BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: UPLAND UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2018120181 ORDER DENYING CHALLENGE FOR CAUSE

On February 11, 2019, Student filed a motion to request an investigation of Administrative Law Judge Alexa J. Hohensee and a dismissal of Upland Unified School District's due process hearing request. This order will treat Student's request for an investigation as a motion to disqualify ALJ Hohensee from hearing this case. The motion to be dismissed will be addressed in a separate order.

OAH has not received a response from Upland regarding the investigation request.

APPLICABLE LAW

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, 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.)

Even the filing of a formal judicial misconduct complaint is not automatically evidence of bias. In *In re Focus Media* (9th Cir. 2004) 378 F.3d 916, 921, a party filed two motions to disqualify a bankruptcy judge for cause and subsequently filed a formal judicial misconduct complaint. On appeal, the party argued that the bankruptcy judge was biased based on the judge's rulings and the judge's reference to the judicial misconduct complaint during the course of the proceedings. (*Id.* at p. 929.) In rejecting the arguments that the judge was biased, the Ninth Circuit noted that without more, judicial rulings by themselves rarely constitute a basis for finding bias. (*Id.* at p. 930.) Further, the federal statute regarding judicial misconduct complaints required that the judge who was the subject of the complaint be provided a copy and that no bias could be inferred from the judge's reference to the complaint during the hearings because the complaint related to the proceedings themselves. (*Ibid.*) In determining that the judicial misconduct complaint did not support a finding of bias, the Ninth Circuit noted that "[a]bsent some evidence of real bias, we are not prepared to infer bias lest we open the door to misuse of the judicial misconduct complaint process as a means of removing a disfavored judge from a case." (*Ibid.*)

DISCUSSION

Background information on the current and previous matters will put Student's challenge for cause in context. Student and Upland participated in a due process hearing before ALJ Hohensee in a previous matter filed by Student (OAH case number 2017100459) on the issue of whether an individualized education program developed by Upland on September 19, 2017 offered Student a free appropriate public education. In the Decision issued February 28, 2018, ALJ Hohensee found in favor of Upland.

On December 5, 2018 Upland filed the instant matter against Student for a determination that it is entitled to conduct assessments of Student pursuant to a March 5, 2018 assessment plan. On December 13, 2018, Student filed a due process hearing request against Upland (OAH case number 2018120463) alleging that an IEP developed on October 3, 2018 did not offer Student a FAPE. These two cases were consolidated on January 17, 2019. On January 23, 2019, Student filed an untimely peremptory challenge to ALJ Hohensee, which was denied by the Presiding ALJ. On January 23, 2019, Student filed a notice of withdrawal from both cases, and based on that notice, Student's case was dismissed by OAH on January 29, 2019. On February 4, 2019, ALJ Hohensee conducted a scheduled telephonic prehearing conference in this matter, for which Parent could not be reached and which proceeded without Parent's participation. As part of the prehearing conference order, served on both parties, ALJ Hohensee wrote that "[i]f Parent chooses not to attend the scheduled hearing and exercise Student's rights on his behalf, this matter will proceed as a default, and Upland will continue to bear the burden of proof." On February 7, 2019, Student sent a letter to the Presiding ALJ making a written request that ALJ Hohensee be investigated for failing to consider evidence, making erroneous conclusions, improperly

applying the law, threatening Student with a default, and forcing Student to go to hearing on a frivolous claim by Upland. The Presiding ALJ issued a notice of ex parte communication and notice of no action, as the letter had not been served on Upland. The due process hearing in this case before ALJ Hohensee is scheduled for hearing on February 21, 2019.

On February 11, 2019, Student re-filed his letter as a motion for investigation of ALJ Hohensee. Student contends that ALJ Hohensee does not consider the evidence, makes erroneous conclusions, and does not properly apply the law, and Student should not be required to participate in a hearing before her. Student argues that by forcing him to go to hearing or suffer a default, ALJ Hohensee is retaliating against Parents. Student concludes that, by allowing this matter to proceed after he filed a notice of withdrawal, ALJ Hohensee is prohibiting Student from exercising his right to a fair and impartial due process hearing.

Student's motion contends that the ALJ should have dismissed Upland's case after Student filed a notice of withdrawal, and that the failure to dismiss this matter is a form of retaliation for the complaint letter to the Presiding ALJ. However, as relevant here and stated in the prehearing conference order, the withdrawal of a respondent does not terminate the petitioner's case, but simply results in the petitioner's due process claim going to hearing as a default prove-up rather than a contested matter. ALJ Hohensee made multiple attempts to contact Parent for the telephonic PHC on February 4, 2019. Rather than show bias or prejudice, the ALJ's PHC order showed fairness by explaining that the matter would go forward despite the notice of withdrawal, and ordering Upland to serve documents and meet and confer with Parent to ensure Parent a continued opportunity to exercise Student's right to present evidence, make arguments, and confront witnesses at the hearing. The ALJ's conduct of a PHC after Student filed a notice of withdrawal does not amount to a showing of bias against Student. In addition, Parent's broad statement that ALJ Hohensee fails to consider evidence, makes erroneous conclusions and fails to properly apply the law is conclusory, and does not establish bias, prejudice or an interest in the proceeding.

Student's motion also suggests that the ALJ's knowledge of his complaint letter to the Presiding ALJ demonstrates some type of bias. Such a contention would be based upon a mistaken belief that his complaint letter was subject to some type of confidential procedure that would never be disclosed to the ALJ. It cannot be concluded that mere knowledge of a complaint letter to the Presiding ALJ establishes bias. If a federal statute provides that judges are required to be informed of formal complaints of judicial misconduct, and no bias was found even when a judge discussed a judicial misconduct complaint with all parties, without more, the ALJ's knowledge of Student's the February 7, 2019 complaint letter does not establish actual bias. (See *In re Focus Media, supra,* 378 F.3d at pp. 929-931.)

In sum, Student has failed to make the requisite showing of actual bias, prejudice or interest to warrant disqualification of ALJ Hohensee for cause.

ORDER

Student's motion to disqualify ALJ Alexa J. Hohensee for cause is denied.

DATE: February 14, 2019

DocuSigned by:
Alexa Hohensee
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ALEXA J. HOHENSEE
Administrative Law Judge
Office of Administrative Hearings