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The Ethics Officer for the Indiana Family and Social Services Administration (FSSA) sought advice on behalf of the new FSSA Chief Medical Officer regarding outside employment/professional activities while employed by FSSA. The Commission finds that the employment/professional activities would not be contrary to the Code of Ethics.

October 14, 2021
2021-FAO-010

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 Director of Clinical Operations and Assistant Medical Director, and the new Chief Medical Officer (Chief Medical Officer) for FSSA. Specifically, the Ethics Officer is requesting an opinion from the Commission to ensure that the Chief Medical Officer's continued outside employment/professional activity with Riley Hospital for Children (Riley) through a contract with Indiana University Health Physicians (IUHP) is acceptable under the Code while she is employed in their new role as Chief Medical Officer of FSSA.

The Chief Medical Officer was formerly employed as the Director of Clinical Operations and Associate Medical Director for FSSA's Office of Medicaid Policy and Planning (OMPP) from August 15, 2019, to August 22, 2021. The Chief Medical Officer has worked at Riley Hospital for Children in the Division of Neonatology in the Department of Pediatrics since August 1, 2019. During their tenure as Director of Clinical Operations and Associate Medical Director for OMPP, the Chief Medical Officer sought a formal advisory opinion and continued their work with IUHP. The Chief Medical Officer wishes to continue this outside employment with IUHP after the shift to Chief Medical Officer of FSSA.

The Chief Medical Officer appeared before the Commission in 2020 when they requested to engage in this same outside employment with IUHP at Riley. In [2020-FAO-007](#) the Commission found that their outside employment opportunity would not create any conflicts of interests under the Code and that they could pursue this position while serving as Director of Clinical Operations and Assistant Medical Director for FSSA. Recently, the Chief Medical Officer was promoted to Chief Medical Officer of FSSA, effective August 23, 2021, and out of an abundance

of caution, due to their new role within the agency, the Chief Medical Officer is requesting an updated opinion regarding continued outside employment with IUHP.

As Chief Medical Officer for FSSA, their duties include providing leadership to the medical directors in each FSSA division and providing expertise and leadership to the agency, including policy advising and program planning. Their role as Chief Medical Officer does not include any contract administration or rulemaking. In their previous role as Director of Clinical Operations and Associate Medical Director, the Chief Medical Officer was responsible for overseeing the OMPP Medical Director, the Pharmacy Team and the Coverage and Benefits Team. Additionally, the Chief Medical Officer assisted FSSA's Program Integrity Team, the team responsible for reviewing suspected cases of fraud and abuse and making recommendations as to same, when the Medical Director for OMPP was unavailable.

The Chief Medical Officer has been working a few clinics per month in the Department of Pediatrics, Division of Neonatology at Riley, including a four (4) hour clinic shift on Thursday mornings. The Chief Medical Officer appreciates the benefit of continuing to interact with clinical providers and patients, she believes that these continued shifts increase their skillset and credibility in their role as Chief Medical Officer with FSSA. Seeing patients in a local setting allows the Chief Medical Officer the ability to predict issues and hear feedback regarding FSSA services.

In their new position as Chief Medical Officer, their outside employment duties and structure will not substantively change. They will continue to work with the Department of Pediatrics for a few clinics per month at Riley. Due to their recent promotion, the Chief Medical Officer seeks an updated formal opinion regarding whether her change in role with FSSA would impact their outside employment opportunities.

The Chief Medical Officer will continue to pay for their own licensing fees. They have not and will not serve in a managerial or leadership role with Riley or IUHP, their direct employer. The Chief Medical Officer is paid hourly by IUHP, and their pay is based only on their contracted hourly rate and not based on the amount/number of patients they see, treatments or services provided.

Riley Hospital for Children and IUHP are Indiana Medicaid enrolled Providers. Each have Indiana Health Coverage Program provider agreements with FSSA and receive Medicaid reimbursement. There are no known active contracts between FSSA and Riley Hospital for Children directly; however, Riley Hospital for Children is associated with Indiana University Health (IU Health). IUHP is also affiliated with IU Health, and FSSA's divisions have approximately four (4) active contracts with IU Health and associated entities. The contracts with IU Health are at the division level, and the FSSA divisions have ownership of the contracts. The Chief Medical Officer will not sign or negotiate these contracts as Chief Medical Officer. To avoid a potential conflict under IC 35-44.1-1-4, neither Riley nor IUHP will use funds from contracts with FSSA to pay the Chief Medical Officer; however, their fees may be paid from general Medicaid funds.

Pursuant to IC 12-8-1.5-10.5, the Office of the Secretary of FSSA is designated as the single state agency for administration of the state Medicaid program under IC 12-15, and the Office of the Secretary shall develop and coordinate Medicaid policy for the State. Therefore, the Chief Medical Officer may make decisions and recommendations involving Medicaid providers; however, her decisions would apply broadly to Medicaid providers in general, and not Medicaid providers at Riley or IUHP specifically. For example, if reimbursement rates were revised for Medicaid providers, they would apply to all relevant Medicaid providers. Additionally, while Riley or IUHP may have infrequent issues to address specifically with FSSA, there is little direct contact between these institutions and FSSA generally.

Should there be a situation whereby the Chief Medical Officer would need to make a decision in their role as Chief Medical Officer related specifically and solely to Riley Hospital for Children or IU Health Physicians, the Chief Medical Officer understands and acknowledges that pursuant to IC 4-2-6-9, FSSA will screen them from participating in any decision or vote, or matter relating to that decision or vote. Should such an issue arise, the Deputy Secretary/Chief of Staff would address any screened matter.

The Chief Medical Officer also understands the duty to maintain confidential information learned through their employment with the State and that they are prevented from divulging confidential information or allowing anyone, including but not limited to, Riley and IUHP from benefiting from same.

The Chief Medical Officer further understands that they cannot use state time for outside employment, and the Chief Medical Officer has no concerns about their continued ability to meet all state work hours. During their Thursday morning clinic, the Chief Medical Officer has flexibility to step out if an emergency arises and does charting at other times, outside of regular working hours. The Chief Medical Officer has not had any issues meeting their regular work hour requirements previously working these clinics.

The previous Chief Medical Officer, now the Secretary of FSSA, also sought a formal advisory opinion from the Commission for a similar situation where they worked shifts at Eskenazi Hospital while acting as FSSA's Chief Medical Officer, and the Commission found in that instance, that there was not a conflict of interest after careful consideration of many factors (2018-FAO-017). The Ethics Officer notes that the Chief Medical Officer's situation is analogous in many ways to the FSSA Secretary's work at Eskenazi.

Further, there are no changes to the Chief Medical Officer's outside employment duties, which the Commission previously approved. The Chief Medical Officer and the Ethics Officer are seeking a formal opinion regarding whether the Chief Medical Officer's change in roles within FSSA would impact the permissibility of their outside employment opportunities under the Code.

ISSUE

What ethics issues, if any, arise for the Chief Medical Officer given their new position as Chief Medical Officer for FSSA and their continued simultaneous outside position with IUHP at Riley?

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 Chief Medical Officer 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.

Based on the information provided by the Ethics Officer, the Commission finds that the Chief Medical Officer's continued outside employment with IUHP at Riley would not create a conflict under this provision. The Chief Medical Officer would not be an employee and would not serve in an administrative leadership role with IUHP; they would be an independent contractor and would be paid on an hourly basis. Further the Chief Medical Officer's responsibilities in working as a physician in the Clinic for IUHP would include a few clinical rounds a month in the Department of Pediatrics, Division of Neonatology at Riley. Accordingly, this role would not conflict with their responsibilities as Director of Clinical Operations and Assistant Medical Director for FSSA and would not require them to recuse themselves from matters that are critical to the performance of her duties at FSSA.

The Ethics Officer provides that the Chief Medical Officer understands that they are prohibited from disclosing confidential information to which they may have access to by virtue of their state employment in their outside position with IUHP. In addition, nothing in the information presented suggests that the Chief Medical Officer would use or attempt to use their state position for any unwarranted privileges or exemptions. The Chief

Medical Officer must continue to ensure they do not use or attempt to use their official FSSA position in this manner.

Accordingly, the Commission finds that the Chief Medical Officer's continued outside employment position with IUHP at Riley would not create a conflict of interests for them under IC 4-2-6-5.5 despite their change in role from Director of Clinical Operations and Assistant Medical Director to Chief Medical Officer of FSSA.

B. Conflict of interests - decisions and votes

IC 4-2-6-9 (a)(1) prohibits the Chief Medical Officer from participating in any decision or vote, or matter relating to that decision or vote, if they have a financial interest in the outcome of the matter. Similarly, IC 4-2-6-9(a)(3) prohibits the Chief Medical Officer 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.

IC 4-2-6-9(b) requires that an employee who identifies a potential conflict of interests notify her ethics officer and appointing authority and seek an advisory opinion from the Commission or file a written disclosure statement.

The Chief Medical Officer will now be serving as Chief Medical Officer of FSSA and will be working a few clinics per month for IUHP at Riley. The Chief Medical Officer will serve as a contracted hourly employee through IU Health Physicians, which is affiliated with IU Health.

Accordingly, the Chief Medical Officer would have a potential conflict of interests if they participate in decisions or votes, or matters related to such decisions or votes, in which they, 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, the Chief Medical Officer for FSSA, is not in a position to negotiate or sign these contracts. Riley, IUHP and IU Health all serve Medicaid patients, and FSSA is the state agency responsible for administering the Medicaid program; however, the Ethics Officer provides that any decisions the Chief Medical Officer would make regarding Medicaid would be broad in scope and would affect all Medicaid providers uniformly. The Ethics Officer does not anticipate that the Chief Medical Officer would ever be in a position to participate in a decision or vote in which Riley or IUHP would have a unique financial interest.

The Ethics Officer provides, however, that should there be a situation whereby a decision would need to be made by the Chief Medical Officer in their role as Chief Medical Officer related specifically and solely to IUHP, IU Health or Riley, the Chief Medical Officer would be screened from participating in any decision or vote, or

matter relating to that decision or vote. Further, should such a situation arise, FSSA's Deputy Secretary/Chief of Staff would address any screened matter.

The Commission finds that the Chief Medical Officer does not have an identified potential conflict of interests at this time. Further, the Commission is satisfied that FSSA's proposed screening procedure would prevent the Chief Medical Officer from violating this rule if a potential conflict of interests was identified in the future.

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 four active contracts with IU Health and its related entities, including IUHP.

The Ethics Officer provides that that in order to avoid any conflicts under IC 35-44.1-1-4 (the criminal conflict of interests statute), IUHP will pay the Chief Medical Officer on an hourly basis, and not use funds from these contracts with FSSA to pay the Chief Medical Officer. She notes that the Chief Medical Officer's fees may be paid from general Medicaid funds; such funds are not considered to be funds derived from a state contract.

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

D. Confidential information

The Chief Medical Officer 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 Chief Medical Officer 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. 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 Chief Medical Officer is exposed to or has access to such confidential information in their new position as Chief Medical Officer for FSSA, they are 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 Chief Medical Officer 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 Chief Medical Officer 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 Chief Medical Officer understands that they may not use state time to work at their outside position, and that the Chief Medical Officer has no concerns about their continued ability to meet all state work hours. The Ethics Officer further provides that the Chief Medical Officer has flexibility to step out if an emergency arises, and does charting at other times, outside of regular working hours. The Chief Medical Officer has not had any issues meeting their regular work hour requirements previously working those clinics.

To the extent that the Chief Medical Officer observes these provisions regarding their outside employment activities, their outside position would not violate these ethics laws.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Chief Medical Officer's continued outside employment with IUHP at Riley would not create a conflict of interests for them under the Code of Ethics.

Respectfully Submitted,

Jennifer Cooper
State Ethics Director