

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:	
PARENT ON BEHALF OF STUDENT,	OAH CASE NO. 2011110858
v.	
SAN LUIS COASTAL UNIFIED SCHOOL DISTRICT,	
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SAN LUIS COASTAL UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2011090132 and 2012060663
v.	
PARENT ON BEHALF OF STUDENT.	ORDER DENYING STUDENT'S PEREMPTORY CHALLENGE

On September 24, 2012, Administrative Law Judge (ALJ) Rebecca Freie conducted a prehearing conference (PHC) in this matter shortly after 10:00 a.m. On September 24, 2012, Marcy Tiffany, attorney for Student, filed a peremptory challenge seeking to disqualify ALJ Freie from hearing this case. Student's peremptory challenge was filed after the PHC, at approximately 11:50 a.m. On September 24, 2012, the San Luis Coastal Unified School District (District) filed an opposition to Student's challenge and Student filed a reply. Student's peremptory challenge is made pursuant to Government Code section 11425.40, subdivision (d), of the Administrative Procedures Act (APA), and California Code of Regulations, title 1, section 1034.

Government Code section 11425.40, subdivision (d), establishes the criteria for disqualification of the presiding officer. A party is entitled to one peremptory challenge (disqualification without cause) to an ALJ assigned to an Office of Administrative Hearings (OAH) hearing. (Cal. Code Regs., tit. 1, § 1034, subs. (a) & (b); Gov. Code, § 11425.40, subd. (d).) In no event will a peremptory challenge be allowed if it is made after the hearing has commenced. In addition, if at the time of a scheduled prehearing conference, an ALJ has been assigned to the Hearing, any challenge to the assigned ALJ shall be made no later than commencement of that prehearing conference. (Cal. Code Regs., tit. 1, § 1034, subd. (c).) A peremptory challenge is not allowed on reconsideration or remand, and cannot be made after a hearing has begun. (Cal. Code Regs., tit. 1, § 1034, subd. (a).)

Student contends that his peremptory challenge is timely because ALJ Freie did not conduct a PHC, but instead continued the PHC. District disputes Student's contention and points out that the matter was convened, recorded, the parties discussed pending motions and ALJ Freie provided a tentative ruling on one of the motions. Student asserts that after taking appearances, ALJ Freie asked if the parties wanted to raise any issues prior to commencing with the PHC. Student further contends that his counsel was unaware that the matter had been assigned to ALJ Freie prior to the PHC and that counsel did not anticipate the PHC moving forward since she had filed a motion to amend the complaint, and in anticipation of that motion being granted, had not filed a PHC statement. Regardless, Student contends that because the issues, witnesses and proposed resolutions in this case were not discussed, nothing substantive transpired and therefore, a PHC was not held.

Student's contentions are wrong. The undersigned has listened to the recording of this matter. ALJ Freie went on the record, called the case, took appearances and then asked if either party needed to be heard about any matter before proceeding further. The ALJ stated that she was aware of the pending motion to amend the complaint. The motion had not been ruled upon and therefore, was appropriate to be discussed at the PHC. Furthermore, Student brought a motion to continue the PHC. That is also a motion appropriate to be discussed and ruled upon in the PHC. The fact that the continuance delayed discussion of the issues, witnesses and proposed resolutions does not mean that the PHC was not conducted.

Similarly, Student's contention that his counsel did not know of the assignment of ALJ Freie until the time of the PHC is equally unpersuasive. The Office of Administrative Hearings maintains an electronic calendar on the internet, which counsel can access at anytime. ALJ Freie had been assigned to the matter for several days prior to September 24, 2012. Furthermore, once the PHC was convened, counsel knew who was assigned to the matter, was given an opportunity to raise any matters and failed to verbally make her challenge. When a PHC is duly noticed, is convened on the record and the parties' appearances are taken, simply because the PHC is continued does not mean that it did not commence. Student's peremptory challenge is untimely and is denied.

IT IS SO ORDERED.

Dated: September 25, 2012

/s/

BOB N. VARMA
Presiding Administrative Law Judge
Office of Administrative Hearings