

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matters of:

STUDENT,

Petitioner,

v.

ANAHEIM CITY SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N2007080932

ANAHEIM CITY SCHOOL DISTRICT,

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N2008010260

ORDER DENYING ADMISSION OF
JOURNAL ARTICLES INTO EVIDENCE

The due process hearing in this matter began on January 28, 2008. On the first day of hearing, Maureen Graves, attorney for Student, submitted as part of her evidence a series of journal articles that are alleged to be important and seminal articles in the field of autism. The articles were voluminous in nature and comprised Student exhibits 75 to 78 and 80 to 109.¹ After a two-week break in the hearing, the matter reconvened on February 27, 2008. At that time, Student offered additional articles based upon testimony received during the case. Those articles are also voluminous and were marked as Student exhibits 126 to 131, 133, 136 to 143, 145 to 147, 153 to 155, 180, and 218. In all, the articles offered by Student encompass nearly four large, three-ring binders of evidence.

Diane Willis, attorney for the District, offered two articles as evidence: District exhibits 74 and 75.

¹ Student exhibit 79 is also an article but was admitted without objection at the hearing.

The District and Student each objected to the admission of the other parties' articles. Admissibility of the articles as evidence was taken under submission for ruling. The parties were permitted until March 14, 2008, to file a five page brief related to the legal grounds and authority to admit the articles into evidence. The administrative law judge (ALJ) instructed the parties that they did not need to include further foundation for the articles, but should instead focus on the legal basis to admit the articles. Both parties timely filed written briefs related to the issue of admissibility of the articles.²

APPLICABLE LAW

The ALJ has discretion to bar introduction of evidence not disclosed to the other party at least five business days prior to hearing. (Ed. Code, § 56505, subd. (e)(7); Ed. Code, § 56505.1, subd (f).)

In special education due process hearings, the technical rules of evidence do not apply. (Cal. Code Regs., tit. 1, § 3082, subd. (b).) In addition, certain provisions of the Administrative Procedure Act (APA) do not apply to special education due process hearings. (Cal. Code Regs., tit. 1, § 3089; Gov. Code, § 11501.) However, by analogy, both the APA and Evidence Code provide guidance as to the admissibility of evidence at due process hearings. (See Gov. Code, § 11501) "Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions." (Cal. Code Regs., tit. 1, § 3082, subd. (b); see Gov. Code, § 11513, subd. (c).) Relevant evidence means evidence having a tendency in reason to prove or disprove any disputed fact of consequence in the determination of the matter. (Evid. Code, § 210.) The hearing judge has discretion to exclude evidence where the probative value is substantially outweighed by the probability that its admission will necessitate an undue consumption of time. (See Gov. Code, § 11513, subd. (f); Evid. Code, § 352.)

If a witness testifies as an expert, the witness may not be cross examined about the content or tenor of any scientific, technical, professional text, treatise, journal or other similar publication unless any of the following occur: a) the witness referred to, considered, or relied upon such publication in arriving at or forming his or her opinion; b) the publication was admitted into evidence; or c) the publication has been established as a reliable authority by the testimony or admission of the witness or by the other expert testimony or by judicial notice. (Evid. Code, § 721.) If admitted, relevant portions of the publication may be read into evidence, but may not be received as an exhibit. (Evid. Code, § 721, subd. (b)(3).)

"The trial court is vested with wide discretion in determining the relevance of evidence. [Citation.] The court, however, has no discretion to admit irrelevant evidence.

² In her brief, Student stated that certain exhibits may have already been admitted, but if not, are ripe for judicial notice. However, she did not state to which specific exhibits she was referring. The ALJ went through every exhibit one by one at the hearing, and the parties were given a ruling as to admissibility of each exhibit, other than the specific exhibits listed in this Order. Student requested leave to brief the judicial notice issue. That request is denied.

[Citation.] ‘Speculative inferences that are derived from evidence cannot be deemed to be relevant to establish the speculatively inferred fact in light of Evidence Code section 210, which requires that evidence offered to prove or disprove a disputed fact must have a tendency in reason for such purpose.’” (*People v. Brady* (2005) 129 Cal. App. 4th 1314, 1337-1338, citing *People v. Babbitt* (1988) 45 Cal.3d 660, 681.)

Hearsay evidence is admissible to supplement or explain other evidence in the case, but over timely objection, shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. (Cal. Code Regs., tit. 1, § 3082, subd. (b).) The proponent of proffered testimony has the burden of establishing its relevance, and if the testimony is comprised of hearsay, the foundational requirements for its admissibility under an exception to the hearsay rule. (*People v. Morrison* (2004) 34 Cal. 4th 698, 724.) Evidence is properly excluded when the proponent fails to make an adequate offer of proof regarding the relevance or admissibility of the evidence. (*Id.*)

By analogy, the APA provides that, “[i]n reaching a decision official notice may be taken, either before or after submission of the case for decision, of any generally accepted technical or scientific matter within the agency’s special field, and of any fact which may be judicially noticed by the courts of this State.” (See Gov. Code, § 11515.) Certain matters may be subject to judicial notice when they pertain to facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be subject to dispute, or facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code, § 452, subd. (g) & (h); see also Evid. Code, § 451, for matters that must be judicially noticed, but are inapplicable to the facts surrounding this case.)

DISCUSSION

The articles offered by both parties purport to be learned articles written by knowledgeable experts in the respective field covered by the article. The articles are reported to be research-based and were published in scientifically approved journals that were reputable, well-known and respected journals. However, the reported findings and conclusions in the articles are subject to debate within the academic and scientific community. Both parties offered limited foundation for the articles, and due to the undue amount of time involved in laying individual foundation for each article, the judge determined that the admissibility of the articles would be taken under submission for ruling.

Generally, both parties offered witnesses who agreed that the articles were important and discussed the areas of inquiry that were at issue in the hearing. However, none of the witnesses indicated that they relied upon any one article in forming any specific opinion about Student or her program, but generally relied upon many of the articles to form the general basis of knowledge and opinions they hold within their respective fields. Generally, the articles were offered so that the judge would read the articles to have a more in-depth understanding of the issues in the case and an understanding of the nature of the research in the field.

The articles offered by both parties are not relevant to deciding any of the disputed issues in this case. Many of the articles were received well after the hearing had begun, with less than five business days' notice. The articles may be informative about a particular area of autism or other matter contained therein, but would not be helpful to the trier of fact in determining the issues in this case. Relevant evidence is admissible if it is the sort of evidence which responsible people are accustomed to rely upon in the conduct of serious affairs. Here, the articles are subject to debate within the academic and scientific communities, and are not the type and kind that would be generally relied upon in the conduct of serious affairs; instead, the articles are subject to interpretation and conjecture about precisely how they might or might not apply to this case.

In addition, the articles could have been used for cross examination purposes, but were not. The parties never intended to use the journal articles to examine any particular witness during the hearing, but instead intended that the ALJ make factual findings and determinations based upon the journal articles without reference to testimony or other evidence in the case. The journal articles were not tied specifically to an opinion offered in this case, and even if they were, this would not necessarily support that the article be admitted. The parties might have utilized the articles to test the expert opinions offered in this case, but this would have served to highlight the subjective nature of the subject matter.

Further, the articles contain hearsay that does not meet any recognized exception to the hearsay rule, and a factual finding based upon the articles alone would not be proper. Furthermore, the journal articles are not the types of information that are subject to judicial notice as the information contained therein is subject to dispute and debate within the professional community.

Relevant, competent evidence must be offered by witnesses and exhibits in the case that will be helpful to resolving the issues in dispute. Here, the journal articles are not the type of evidence that is admissible and is not relevant to the issues in this administrative proceeding. Accordingly, the exhibits that contain extensive, voluminous journal articles are not admissible evidence.

ORDER

1. Student exhibits 75 to 78, 80 to 109, 126 to 131, 133, 136 to 143, 145 to 147, 153 to 155, 180, and 218, are not admitted as evidence in this matter.
2. District exhibits 74 and 75 are not admitted as evidence in this matter.

Dated: April 4, 2008

RICHARD M. CLARK
Administrative Law Judge
Office of Administrative Hearings
Special Education Division