

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SANTA BARBARA UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2012080468

ORDER DENYING DISTRICT'S  
PREEMPTIVE CHALLENGE AND  
STUDENT'S PEREMPTORY  
CHALLENGE

On September 13, 2012, the Office of Administrative Hearings (OAH) granted a joint request for continuance in this matter, wherein OAH assigned the prehearing conference (PHC) and the due process hearing to Administrative Law Judge (ALJ) Rebecca Freie. Subsequent to that assignment, on or about September 25, 2012, OAH reassigned this matter to ALJ Alexa Hohensee. Thereafter, and prior to the October 8, 2012 PHC in this matter, OAH again reassigned this matter to ALJ June Lehrman. These reassignments were due to OAH's operational needs.

On October 5, 2012, Mary L. Kellog, attorney for the Santa Barbara Unified School District filed a document titled "Notice of Potential Conflict by Assigned Administrative Law Judge" (District's Notice). Therein, District contended that Ms. Kellog had, 10 years prior, worked in the same law firm as ALJ Hohensee. Ms. Kellog asserted that due to this working relationship, and to "avoid any appearance of bias or impropriety," ALJ Hohensee should disqualify herself from hearing this matter. Whatever the breed of this creature, District's Notice was neither filed as a preemptory challenge nor as a challenge for cause.

On October 8, 2012, shortly before the PHC, assigned to ALJ Lehrman, Andrea Marcus, attorney for Student, filed a preemptory challenge to prevent ALJ Freie from hearing this matter. In her challenge, Ms. Marcus contended that she did not know who was assigned to the matter and to the extent that ALJ Freie may be assigned at that time, she was raising a preemptory challenge.

APPLICABLE LAW, DISCUSSION AND ORDER

Government Code section 11425.40, subdivision (d), establishes the criteria for disqualification of the presiding officer. A party is entitled to one preemptory challenge (disqualification without cause) to an ALJ assigned to an OAH hearing. (Cal. Code Regs., tit. 1, § 1034, subds. (a) & (b); Gov. Code, § 11425.40, subd. (d).) In no event will a preemptory 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).)

*District's Challenge*

As mentioned above, District's Notice does not fit the parameters of either a peremptory challenge or a challenge for cause. A party has to either make an affirmative peremptory challenge or challenge for cause. It cannot file a letter stating that at some time in the distant past there may have been an event that may now lead to an unidentified conflict for the ALJ. Accordingly, District's Notice is not considered a challenge and is denied to the extent that it is neither a peremptory challenge nor a challenge for cause, but a mere request that an ALJ "disqualify" herself.

*Student's Challenge*

Student's challenge was made on October 8, 2012, when ALJ Freie was no longer assigned to this matter. As discussed above, a party is entitled to one peremptory challenge under California Code of Regulations, title 1, section 1034, subdivision (a), "of an ALJ **assigned** to an OAH hearing." [Emphasis added.] At the time of Student's challenge, ALJ Freie was not assigned to this matter. Accordingly, Student's challenge is moot and is denied.

IT IS SO ORDERED.

Dated: October 11, 2012

/s/

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