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An FSSA employee/physician sought advice regarding outside employment for potentially obtaining a position with an outside healthcare organization so she can maintain her clinical skills as a pediatrician and help her in her current role at FSSA. The Commission finds that prospective outside employment position would not create a conflict of interests under the Code of Ethics.

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The Indiana State Ethics Commission (Commission) issues the following advisory opinion concerning the State Code of Ethics (Code) pursuant to IC 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

The Ethics Officer for the Indiana Family and Social Services Administration (FSSA) is requesting an advisory opinion on behalf of the Director of Clinical Operations and Assistant Medical Director (Director), who works as part of the Strategy Team for the FSSA Office of Medicaid Policy and Planning (OMPP).

Specifically, the Ethics Officer is requesting an opinion from the Commission addressing whether it would be a conflict of interests for the Director to obtain outside employment with Indiana University Health Physicians (IUHP).

IUHP is an Indiana Medicaid Provider that has an Indiana Medicaid Provider Agreement with FSSA and receives Medicaid reimbursements. IUHP is affiliated with Indiana University Health (IU Health) and its related entities, with whom FSSA's various divisions have active contracts. The FSSA division directors are the owners of the IU Health contracts. The Director is not in a position to negotiate or sign these contracts.

The Director joined FSSA on August 15, 2019. She is responsible for overseeing the OMPP Medical Director, the Pharmacy Team led by a pharmacy director and the Coverage and Benefits Team. She is not in a position to make decisions regarding Medicaid providers, and any direction she provides regarding protocols, policies or procedures that might impact external stakeholders apply to all clinical specialists, hospital administrators and any other providers uniformly.

Occasionally, the Director assists the Program Integrity Team when the OMPP Medical Director is unavailable. The Program Integrity Team is primarily responsible for reviewing

suspected cases of fraud and abuse and making recommendations regarding Medicaid providers. Usually, the OMPP Medical Director serves on the Program Integrity Team and participates in the meetings. Furthermore, the reviews the Program Integrity Team conducts usually concern the actions of an individual and not an entity; therefore, it is unlikely FSSA would make a decision that would have a unique impact on IUHP, IU Health or their related entities. In the unlikely event that FSSA is required to make such a decision, FSSA intends to screen the Director from participating in any such decision by having her supervisor delegate full authority to another employee to handle such matters independently.

The Ethics Officer provides that the Director would like to pursue this outside employment opportunity because she does not want to lose her clinical skills as a pediatrician. Additionally, she is interested in the opportunity because she believes it would increase her credibility in her current role within FSSA. The Director is interested in working in a clinic with pediatricians, nurse practitioners, speech therapists and physical therapists so that she can get a better understanding of their interactions with Medicaid, which would be helpful to her in her position with FSSA.

If approved to accept the position, IUHP would pay for the Director's medical malpractice insurance and certifications. She would pay her own licensing fees. Furthermore, she would not serve in an administrative leadership role with IUHP. Her responsibilities with IUHP would include working in the Neonatal Intensive Care Unit Follow-Up Clinic (Clinic) to assess the discharged children's growth and development and connect them with referrals and resources as indicated. She would serve as supplemental faculty and may occasionally have medical students or residents in the clinic that she would be responsible for overseeing. She would not charge patients nor would she bill insurance.

She would contract with IUHP through the Division of Neonatology in the Department of Pediatrics and would not be an employee of IUHP. The Director would not be paid by any State grant or contract dollars. Rather, IUHP would pay her on an hourly basis. The patients she would be caring for in the Clinic could potentially include Medicaid patients similar to any other neonatologist providing clinical service for IUHP. Her compensation would not be tied to the charges and collections that she generates or the payer mix of the patients for which she cares; however, her fees may be paid from general Medicaid funds.

The Director understands and agrees that she may not use state time for her outside employment activities. Additionally, she is confident that she will meet the 37.5-hour work week requirement despite seeing patients a few hours a month.

Based on the information presented, the Ethics Officer does not believe that the Director's outside employment activities would be incompatible with her FSSA duties. Rather, the Director's outside employment activities would help maintain and build upon her professional skills such that she may better be able to meet the essential functions of her position as Director of Clinical Operations and Assistant Medical Director.

ISSUE

1. Would the Director's outside employment opportunity with IUHP create any conflict of interests for her under the Code of Ethics?
2. What other ethics issues, if any, arise for the Director given her position at FSSA and her prospective simultaneous outside position with IUHP?

RELEVANT LAW

IC 4-2-6-5.5 (42 IAC 1-5-5)

Conflict of interest; advisory opinion by commission

Sec. 5.5. (a) A current state officer, employee, or special state appointee may not knowingly do any of the following:

- (1) Accept other employment involving compensation of substantial value if the responsibilities of that employment are inherently incompatible with the responsibilities of public office or require the individual's recusal from matters so central or critical to the performance of the individual's official duties that the individual's ability to perform those duties would be materially impaired.
 - (2) Accept employment or engage in business or professional activity that would require the individual to disclose confidential information that was gained in the course of state employment.
 - (3) Use or attempt to use the individual's official position to secure unwarranted privileges or exemptions that are:
 - (A) of substantial value; and
 - (B) not properly available to similarly situated individuals outside state government.
- (b) A written advisory opinion issued by the commission stating that an individual's outside employment does not violate subsection (a)(1) or (a)(2) is conclusive proof that the individual's outside employment does not violate subsection (a)(1) or (a)(2).

IC 4-2-6-9 (42 IAC 1-5-6)

Conflict of economic interests; commission advisory opinions; disclosure statement; written determinations

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote, or matter relating to that decision or vote, if the state officer, employee, or special state appointee has knowledge that any of the following has a financial interest in the outcome of the matter:

- (1) The state officer, employee, or special state appointee.
- (2) A member of the immediate family of the state officer, employee, or special state appointee.
- (3) A business organization in which the state officer, employee, or special state appointee is serving as an officer, a director, a member, a trustee, a partner, or an employee.

- (4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.
- (b) A state officer, an employee, or a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and ethics officer in writing and do either of the following:
- (1) Seek an advisory opinion from the commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. The commission shall:
 - (A) with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state officer, employee, or special state appointee seeking an advisory opinion from involvement in the matter; or
 - (B) make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services that the state expects from the state officer, employee, or special state appointee.
 - (2) File a written disclosure statement with the commission that:
 - (A) details the conflict of interest;
 - (B) describes and affirms the implementation of a screen established by the ethics officer;
 - (C) is signed by both:
 - (i) the state officer, employee, or special state appointee who identifies the potential conflict of interest; and
 - (ii) the agency ethics officer;
 - (D) includes a copy of the disclosure provided to the appointing authority; and
 - (E) is filed not later than seven (7) days after the conduct that gives rise to the conflict.

A written disclosure filed under this subdivision shall be posted on the inspector general's Internet web site.

- (c) A written determination under subsection (b)(1)(B) constitutes conclusive proof that it is not a violation for the state officer, employee, or special state appointee who sought an advisory opinion under this section to participate in the particular matter. A written determination under subsection (b)(1)(B) shall be filed with the appointing authority.

IC 4-2-6-10.5 (42 IAC 1-5-7)

Prohibition against financial interest in contract; exceptions; disclosure statement; penalty for failure to file statement

Sec. 10.5. (a) Subject to subsection (b), a state officer, an employee, or a special state appointee may not knowingly have a financial interest in a contract made by an agency.

- (b) The prohibition in subsection (a) does not apply to a state officer, an employee, or a special state appointee who:
- (1) does not participate in or have contracting responsibility for the contracting agency; and
 - (2) files a written statement with the inspector general before the state officer, employee, or special state appointee executes the contract with the state agency.
- (c) A statement filed under subsection (b)(2) must include the following for each contract:
- (1) An affirmation that the state officer, employee, or special state appointee does not participate in or have contracting responsibility for the contracting agency.

- (2) An affirmation that the contract: (A) was made after public notice and, if applicable, through competitive bidding; or (B) was not subject to notice and bidding requirements and the basis for that conclusion.
 - (3) A statement making full disclosure of all related financial interests in the contract.
 - (4) A statement indicating that the contract can be performed without compromising the performance of the official duties and responsibilities of the state officer, employee, or special state appointee.
 - (5) In the case of a contract for professional services, an affirmation by the appointing authority of the contracting agency that no other state officer, employee, or special state appointee of that agency is available to perform those services as part of the regular duties of the state officer, employee, or special state appointee. A state officer, employee, or special state appointee may file an amended statement upon discovery of additional information required to be reported.
- (d) A state officer, employee, or special state appointee who:
- (1) fails to file a statement required by rule or this section; or
 - (2) files a deficient statement; before the contract start date is, upon a majority vote of the commission, subject to a civil penalty of not more than ten dollars (\$10) for each day the statement remains delinquent or deficient. The maximum penalty under this subsection is one thousand dollars (\$1,000).

42 IAC 1-5-10

Benefiting from confidential information

Sec. 10. A state officer, employee, or special state appointee shall not benefit from, or permit any other person to benefit from, information of a confidential nature except as permitted or required by law.

42 IAC 1-5-11

Divulging confidential information

Sec. 11. A state officer, employee, or special state appointee shall not divulge information of a confidential nature except as permitted by law.

IC 4-2-6-6

Present or former state officers, employees, and special state appointees; compensation resulting from confidential information

Sec. 6. No state officer or employee, former state officer or employee, special state appointee, or former special state appointee shall accept any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature.

IC 4-2-6-17

Use of state property for other than official business; exceptions; Violations

Sec. 17. (a) Subject to IC 4-2-7-5, a state officer, an employee, or a special state appointee may not use state materials, funds, property, personnel, facilities, or equipment for purposes other than official state business unless the use is expressly permitted by a general written agency, departmental, or institutional policy or regulation that has been approved by the commission. The commission may withhold approval of a policy or rule that violates the intent of Indiana law

or the code of ethics, even if Indiana law or the code of ethics does not explicitly prohibit that policy or rule.

(b) An individual who violates this section is subject to action under section 12 of this chapter.

42 IAC 1-5-13

Ghost employment

Sec. 13. A state officer, employee, or special state appointee shall not engage in, or direct others to engage in, work other than the performance of official duties during working hours, except as permitted by general written agency, departmental, or institutional policy or regulation.

ANALYSIS

The Ethics Officer's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to Conflicts of Interests, Use of State Property, Ghost Employment and Benefitting from and Divulging Confidential Information. The application of each provision to the Director is analyzed below.

A. Outside employment

An outside employment or professional activity opportunity creates a conflict of interests under IC 4-2-6-5.5 if it results in the employee: 1) receiving compensation of substantial value if the responsibilities of the employment are inherently incompatible with the responsibilities of public office or require the employee's recusal from matters so central or critical to the performance of her official duties that her ability to perform them would be materially impaired; 2) disclosing confidential information that was gained in the course of state employment; or 3) using or attempting to use her official position to secure unwarranted privileges or exemptions of substantial value that are not properly available to similarly situated individuals outside state government.

The Commission generally defers to an agency's ethics officer regarding outside employment opportunities since these individuals are in a better position to determine whether a conflict of interests might exist between an employee's state duties and an outside employment opportunity.

Based on the information and opinion provided by the Ethics Officer, the Commission finds that the Director's employment at IUHP would not create a conflict under this provision. The Director would not be an employee and would not serve in an administrative leadership role with IUHP; she would be an independent contractor and would be paid on an hourly basis. According to the Ethics Director, the Director's responsibilities in working as a physician in the Clinic for IUHP would include caring for patients and occasionally overseeing clinic students. This role would not conflict with her responsibilities as Director of Clinical Operations and Assistant Medical Director for FSSA and would not require her to recuse herself from matters that are critical to the performance of her duties at FSSA.

Further, the Director would not be required to disclose confidential information to which she may have access to by virtue of her state employment in her outside position with IUHP. In addition, nothing in the information presented suggests that the Director would use or attempt to use her state position for any unwarranted privileges or exemptions. The Director must continue to ensure she does not use or attempt to use her official FSSA position in this manner.

Accordingly, the Commission finds that the Director's outside employment opportunity with IUHP would not create a conflict of interests for her under IC 4-2-6-5.5.

B. Conflict of interests - decisions and votes

IC 4-2-6-9 (a)(1) prohibits the Director from participating in any decision or vote, or matter relating to that decision or vote, if she has a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(3) prohibits the Director from participating in any decisions or votes, or matters related to such decisions or votes, in which IUHP or IU Health would have a financial interest in the outcome.

The Ethics Officer provides that FSSA's various divisions have active contracts with IU Health and related entities. The Ethics Officer provides that these contracts are at the division level in FSSA and that the division directors are the owners of the contracts.

According to the information provided by the Ethics Officer, as Director of Clinical Operations and Assistant Medical Director for FSSA, the Director is not in a position to negotiate or sign these contracts. Further, the Director is not in a position to make decisions regarding Medicaid providers or community mental health centers, and any direction she would provide regarding protocols, policies or procedures that might impact external stakeholders would apply to all clinical specialists, hospital administrators and any other providers uniformly.

The Ethics Officer notes that the Director occasionally attends meetings of the Program Integrity Team when the OMPP Medical Director, who usually participates in these meetings, is unavailable. The Program Integrity Team is primarily responsible for reviewing suspected cases of fraud and abuse and making recommendations regarding Medicaid providers. Furthermore, the reviews conducted by the Program Integrity Team usually concern the actions of an individual and not an entity.

Therefore, even if the Director was required to take the OMPP Medical Director's place and participate on the Program Integrity Team, it is unlikely the Director, or even FSSA, would make a decision that would have a unique impact on IUHP, IU Health or their related entities.

The Commission finds that the Director does not have an identified potential conflict of interests at this time; however, if a potential conflict of interests is identified in the future, the Ethics Officer must ensure that the Director meets the disclosure and notification requirements in IC 4-2-6-9(b). The Ethics Officer has provided that if any

conflicts arise for the Director, FSSA will ensure that she is screened from participating in the matters and her supervisor would delegate full authority to another employee to handle such matters independently.

C. Conflict of interests – contracts

Pursuant to IC 4-2-6-10.5, a state employee may not knowingly have a financial interest in a contract made by an agency. This prohibition, however, does not apply to an employee that does not participate in or have contracting responsibility for any of the activities of the contracting agency, provided certain statutory criteria are met.

The Ethics Officer provides that FSSA's various divisions have six active contracts with IU Health and its related entities, including IUHP.

The Ethics Officer provides that IUHP will not use funds from these contracts with FSSA to pay the Director. Further, her compensation would not be tied to the charges and collections that she generates or the payer mix of the patients she cares for; however, her fees may be paid from general Medicaid funds. The Director's salary would be paid hourly through IUHP's Division of Neonatology in the Department of Pediatrics, and her compensation would not be derived from any State grant or contract dollars.

Accordingly, the Commission finds that the Director would not have a conflict of interests under this rule, because she will not have a financial interest in a state contract if she were to accept the outside employment opportunity with IUHP.

D. Confidential information

The Director is prohibited under 42 IAC 1-5-10 and 42 IAC 1-5-11 from benefitting from, permitting any other person to benefit from or divulging information of a confidential nature except as permitted or required by law. Similarly, IC 4-2-6-6 prohibits the Director from accepting any compensation from any employment, transaction or investment which is entered into or made as a result of material information of a confidential nature. The term "person" is defined in IC 4-2-6-1(a)(13) to encompass both an individual and a corporation, such as IUHP/IU Health. In addition, the definition of "information of a confidential nature" is set forth in IC 4-2-6-1(a)(12).

To the extent the Director is exposed to or has access to such confidential information in her position with FSSA, she is prohibited not only from divulging that information but from ever using it to benefit any person, including her outside employer, in any manner.

E. Use of state property and Ghost employment

42 IAC 1-5-12 prohibits the Director from using state property for any purpose other than for official state business unless the use is expressly permitted by a general written agency, departmental or institutional policy or regulation that has been approved by the Commission. Likewise, 42 IAC 1-5-13 prohibits the Director from engaging in, or

directing others to engage in, work other than the performance of official duties during working hours, except as permitted by general written agency, departmental or institutional policy or regulation.

The Ethics Officer provides that the Director understands that she may not use state time to work at her outside position. She further provides that she is confident that she will meet the 37.5-hour work week requirement despite seeing patients a few hours per month.

To the extent that the Director observes these provisions regarding her outside employment activities, her outside position would not violate these ethics laws.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Director's prospective outside employment position would not create a conflict of interests under the Code of Ethics.

Respectfully Submitted,

Jennifer Cooper
State Ethics Director