BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:	
PARENT ON BEHALF OF STUDENT,	OAH Case No. 2016040799
v.	NOTICE OF DISQUALIFYING DISCLOSURE AND ORDER OF RECUSAL
ANTIOCH UNIFIED SCHOOL DISTRICT.	

PROCEDURAL STATUS AND PREVIOUS CHALLENGES

On April 28, 2016, Attorney Evan Goldsen filed, on behalf of Parent and Student, a Request for Due Process Hearing with the Office of Administrative Hearings, naming Antioch Unified School District.[1] On June 17, 2016, OAH granted the parties' joint request to continue dates and the matter was set for hearing beginning August 16, 2016, with a prehearing conference on August 8, 2016.

Administrative Law Judge Charles Marson conducted the prehearing conference on August 8, 2016. On August 12, 2016, OAH re-assigned the hearing to ALJ Theresa Ravandi. OAH staff informed Mr. Goldsen as well as Attorney Matthew Juhl-Darlington, Antioch's counsel, of this re-assignment via telephone on August 12, 2016, and posted the assignment on OAH's special education hearing calendar located on its website.

On August 16, 2016, the undersigned commenced the hearing. At the start of the hearing, prior to taking any evidence, the undersigned made a non-disqualifying disclosure related to a proposed exhibit identified by Student in his prehearing conference statement. This exhibit was identified as Student's exhibit number 44: "Disability Rights California, American Civil Liberties Union, and Disability Righted [sic] Education Defense Fund 1/15/16 Letter to Superintendent and California Department of Education."

[1] Student originally filed a complaint on April 18, 2016, but failed to properly serve Antioch. On April 28, 2016, Student filed a request to amend his complaint along with a proposed amended complaint which he served on Antioch. On May 12, 2016, Antioch moved to reset timelines due to improper service of Student's initial complaint. On May 18, 2016, Student filed a non-opposition to Antioch's request to reset timelines. On May 18, 2016, the undersigned dismissed Student's original complaint based on improper service and deemed Student's first amended complaint filed on April 28, 2016, an initial complaint. OAH issued a new scheduling order based on the April 28, 2016 filing date, and Student's request to amend and Antioch's request to reset timelines were denied as moot.

The undersigned disclosed on the record the following: that her husband is a senior special education attorney with the Sacramento office of Disability Rights California; that she had not seen the letter identified in exhibit 44, did not know the contents of the letter, and had not discussed the letter with her husband; that she had served as a legal intern with Disability Rights, Education, and Defense Fund in the early 1990's; that she did not have a personal relationship with any of the attorneys with that agency and that she had not maintained a professional relationship with any of the attorneys following her semester internship. The undersigned further disclosed that she had determined that she was not disqualified from hearing this case due to her husband's employment or her past internship and that she could be fair and impartial to both parties based on the information known at that time.

Both parties were afforded the opportunity to take a recess and to be heard as to the disclosure. Antioch moved for a peremptory challenge and also challenged the undersigned for cause based on the disclosure. Student opposed the challenges.

Peremptory Challenge

APPLICABLE LAW

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 hearing. (Cal. Code Regs., tit. 1, § 1034, subds. (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).)

DISCUSSION AND ORDER

The parties had been informed of the ALJ reassignment on August 12, 2016. Pursuant to title 1 of the California Code of Regulations, section 1034, subdivision (e), since this matter was not being conducted at an OAH regional office, a peremptory challenge needed to have been filed by noon on August 12, 2016, the Friday prior to the start of the hearing. Further, pursuant to OAH's operating procedures, in accord with its memorandum of understanding with the California Department of Education, OAH would have found a peremptory challenge to have been timely if lodged by noon the day prior to hearing, on August 15, 2016. (CDE Agreement No. CN 150104, section 10.7.) Having waited to raise its peremptory challenge until after the hearing started, the undersigned ruled that Antioch's challenge was untimely. .

Challenge for Cause

An ALJ may be disqualified for bias, prejudice, or interest in the proceeding. (Gov. Code, § 11425.40, subd. (a).) The following, without further evidence of bias, prejudice, or interest, are not by themselves grounds for disqualification: 1) the ALJ is or is not a member of a racial, ethnic, religious, sexual, or similar group and the proceeding involves the rights of that group; 2) the ALJ has experience, technical competence, or specialized knowledge of, or has in any capacity expressed a view on, a legal, factual, or policy issue presented in the proceeding; or 3) the ALJ has as a lawyer or public official participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding. (Gov. Code, § 11425.40, subd. (b).)

