BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. EAST SIDE UNION HIGH SCHOOL DISTRICT AND SANTA CLARA COUNTY OFFICE OF EDUCATION.	OAH Case No. 2016061098 ORDER DENYING REQUEST FOR JUDICIAL NOTICE

This matter was heard on September 27, 28, and 29, October 18, 19, 20, 25, 26, and 27, and November 4, 2016. On November 4, 2016, the matter was continued to November 23, 2016, for the filing of written closing arguments. On that day the parties filed closing arguments, the record was closed, and the matter was submitted for decision.

On November 30, 2016, in response to a subpoena duces tecum issued in this matter in September 2016, and after a hearing under section 827 of the Welfare and Institutions Code, the Juvenile Court entered an order releasing 45 documents from Student's juvenile court file, and also entered a protective order limiting the use of those documents. The order and attached documents constitute 241 pages of material not previously available to the parties or the ALJ.

On December 12, 2016, East Side filed a Request for Judicial Notice of the order of the Juvenile Court dated November 30, 2016, and the 45 documents attached to it. On December 13, 2016, Student filed an opposition to the request. On December 14, 2016, the County Office of Education filed a memorandum in support of East Side's request. On December 15, 2016, East Side filed a memorandum supporting its request, and Student filed another opposition in response.

APPLICABLE LAW

No specific statute or regulation governs the taking of official notice[1] in special education due process proceedings. For guidance in such situations the Office of Administrative Hearings often looks to the Evidence Code. Section 452, subdivision (h) of that Code allows the taking of judicial notice of "[f]acts and propositions that are not

[1] Judicial notice is generally called official notice when taken by an administrative tribunal. (See, e.g., Gov. Code, § 11515.)

reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

DISCUSSION

In late September 2016, during the hearing, East Side served an OAH subpoena duces tecum on the Department of Probation for records pertaining to Student. The Department declined to produce the records without an order of the Juvenile Court releasing the records made pursuant to section 827 of the Welfare and Institutions Code. East Side sought such an order, but that process was not completed until well after the hearing was concluded, briefs were filed, and the matter was submitted for decision.

East Side now moves, unselectively, to introduce into the record everything produced in response to that subpoena by way of a request for judicial notice. The 45 documents released by the Juvenile Court include actions taken by the court, police reports, witness statements, draft pleadings, an internal court memorandum, recommendations of probation officers and social workers, a diagnostic assessment, and a wide variety of other materials. With a single exception discussed below, East Side does not identify why any particular document is important to the upcoming decision herein. East Side argues that an unspecified number of the records are relevant because they confirm specific actions of the Juvenile Court of which the parties and the ALJ are generally aware because they were established at hearing. However, there is no particular need for more specifics about those actions, as they would make no difference to the outcome. Nor is there any apparent need to introduce into the record dozens of documents the usefulness of which East Side does not identify.

East Side also argues that some of the statements in some of the documents support its position that the primary reason for Student's residential placement is not educational. In specific, it cites a "Cognitive/Psychodiagnostic Assessment" report by clinical psychologist Anu Aurora setting forth her views of Student's condition and the reasons for it, including her opinion as to the significance of Student's drug use, a subject disputed at hearing.

Dr. Aurora's report presents significant evidentiary problems not susceptible to resolution on this motion. It contains substantial unexplained redactions, and presents the results of at least one intelligence test probably forbidden for use for special education purposes by *Larry P. v. Riles* (9th Cir. 1974) 502 F.2d 963 and related decisions.

In addition, because Dr. Aurora's opinions are hearsay, a court would not take judicial notice of them. (See, e.g., *People v. Franklin* (2016) 63 Cal.4th 261, 280; *Day v. Sharp* (1975) 50 Cal.App.3d 904, 913.) OAH does admit hearsay in an appropriate case, but its use in this context would violate Student's right to due process of law. East Side is essentially offering, long after the record has been closed, a written expert opinion from a witness (whose professional qualifications are unknown beyond her title) whom Student has no opportunity to cross-examine and whose opinions the ALJ has no opportunity to evaluate beyond the four corners of the document. Reliance on such an opinion would be fundamentally unfair to Student. This is especially true since Dr. Aurora was on East Side's

witness list for the hearing, but was withdrawn from that list. East Side does not explain why Dr. Aurora should now be allowed to opine, without cross-examination, when her testimony could have been presented at hearing.

In addition, these 241 pages of materials arrive far too late in the decisional process to be of use to the ALJ. By statutory command the decision in this matter must be filed next week, and there is insufficient time for the ALJ to evaluate these documents and incorporate them into a decision. Nor is it fair to the parties for the ALJ to rely on documents they have had no opportunity to discuss in their closing briefs.

Finally, it is not clear how the documents could be used in a decision. They are accompanied by a protective order of the Juvenile Court requiring that they be "used only in Office of Administrative Hearings Case No. 2016061098, and disclosed to necessary persons in that case only. No other disclosure or use of these documents is permitted." Since OAH is required by law to make its decision public, reference to and reliance on the Juvenile Court's documents in that decision might violate that court's protective order that the documents be "disclosed to necessary persons in that case only."

For the reasons above, East Side's request for judicial notice is denied.

IT IS SO ORDERED.

DATE: December 16, 2016

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Charles Marson
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CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings