

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

BERKELEY UNIFIED SCHOOL  
DISTRICT AND ALAMEDA COUNTY  
BEHAVIORAL HEALTH CARE  
SERVICES

OAH CASE NO. 2012010446

ORDER DENYING STUDENT'S  
MOTION TO DISQUALIFY COUNSEL

On February 29, 2012, a prehearing conference (PHC) was held in this matter before Administrative Law Judge (ALJ) Gary A. Geren, Office of Administrative Hearings, Special Education Division (OAH). At the commencement of the PHC, counsel for Parent on Behalf of Student (Student), Lisa S. Serebin, moved to have counsel for Berkeley Unified School District (District), Jan E. Tomsy, disqualified from continuing to represent the District in this matter. The basis of the motion was that Ms. Tomsy and Student's father (Father) purportedly engaged in confidential conversations prior to Student's filing his complaint in this matter. During the PHC, the undersigned informed Ms. Serebin that a formal, noticed motion would need to be filed before OAH would rule on the motion. On March 12, 2012, Student filed a written motion. On March 14, 2012, District filed its opposition.

APPLICABLE LAW

A trial court's authority to disqualify an attorney derives from its inherent power to “control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.” (*People ex rel Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135 (*Speedee*)). “The power is frequently exercised on a showing that disqualification is required under professional standards governing ... potential adverse use of confidential information.” (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1723–1724.)

A disqualification motion involves a conflict between a client's right to counsel of his or her choice, on the one hand, and the need to maintain ethical standards of professional responsibility, on the other. (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846.) When ruling on a disqualification motion, “[t]he paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process.” (*SpeeDee*, at p. 1145; see also *Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 705–706.)

Whether an attorney should be disqualified due to a conflict of interest is addressed to the sound discretion of trial court. (*Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109.) The court's authority under California law to disqualify an attorney or craft appropriate relief to punish or deter attorney misconduct derives from the court's equitable powers, and hence, a motion for disqualification is governed by such equitable principles as waiver, estoppel, laches, undue hardship, and a balancing of the equities. (*UMG Recordings, Inc. v. MySpace, Inc.* (C.D.Cal.2007) 526 F.Supp.2d 1046.)

## DISCUSSION

The parties' moving and opposing papers, as well as the declarations filed in their support show that Ms. Tomsky's practice is dedicated almost exclusively to the representation of school districts, including the San Rafael School District, where Father is employed as a school psychologist. Mutual interactions through this relationship resulted in what Student contends were two "confidential" conversations between Father and Ms. Tomsky.

Father's declaration states that on September 7, 2007 (four and one half years ago) "I asked Ms. Tomsky generally about the provision of counseling services, speech services and eligibility for special education services under the category of emotionally disturbed. The conversation then became specific with respect to [Student's] need for such services, which required disclosure of confidential information regarding [Student]. Ms. Tomsky answered my questions and provided advice with respect to how to proceed to address [Student's] educational needs."

Father's declaration further alleges in a second conversation on January 25, 2010, (over two years ago): "I attended a presentation by Ms. Tomsky to the San Rafael School District Special Education Department as part of my required staff development program. After the presentation, I spoke with Ms. Tomsky for a second time about [Student's] special education needs and residential placement, which required the disclosure of confidential

information regarding [Student]. We discussed [Student's] residential placement, and about the process of obtaining reimbursement in connection with the placement. Ms. Tomsky answered my questions and provided advice with respect to [Student's] residential placement and the process for obtaining reimbursement."

Ms. Tomsky filed her declaration in support of District's opposition, stating she has "no recollection of speaking with [Father] regarding [Student]" in either 2007 or 2010. She further declares she represented this District in a previous matter filed by Father on behalf of Student wherein she filed a PHC statement dated November 29, 2011, and a notice of representation, dated January 13, 2011, each of which she contends provided Father notice of the fact that she represents the District.

The following events bear on this ruling (all quotes are taken from Student's motion):

- January 18, 2012: Student files a Request for Due Process Hearing (complaint).
- February 6, 2012: Ms. Tomsky serves a request for release of Student's record on Ms. Serebin, which she forwarded to Father that same day.
- February 8, 2012: Ms. Tomsky files a notice of representation.
- February 8, 2012: Father advises Ms. Serebin of his prior conversations with Ms. Tomsky.
- February 14, 2012: Ms. Serebin leaves a voicemail with Ms. Tomsky to discuss "the potential conflict of interest."
- February 16, 2012: Ms. Serebin leaves a second voicemail with Ms. Tomsky to again discuss "the potential conflict of interest."
- February 21, 2012: Ms. Serebin shares "her concerns regarding the conflict issue" with Ms. Tomsky's associate at the beginning of the mediation of this matter, which was noticed by an order issued on January 18, 2012.
- February 24, 2012: Ms. Tomsky's office files its PHC statement, with Ms. Tomsky's name at the top of the pleading (the date and time for the PHC had also been noticed by the same order, mentioned above).
- February 28, 2012: District files an opposition to a motion to dismiss filed by Alameda County Behavioral Health Care services, again listing Ms. Tomsky's name at the top of the pleading.

- February 29, 2012: The PHC was convened and Ms. Serebin orally moved to disqualify Ms. Tomsy.

The communications made between Father and Ms. Tomsy do not support her being disqualified from continuing to represent the District. The first communication allegedly took place approximately four and one-half ago, and the second, over two years ago. Furthermore, there is insufficient detail contained in the declarations to conclude that any information Father shared with Ms. Tomsy provides District with unfair advantage in defending this matter "under professional standards governing ... potential adverse use of confidential information." While Father's declaration asserts that "confidential information" was exchanged, his characterization of what was said is conclusory. His declaration fails to set forth sufficient facts to support an inference that Ms. Tomsy was provided with "confidential information" potentially adverse to Student's case, even though he may consider the unstated information "confidential." To the extent Father's declaration sets forth details of his conversations with Ms. Tomsy, it appears Ms. Tomsy provided Father with basic procedural guidance as to how he may secure reimbursement for Student's private placement. This information does not provide for an "adverse use of confidential information," nor does it "affect the fundamental principles of our judicial system."

Equitable considerations support the denial of Student's motion. Balancing all considerations, it was incumbent upon Ms. Serebin to promptly move for Ms. Tomsy's disqualification. Had potentially harmful "confidential" communications occurred, then swift action was needed to prevent the potential misuse of information, as well as to stop the District from expending unnecessary legal fees on an attorney Ms. Serebin intended to disqualify. While the voicemails Ms. Serebin left with Ms. Tomsy to discuss a "potential conflict of interest" show some good faith attempts to resolve the issue informally, when her messages were not returned it should have become clear that Ms. Tomsy was not intending to voluntarily disqualify herself from continuing to represent the District in this matter based on a "potential" conflict. Ms. Serebin needed to bring a formal motion setting forth a sufficient factual basis to conclude that Ms. Tomsy breached "ethical standards of professional responsibility" (something that could not be done by raising the issue at the PHC), and this was not timely done.

Given Ms. Tomsy's previous representation of the District in a matter initiated by Father on behalf of Student, it should have come as no surprise that she would be defending the District in this matter, and therefore, any issue of her holding "confidential" information having an impact on the "scrupulous administration of justice" needed to be brought to the immediate attention of OAH. To require District to retain new counsel at this point in the litigation is unwarranted based on the record relating to the unspecified nature of the

confidential communications, the insufficiency of the evidence supporting the motion, and the hardship and delay caused if District were to attempt to now retain new counsel.

ORDER

Student's motion to disqualify Jan E. Tomsy as counsel for the District is denied.

Dated: March 21, 2012

/s/

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GARY GEREN  
Administrative Law Judge  
Office of Administrative Hearings