

42 IAC 1-5-5 Outside employment (IC 4-2-6-5.5)
42 IAC 1-5-6 Conflicts of Interest (IC 4-2-6-9)
42 IAC 1-5-7 Prohibition against financial interest in contract (IC 4-2-6-10.5)
42 IAC 1-5-10 Benefiting from confidential information
42 IAC 1-5-11 Divulging confidential information
IC 4-2-6-6 Compensation resulting from confidential information
IC 4-2-6-17 Use of state property
42 IAC 1-5-13 Ghost employment

The Indiana Family Social Services Administration sought advice regarding the State Suicide Prevention Director seeking to retain outside employment with a small private psychological counselling practice. The Commission finds that the outside employment position would not create a conflict of interests under the Code of Ethics.

November 12, 2020
2020-FAO-013

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 State Suicide Prevention Director for FSSA's Division of Mental Health and Addiction (Director).

The Ethics Officer is requesting an opinion from the Commission addressing whether it would be a conflict of interests for the Director to continue his outside employment with a small private practice, Psych Consults, LLC, while employed at FSSA.

The Director joined FSSA on September 21, 2020. The role of State Suicide Prevention Director was legislatively mandated by House Enrolled Act 1430. As Director, he serves as both a regional suicide prevention specialist and oversees suicide prevention efforts on a statewide level. He is responsible for working with the Indiana Suicide Prevention Network Advisory Council and other state-level policy entities. Additionally, he is responsible for being a primary source for evidence-based suicide prevention strategies and serving as the leader for suicide prevention and early intervention efforts in Indiana communities. Furthermore, he is responsible for collaborating with local community prevention professionals to successfully educate key local stakeholders about suicide prevention and to engage them as part of community coalitions.

Prior to joining FSSA, the Director worked in a small private practice, Psych Consults, LLC, counseling individuals. He would like to continue his private practice while working with FSSA. The Director plans to see no more than five clients a week, which translates to five to six hours a week. He would generally see clients on Wednesdays and Thursdays in the late afternoon/early evening (central time zone). This work schedule would still allow him to meet

his 37.5-hour state work week requirement. He would like to continue with his private practice to maintain his clinical skills and his psychologist license and to help people locally who are seeking psychological services.

According to its website, Psych Consults, LLC was founded in 2007. The practice provides services to children and adults and specializes in psychological testing and treatment. The practice treats individuals receiving Medicaid through FSSA. The Director primarily provides psychotherapy; however, he may also provide psychological assessment services on occasion. Psych Consults, LLC will pay the Director on an hourly basis, and he will not serve in a supervisory or leadership role. He will not directly charge patients nor will he bill insurance. The practice manager completes these tasks. Psych Consults, LLC will compensate the Director via funds paid by insurance companies or clients who wish to pay out-of-pocket for psychological services.

Although Psych Consults, LLC is a Medicaid provider with FSSA, according to the Ethics Officer, the Director's position within FSSA does not impact any contractual or financial responsibilities between FSSA and Psych Consults, LLC and the Director is not involved in decisions regarding whether the practice is a Medicaid provider and how/if Medicaid is reimbursed. Furthermore, his responsibilities do not include the ability to make decisions that directly impact Psych Consults, LLC or its patients. As such, his employment with Psych Consults, LLC would not require recusal from his official responsibilities to the extent that his ability to perform them would be materially impaired, nor would he be required to use any confidential information in his employment with Psych Consults, LLC.

The Director understands that he is not to use his FSSA position to secure unwarranted privileges or exemptions that are of substantial value and not properly available to similarly situated individuals outside state government. He also understands and agrees to abide by the ethics rules governing conflicts of interests, ghost employment, use of state property and confidential information.

ISSUE

1. Would the Director's outside employment opportunity with Psych Consults, LLC create any conflict of interests for him under the Code?
2. What other ethics issues, if any, arise for the Director given his position at FSSA and his simultaneous outside position with Psych Consults, LLC?

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 his official duties that his 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 his 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 Director's employment at Psych Consults, LLC would not create a conflict under this provision. The Director's role and responsibilities at Psych Consults, LLC would be very different from his role as Director, and it does not appear that the positions would overlap in any meaningful way. The Director plans to see patients and provide psychological services at Psych Consults, LLC, for a few hours a week. He would not be in a supervisory or leadership role.

Accordingly, the Commission finds that the Director's responsibilities with Psych Consults, LLC would not be inherently incompatible with his FSSA responsibilities nor would they require his recusal from matters that are critical to the performance of his state duties.

Further, the Commission confirmed that the Director would not be required to disclose confidential information to which he may have access by virtue of his state employment in his outside position with Psych Consults, LLC.

Nothing in the information presented suggests that the Director would use or attempt to use his state position to secure any unwarranted privileges or exemptions, as the Director already worked for Psych Consults, LLC prior to joining FSSA. The Director must continue to ensure he does not use or attempt to use his official FSSA position to secure any unwarranted privileges or exemptions.

The Commission finds that the Director's outside employment opportunity with Psych Consults, LLC would not create a conflict of interests for him 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 he 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 Psych Consults, LLC would have a financial interest in the outcome.

Although Psych Consults, LLC is a Medicaid provider with FSSA, the Ethics Officer provides that the Director is not in a position at FSSA to impact any contractual or financial responsibilities between FSSA and Psych Consults, LLC. Furthermore, he does not interact with Psych Consults, LCC in his state position, and his responsibilities do not include the ability to make decisions that directly impact Psych Consults, LLC or its patients.

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 all the disclosure and notification requirements in IC 4-2-6-9(b). Mere recusal from matters that could create a potential conflict of interests would not be enough to satisfy the requirements.

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 unless the employee can meet certain requirements. The Commission has interpreted this rule to apply when a state employee derives compensation from a contract between the state and a third party.

The Ethics Officer provides that the Director would be paid on an hourly basis for his work in seeing patients for Psych Consults, LLC and the practice would compensate him with funds from insurance companies or clients who wish to pay out-of-pocket for psychological services. Further, the Ethics Officer, confirmed that the Director will not be paid from any state contract or grant Although Psych Consults receives Medicaid payments/reimbursements, these are not considered state contract or grant funds.

Accordingly, the Commission finds that the Director does not have a financial interest in a state contract.

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 that 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 Psych Consults, LLC. 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 his position with FSSA, he is prohibited not only from divulging that information but from ever using it to benefit any person, including his 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.

To the extent that the Director observes these provisions regarding his outside employment activities, his outside position with Psych Consults, LLC would not violate these ethics laws.

CONCLUSION

Subject to the foregoing analysis, the Director’s outside employment with Psych Consults, LLC would not create a conflict of interests for him under the Code of Ethics.

Respectfully Submitted,

Jennifer Cooper
Ethics Director