

**42 IAC 1-5-5 Outside employment (IC 4-2-6-5.5)**  
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**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 Ethics Officer for the Indiana Family Social Services Administration (FSSA) sought advice on behalf of the new FSSA Secretary regarding his continued outside employment/professional activities while employed by FSSA. The Commission finds that the outside employment/professional activities would not be contrary to the Code of Ethics.

August 12, 2021  
2021-FAO-007

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 recent Chief Medical Officer and the new Secretary of FSSA (Secretary). Specifically, the Ethics Officer is requesting an opinion from the Commission to ensure that the Secretary's continued outside employment/professional activity with Eskenazi Health and Indiana University (IU) School of Medicine is acceptable under the Code while he is employed in his new role as Secretary of FSSA.

The Secretary appeared before the Commission in 2018 when he became the Chief Medical Officer for FSSA regarding this same outside employment. In 2018-FAO-017, the Commission found that his outside employment opportunities would not create any conflicts of interests under the Code and that he could continue in these positions while serving as Chief Medical Office for FSSA. Recently, he was promoted to Secretary of FSSA, effective August 1, 2021, and out of an abundance of caution, due to his new role within the agency, the Secretary is requesting an updated opinion regarding continued outside employment with Eskenazi Health and his faculty position with IU School of Medicine.

The Secretary was the Chief Medical Officer for FSSA from August 6, 2018, to July 30, 2021. During this time, after approval from the Commission through 2018-FAO-017, the Secretary has worked in the emergency department of Eskenazi Health. The Secretary wishes to continue this outside employment as he transitions to his new role as Secretary of FSSA. The Secretary is also on temporary leave from IU School of Medicine, but he maintains a faculty position; he would like to maintain this position moving forward in his role as Secretary of FSSA as well.

As Chief Medical Officer for FSSA, the Secretary's duties included providing leadership to the medical directors in each FSSA division and providing expertise and leadership to the agency, including policy advising and program planning. The Secretary's role as Chief Medical Officer did not include any contract administration or rulemaking.

The Secretary would like to continue to work a few evenings a month in the emergency department at Eskenazi Health while serving in his new role as Secretary of FSSA. The Secretary believes that it is important for him to continue working in the emergency room to maintain his skills through patient contact, which has aided him in his role as Chief Medical Officer and would continue to benefit him in his new role as Secretary. Eskenazi Health partners with the IU School of Medicine and serves as the public hospital division of the Health and Hospital Corporation of Marion County. Eskenazi is a safety-net hospital, meaning that it provides health care and other related services to the uninsured, Medicaid-recipients and other vulnerable populations regardless of ability to pay. Continuing to work shifts in the emergency department at Eskenazi Health would allow the Secretary to have real world access to issues that are presented in the health care setting, which would be helpful in his role as FSSA Secretary in addressing the same issues.

The Secretary has and will continue to pay for his own licensing fees and certifications. He has not and will not serve in a managerial or leadership role with Eskenazi Health or Indiana University Health Physicians (IU Health Physicians), his direct employer. The Secretary is considered a supplemental employee, and IU Health Physicians will pay him for his work at Eskenazi Health on an hourly basis, rather than billing patients or insurance.

Eskenazi Health and IU Health Physicians are Indiana Medicaid Providers. Each has an Indiana Medicaid Provider Agreement with FSSA, and both receive Medicaid reimbursements. Eskenazi Health does not have a direct contract with FSSA; however, its community mental health center is certified by FSSA's Division of Mental Health and Addiction. Additionally, IU Health Physicians is affiliated with Indiana University Health (IU Health), and FSSA's various divisions have six active contracts with IU Health, Indiana University and related entities. The contracts are at the division level in FSSA, and the FSSA divisions have ownership of the contracts. As Secretary, he would not be in a position to negotiate or sign these contracts. To avoid a potential conflict under IC 35-44.1-1-4, neither Eskenazi Health nor IU Health Physicians will use funds from contracts with FSSA to pay the Secretary; however, his fees may be paid from general Medicaid funds.

Pursuant to IC 12-8-1.5-10.5, the Office of the FSSA Secretary is designated as the single state agency for administration of the State's Medicaid program under IC 12-15. As such the Office of the FSSA Secretary develops and coordinates Medicaid policy for the State. Therefore, the FSSA Secretary may make decisions affecting Medicaid providers; however, his decisions would apply broadly to all Medicaid providers uniformly and not specifically to Medicaid providers at Eskenazi or IU Health Physicians. For example, if reimbursement rates were revised for Medicaid providers, such changes would apply uniformly to all relevant Medicaid providers. Additionally, while Eskenazi Health or IU Health Physicians may have infrequent issues to address specifically with FSSA, there is little direct contact between these institutions and FSSA generally.

Accordingly, it is unlikely that FSSA would make a decision that would have a unique impact on Eskenazi Health or IU Health Physicians; however, should there be a situation whereby, in his role as Secretary, he would need to make a decision related specifically and solely to Eskenazi Health or IU Health Physicians, the Secretary understands and acknowledges that pursuant to IC 4-2-6-9, he will be screened from participating in any decision or vote, or matter relating to that decision or vote in which Eskenazi Health or IU Health Physicians would have a financial interest in the outcome.

The Secretary also would like to maintain his appointment at the IU School of Medicine while employed by FSSA. The Secretary had formerly taken a temporary leave of absence from the medical school that permits him to retain his title and the full rights of a faculty member. During his leave of absence, the Secretary will not receive any benefits or salary from the IU School of Medicine; however, he will be required to continue to abide by the professional standards of the medical school to remain a faculty member in good standing. This leave of absence is renewed annually.

The Secretary also understands that he has a duty to maintain confidential information learned through his employment with the State and that he is prohibited from divulging confidential information or allowing anyone, including but not limited to Eskenazi Health and IU Health Physicians, from benefiting from the same.

The Secretary further understands that he cannot use state time for outside employment with either Eskenazi Health or the medical school. The Secretary plans to continue the emergency department shifts during off work time such as evenings or weekends.

The previous Secretary of FSSA also sought a formal advisory opinion from the Commission for a similar situation wherein she worked shifts at Riley Hospital for Children (Riley) during her tenure at FSSA. The Commission found in that instance, after careful consideration of several factors, that the previous Secretary of FSSA did not have any conflict of interests under the Code and would be able to continue her outside employment with Riley while serving as Secretary.

The Ethics Officer provides that previous Secretary of FSSA's situation is analogous in many ways to the previous FSSA Secretary's work at Riley. Further, there are no changes to the Secretary's outside employment duties, which the Commission previously approved. He and the Ethics Officer are seeking a formal opinion regarding whether his change in roles within FSSA would impact the permissibility of his outside employment opportunities under the Code.

### **ISSUE**

What ethics issues, if any, arise for the Secretary given his new position as Secretary of FSSA and his continued simultaneous outside positions with Eskenazi Health and IU School of Medicine?

## 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 Secretary 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.

Based on the information provided by the Ethics Officer, the Secretary's employment at Eskenazi Health would not create a conflict of interests for him under this provision. The Secretary would not serve in a supervisory or leadership role with the hospital; he would be working as a physician on an hourly basis and would not have a managerial or leadership role. According to the Ethics Officer, the Secretary's responsibilities at Eskenazi Health would not conflict with his responsibilities at FSSA and would not require him to recuse himself from matters that are critical to the performance of his duties as Secretary of FSSA.

His other outside employment/professional activity would not provide the Secretary with compensation of a substantial value. The Secretary is taking a leave of absence from his position with IU School of Medicine and will not receive any benefits or salary during this time.

The Ethics Officer provides that the Secretary understands that he is prohibited from disclosing confidential information that he may have access to by virtue of his state employment in any of his outside positions. Nothing in the information presented suggests that the Secretary would use or attempt to use his state position for any unwarranted privileges or exemptions. The Secretary held both of these outside positions prior to becoming the Chief Medical Officer, and now the Secretary, for FSSA.

Accordingly, the Commission finds that the Secretary's outside employment positions with Eskenazi Health and IU School of Medicine 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 Secretary 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 Secretary from participating in any decision or vote, or matter relating to that decision or vote, if he or a business organization which employs him has a financial interest in the matter. IC 4-2-6-9(b) requires that an employee who identifies a potential conflict of interests notify his or her Ethics Officer and Appointing Authority and seek an advisory opinion from the Commission or file a written disclosure statement.

The Secretary will now be serving as Secretary of FSSA and will be working a few shifts per month in the emergency department at Eskenazi Health. The Secretary will serve as a supplemental (hourly) employee at Eskenazi Health through IU Health Physicians, which is affiliated with IU Health.

Accordingly, the Secretary would have a potential conflict of interests if he participates in decisions or votes, or matters related to such decisions or votes, in which he, Eskenazi Health, IU Health Physicians or IU Health would have a financial interest in the outcome.

Eskenazi Health does not have any direct contracts with FSSA; however, its community mental health center is certified by FSSA's Division of Mental Health and Addiction. Additionally, FSSA's various divisions have six 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, not the Secretary.

Eskenazi Health and other IU Health-affiliated facilities serve Medicaid patients. FSSA is the state agency responsible for administering the Medicaid program; however, any decisions that the Secretary would make regarding Medicaid would be broad in scope and would affect all Medicaid providers uniformly. The Ethics Officer does not anticipate that the Secretary would ever be in a position to participate in a decision or vote in which Eskenazi Health, IU Health Physicians or IU Health, would have a unique financial interest.

The Commission finds that the Secretary does not have an identified potential conflict of interests at this time; however, in the event that any matters in which a decision made by him as Secretary could uniquely affect Eskenazi Health, IU Health Physicians or IU Health arise, FSSA must be prepared to institute a screening mechanism whereby it would delegate any decisions, and matters related to such decisions, in which Eskenazi Health, IU Health Physicians or IU Health would have a unique financial interest in the outcome to the Deputy Secretary.



*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 Eskenazi Health does not have any direct contracts with FSSA; however, FSSA's various divisions have six active contracts with IU Health and related entities.

The Ethics Officer provides that in order to avoid any conflicts under IC 35-44.1-1-4 (the criminal conflict of interests statute), IU Health Physicians will not use funds from these contracts with FSSA to pay the Secretary. The Ethics Officer notes that his fees may be paid from general Medicaid funds; such funds are not considered to be derived from a state contract.

The Commission finds that FSSA has taken the appropriate steps to ensure the Secretary will not have a conflict of interests under both the Code and Indiana criminal code and that the Secretary would not have a financial interest in a state contract that would create a conflict of interests.

*D. Confidential information*

The Secretary 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 Secretary 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 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 Secretary is exposed to or has access to such confidential information in his new position as Secretary of FSSA, he would be prohibited not only from divulging that information but from ever using it to benefit any person, including any of his outside employers, in any manner.

*E. Use of state property and Ghost employment*

42 IAC 1-5-12 prohibits the Secretary 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 Secretary 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 Secretary observes these provisions regarding his outside employment/professional activities, his outside positions would not violate these ethics laws.

### **CONCLUSION**

Subject to the foregoing analysis, the Commission finds that the Secretary's outside positions with Eskenazi Health and the IU School of Medicine would not create a conflict of interests for him under the Code of Ethics.

Respectfully Submitted,

Jennifer Cooper  
Ethics Director