In other words, to disqualify an ALJ for cause, a factual showing of actual bias or prejudice is required. (See *American Isuzu Motors, Inc. v. New Motor Vehicle Board* (1986) 186 Cal.App.3d 464, 472.) For example, in order to be a basis for disqualification, the financial interest of the ALJ in the outcome of the case must be direct, personal, and substantial, rather than slight. (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1031.) Similarly, personal involvement in the case by the ALJ or familial connections may warrant disqualification based solely on the probability of bias. (See *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1170-1173.) However, in most other cases, including claims of bias arising from the hearing officer's personal or political views, disqualification will not occur absent a showing of actual bias. (*Haas*, *supra*, at p. 1032.)

DISCUSSION AND ORDER

In support of its challenge for cause, Antioch simply re-stated the undersigned's disclosure. Antioch did not provide any additional information and failed to allege or establish any facts showing actual bias or prejudice. The undersigned made a finding that she was free from bias or prejudice in this due process proceeding and could be fair and impartial in conducting this hearing and adjudicating the issues. Therefore, having failed to demonstrate any actual bias, Antioch's challenge for cause was denied.

NOTICE OF DISQUALIFYING DISCLOSURE

The undersigned completed the second day of hearing on August 17, 2016, and continued the matter to the previously scheduled date of August 30, 2016. On August 24, 2016, the undersigned reviewed several of the exhibits that had been marked for identification and/or admitted into evidence, including a February 20, 2015, and March 18, 2015 individualized education program. These two documents clearly indicate that Student and Parent had been represented at those meetings by attorneys from Disability Rights California. The undersigned recognized the names of the two attorneys as colleagues of her husband from the Oakland office. Neither Attorney Juhl-Darlington, nor Attorney Goldsen

had informed the undersigned that Student was previously represented by Disability Rights California.

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APPLICABLE LAW

An administrative law judge shall voluntarily disqualify herself and withdraw from any case in which there are grounds for disqualification. (Gov. Code, § 11512, subd. (c).) One ground for disqualification is if a lawyer in the proceeding is the spouse of the judge or if the judge's spouse is associated in the private practice of law with a lawyer in the proceeding. (Code Civ. Proc., § 170.1, subd. (a)(5).) Further, a judge is disqualified from presiding over a matter if a person aware of the facts might reasonably doubt that the judge would be able to be impartial. (Code Civ. Proc., § 170.1, subd. (a)(6)(A)(iii).) A conflict of interest means a dealing or relationship that reasonably raises a question of bias. (5 Cal. Code Regs., § 3090.1.) The duty to disqualify continues throughout the case and if disqualifying facts are discovered after a hearing commences, the judge must immediately make the disqualification decision. (Code of Civ. Proc., § 170.3, subd. (b)(4).) If a judge determines she is disqualified, the judge shall notify the presiding judge of her recusal and shall not participate in the proceeding unless the parties waive her disqualification. (Code Civ. Proc., § 170.3(a)(1).)

DISCUSSION AND ORDER

The undersigned has no knowledge whether or not her husband, who has been employed by Disability Rights California since 1995, has had any involvement in the representation of Parent and Student. Disability Rights California is not the current counsel of record for Student. Even so, had the undersigned been informed that Disability Rights had recently represented Student concerning the issues involved in this case, the undersigned would have declined to adjudicate this matter based on the appearance of bias and the possibility that the prior attorneys could be called as percipient witnesses in this matter.

The undersigned has determined that there are grounds for disqualification pursuant to California Code of Civil Procedure section 170.1, subdivision (a)(6)(A)(iii) in that a person aware of the fact that Student had been previously represented by the firm which employed and continues to employ her husband might reasonably entertain doubt of the undersigned's ability to be impartial. Further, pursuant to title 5 of the California Code of Regulations, section 3090.1, the undersigned has determined that she has a conflict of interest due to her husband's employment with Disability Rights California and the fact that this firm represented Student during the time frame at issue in this matter. This relationship reasonably raises a question of bias.

Therefore, the undersigned declines to adjudicate this matter and hereby recuses herself.

DATE: August 24, 2016

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Theresa Ravandi
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THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings