. for the 2013-14 school year, \$95 per
18 day for the 2014-15 school year, and \$76 per day for the 2015-26 school year.⁶ Id. at ¶¶ 7, 8. She
19 explains that these quotes are based upon a number of factors, including the times of day of travel,
20 traffic, and gas prices. Id. at ¶ 7. Saunders states that she was initially scheduled to testify at the
21 hearing on or around March 24, 2016, and confirms that she was not available to testify at the
22 hearing on March 25, 2016 until the afternoon. Id. at ¶ 4.

23 Plaintiffs argue that the Saunders declaration is relevant to their claim that the ALJ should
24 have awarded them the actual costs of transportation instead of mileage reimbursement. They
25 argue that her declaration is evidence “from a witness that was unavailable at trial that is [n]on-

26 _____
27 ⁶ Elsewhere in her declaration, Saunders states that a “\$70 rate would have been appropriate for
28 the 2013-2[0]14 school year.” Saunders Decl. ¶ 8. It is not clear whether Saunders is stating that
she would have quoted the District \$80 per day but actually only charged them \$70, or if she is
discussing Yellow Cab USA’s quote of \$70 per one way.

1 [c]umulative and [r]elevant.” Pls.’ Mot. 4.

2 The District opposes the motion on the ground that Saunders was not actually
3 “unavailable” to testify, and that Plaintiffs’ counsel instead made a strategic decision not to call
4 her as a witness. The District submits excerpts from the hearing transcript in which Plaintiffs’
5 counsel responds to the ALJ’s questions about her “proposed plan [for] witnesses” on the
6 following day by stating “I actually got quotes from the taxicab company . . . in lieu of testimony
7 so that we can be done faster.” Counsel further states that “if those [quotes] are not acceptable,
8 then [she] can call Brenda [Saunders].” [Docket No. 54-1 (Mishook Decl., Oct. 19, 2017) ¶ 2, Ex.
9 A at ECF p. 10-11 (emphasis added).] On what appears to be the following day, Plaintiffs’
10 counsel stated on the record that Saunders “is available to testify today . . . in mid-afternoon,” and
11 that if the ALJ admitted the quotes from the taxicab company, the quotes “would be in lieu of
12 [Saunders’s] testimony.” Mishook Decl. Ex. A at ECF p. 13. The District also argues that
13 Saunders’s declaration is cumulative because the record already includes three separate quotes for
14 transportation services introduced by Plaintiffs.

15 Plaintiffs’ motion to supplement the record with Saunders’s declaration is denied. As
16 noted, the Ninth Circuit has held that reasons for supplementing the record include the
17 “unavailability of a witness” or “an improper exclusion of evidence by the administrative agency.”
18 See *Ojai*, 4 F.3d at 1473 (quoting *Town of Burlington*, 736 F.2d at 790). Contrary to Plaintiffs’
19 assertion, Saunders was not unavailable to testify at the hearing. Nor did the ALJ exclude her
20 testimony. Rather, as Plaintiffs concede in their reply, “Plaintiff[s]’ attorney made the decision
21 that in lieu of her testimony, Plaintiff[s]’ attorney submitted the transportation quotes instead.”
22 Pls.’ Reply 2. It appears to be undisputed that Plaintiffs had the opportunity to call Saunders as a
23 witness, but chose not to in favor of relying on transportation quotes. By making that strategic
24 choice, Plaintiffs deprived the District of the opportunity to cross-examine Saunders. Permitting
25 Plaintiffs to introduce the Saunders declaration as additional evidence under these circumstances
26 would be fundamentally unfair.

27 Additionally, Saunders’s declaration is confusing, and would not assist the court without
28 further clarification. According to Plaintiffs, if the court accepted Saunders’s “rate of \$80 each

1 way or the lowest transportation quote of \$55 each way, the District would have paid between
2 \$110-\$170 per day for the 2013-14 school year.” Reply 3. However, it is not clear from her
3 declaration that Saunders contends that a rate of “\$80 each way” for the 2013-14 school year
4 would be appropriate, as she states the following:

5 If I had contracted with West Contra Costa Unified School District,
6 I would have quoted them \$80 per day for the 2013-14 school year .
7 ..

8 Saunders Decl. ¶ 7. While it appears that she is referring to a rate for one-way travel, she does not
9 clearly state whether the \$80 per day covers one way or round trip transportation.

10 In sum, the court declines to exercise its discretion to permit Plaintiffs to supplement the
11 record with a declaration from a witness they chose not to call in the administrative hearing.
12 Plaintiffs’ motion to supplement the record is denied.

13 **IV. CONCLUSION**

14 For the foregoing reasons, the District’s motion to supplement the record is granted.
15 Plaintiffs’ motion to supplement the record is denied.

16 **IT IS SO ORDERED.**

17 Dated: November 17, 2017

