BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

PALOS VERDES PENINSULA UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2020010514

ORDER GRANTING REQUEST FOR RECUSAL AND VACATING ORDER REGARDING STATUTE OF LIMITATIONS

JULY 6, 2020

At hearing by videoconference on June 23, 2020, Student orally requested the undersigned Administrative Law Judge Robert G. Martin recuse himself from this case. An administrative law judge is referred to as an ALJ. The hearing was continued to allow briefing of Student's request, and on June 29, 2020, Student filed a motion to recuse or disqualify ALJ Martin from hearing this case.

Student filed this matter on January 16, 2020, naming Palos Verdes Peninsula Unified School District, referred to as Palos Verdes. ALJ Martin held the prehearing conference, referred to as a PHC, in this matter on June 15, 2020. At the PHC, the ALJ directed the parties to be prepared to address at the start of hearing whether the parties' tolling agreement could extend the two-year statute of limitations generally

applicable to special education matters pursuant to Title 20, United States Code section 1415(f)(3)(C), and Education Code section 56505, subd. (l).

At hearing on June 23, 2020, before the start of testimony, and prior to any recess of the hearing, the ALJ heard oral argument on the statute of limitations issue. For reasons stated on the record, the ALJ ruled that the parties' tolling agreement could not extend the statute of limitations, which barred those of Student's claims that arose from alleged acts or omissions of Palos Verdes occurring before January 16, 2018.

After a short recess following the ALJ's ruling, Student requested the ALJ recuse himself from the hearing on grounds the ALJ had mediated on March 19, 2019, a prior case involving the same parties and several of the claims at issue in this proceeding, OAH Case Number 2018110392. Student's counsel, Palos Verdes' counsel, and the ALJ stated on the record they had not recalled the prior mediation, and had no recollection of any of the conversations that took place during the mediation. Student's counsel explained Parents had recalled the mediation and brought it to the attention of Student's counsel during the first hearing recess.

On the record, the ALJ vacated the existing hearing dates and continued the hearing, and scheduled briefing of Student's motion to recuse the ALJ. Later on June 23, the ALJ issued a written order reciting the above chronology of events leading to the continuance of the hearing, and confirming a briefing schedule for Student's request for recusal, and the continued hearing dates.

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).)

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:

- 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;
- 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
- 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.) In most 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.)

Government Code, section 11425.40 does not specify when a motion to disqualify an ALJ must be made, but Code of Civil Procedure section 170.3, subdivision (c) states that parties must bring a motion "at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification." (§ 170.3, subd. (c).) If a party is aware of grounds for disqualification of a judge but waits until after a pending motion is decided to present the statement of objection, the statement may be stricken as untimely. (*Tri Counties Bank v. Sup. Ct.* (2008) 167 Cal.App.4th 1332, 1337, quoting *Alhusainy v. Sup. Ct.* (2006) 143 Cal.App.4th 385, 394.)

Code of Civil Procedure section 170 provides a judge has a duty to decide any proceeding in which he or she is not disqualified.

There is no authority for the proposition that hearing officers must recuse themselves if they served as mediators in a related proceeding (*S.E.C. v. ING USA Annuity and Life Ins. Co.* (9th Cir. 2009) 360 Fed.Appx. 826, 828), or even in the same proceeding (*Blackmon v. Eaton Corp.* (6th Cir. 2014) 587 Fed.Appx. 925, 934). However, cases stress that judges are free to recuse themselves from matters after they have presided over mediation. (*Blackmon*, *supra*, at 934.)

DISCUSSION

This case presents an unusual situation in which several of the issues now presented for hearing have persisted through three cases filed with OAH over the past 18 months. Student filed OAH Case number 2018110392 in November 2018. The ALJ served as mediator in that case in March 2019. Student dismissed that case in April 2019, and filed a second case in July 2019, Case number 2019070754, in which the ALJ had no involvement. Student dismissed his second Case number 2019070754 in December 2019, before filing the present case in January 2020.

Student's motion states it is based on the ALJ's having served as mediator in Case number 2018110392. The ALJ has no recollection of the issues in that case, or the parties' statements at mediation. However, a review of the complaint in Case Number 2018110392 confirms that several of the issues raised in that case are included in Student's present case. As grounds for recusal or disqualification, Student contends Parents found the ALJ exhibited errors of judicial judgment and temperament that were "known and obvious to Petitioners during the mediation on March 19, 2019." Student also contends the ALJ's order continuing the hearing evidenced bias or prejudice against Student because it stated Student's request for recusal followed the ALJ's ruling on the statute of limitations issue.

Student's first basis for recusal or disqualification – the ALJ's judgment or judicial temperament – is unrelated to actual bias or prejudice, and should have been pursued by Student in a peremptory challenge brought no later than the PHC in this matter. Its assertion following the start of hearing is untimely.

Student's second grounds for disqualification – the alleged bias demonstrated by the ALJ by including in his order continuing the hearing the undisputed fact that Student's request for recusal followed an adverse ruling on a motion – does not constitute a factual showing of actual bias or prejudice. Student did not support his allegations of bias with a declaration from Parent or attorney. The facts that the hearing had commenced, and an adverse ruling had been issued, were potentially relevant to determination of the timeliness of Student's request for recusal. The order also recognized other facts potentially favorable to Student's motion. It noted the claims in the previously mediated case and the present case were similar. It also noted Student's request for recusal followed the first recess in the hearing, and the representation by Student's counsel that Parents had recognized the ALJ as their mediator after the opening of the hearing, and called counsel's attention to the fact at the first recess.

Notwithstanding the absence of authority mandating that an ALJ recuse or disqualify themselves from hearing a matter they mediated absent a showing of actual bias or prejudice, it is OAH's general practice not to assign a due process hearing to a judge who has previously mediated the same case. Here, although the mediated case is not the same case, and was in fact twice removed from the present case, several of the same issues were presented in both cases. Although it was Student's responsibility – not OAH's – to keep track of the issues in Student's cases, and the mediators and hearing judges assigned to them, it appears in this case that Student was genuinely unaware that the hearing judge had mediated a prior case involving some of the same issues, and had called attention to that fact quickly after becoming aware of it.

Under the unique facts of this case, it is the decision of the undersigned ALJ to recuse himself from the hearing of this case, based solely on his having mediated a previous case involving some of the same issues presented here.

ORDER

Student's request that ALJ Martin recuse himself from the hearing of this case is granted. The ALJ's order finding the parties' tolling agreement did not extend the statute of limitations in this matter is vacated. All dates previously set in this matter are confirmed.

IT IS SO ORDERED.

DocuSigned by:

Robert G. Martin
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Administrative Law Judge

Office of Administrative Hearings