

**42 IAC 1-5-5 Outside employment (IC 4-2-6-5.5)**  
**42 IAC 1-5-6 Conflicts of Interests (IC 4-2-6-9)**  
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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 and Social Services Administration (FSSA) sought advice on behalf of the new FSSA Office of Medicaid Policy and Planning's Director of Clinical Operations 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.

March 10, 2022  
2022-FAO-005

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 new Director of Clinical Operations (Director) for FSSA's Office of Medicaid Policy and Planning (OMPP). Specifically, the Ethics Officer is requesting an opinion from the Commission to ensure that the Director's continued outside employment/professional activity with Eskenazi Health (Eskenazi) and Indiana University (IU) School of Medicine is acceptable under the Code while he is employed at FSSA.

The Director started in his role at FSSA on February 7, 2022. Prior to accepting his position with the State, the Director worked in the Emergency Department of Eskenazi. The Director wishes to continue this outside employment with Eskenazi while serving in his role as OMPP's Director of Clinical Operations.

Also, prior to accepting the position with the State, the Director was on the faculty with IU School of Medicine. The Director is on unpaid leave from the IU School of Medicine. He retains his faculty appointment, and he would like to maintain that appointment moving forward in his role as OMPP's Director of Clinical Operations.

The Director is directly employed by IU Health Physicians, which contracts with Eskenazi to staff its Emergency Department. IU Health Physicians pays the Director hourly, and he does not bill his patients or insurance directly. The Director is considered a supplemental employee. IU Health Physicians will continue to pay him on an hourly basis for his work at Eskenazi, rather than the Director billing patients or insurance. As the Director will be providing patient care in the Emergency Department, this could potentially include Medicaid patients similar to any other physician providing medical services for IU Health Physicians. His compensation would not be tied to the charges and collections that he generates or the

payer mix of the patients for which he cares; however, his fees may be paid from general Medicaid funds.

As OMPP's Director of Clinical Operations, the Director's duties include providing medical oversight, expertise and leadership to projects and operations within OMPP. He reports to the Medicaid Director. The Director's position oversees all clinical operations within OMPP and as performed by the Managed Care Entities. He is generally not in a position to make decisions regarding specific Medicaid providers, and any direction he 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 Director will work with FSSA's Pharmacy Team, led by a Pharmacy Director and Coverage and Benefits Team. Occasionally, the Director will assist FSSA's Program Integrity Team when the 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 conducted by the Program Integrity Team 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 IU Health Physicians, Eskenazi or their related entities. If the situation presented itself, FSSA would screen the Director from participating in such decisions by having his colleague, Dr. Mary Reilly, be given full authority to handle such matters independently.

At this time, the Director's role does not include any contract administration or rulemaking as OMPP's Director of Clinical Operations. There may be an opportunity for rule or contract review; however, these reviews would be on matters applicable to all Medicaid providers generally. The Director understands that he would need to be screened from any issues involving only IU Health Physicians or Eskenazi.

The Director's shifts with Eskenazi will generally be on Wednesdays, but he may assist in other shifts on evenings or weekends to assist with coverage. The Director has no concerns with being able to meet the weekly 37.5 regular work hours in his role as Director of Clinical Operations. The Director understands that he cannot use state funds for outside employment with either Eskenazi or IU School of Medicine.

The Director believes that it is important to continue to work in the Emergency Department to maintain skills through patient contact, which will allow continued access to real world issues that OMPP faces and oversees. Eskenazi is a safety-net hospital, meaning that it provides health care and related services to the uninsured, Medicaid members and other vulnerable populations regardless of the ability to pay.

The Director 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 or IU Health Physicians, his direct employer.

Eskenazi and IU Health Physicians are Indiana Medicaid enrolled Providers. Each have Indiana Health Coverage Program provider agreements with FSSA and receive Medicaid reimbursement. Eskenazi has five active contracts with FSSA, specifically with FSSA's Division of Mental Health and Addiction (DMHA). DMHA also certifies Eskenazi's

community mental health center. IU Health Physicians is affiliated with IU Health. FSSA's divisions have three active contracts with IU Health. The contracts with Eskenazi and IU Health are at the division level, and none are with OMPP. The FSSA divisions have ownership of the contracts. The Ethics Officer writes that the Director will not sign or negotiate these contracts as OMPP's Director of Clinical Operations.

The Director also would like to maintain his appointment with the IU School of Medicine while he is employed with FSSA. The Director has taken an unpaid leave of absence and has maintained his title and the full rights of a faculty member. He will not receive benefits or salary from IU School of Medicine during his leave of absence, but he must continue to abide by the professional standards of the medical school to remain a faculty member in good standing. This leave is renewed annually.

According to the Ethics Officer, the Director understands the duty to maintain confidential information learned through his employment with the State and that he is prevented from divulging confidential information or allowing anyone, including Eskenazi and IU Health Physicians, from benefitting from such information.

The Ethics Officer is seeking the Commission's opinion regarding the application of any of the rules in the Code to the Director's continued outside employment with Eskenazi and IU School of Medicine.

### **ISSUE**

What ethics issues, if any, arise for the Director given his new position as OMPP Director of Clinical Operations and his continued simultaneous outside positions with Eskenazi 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 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 provided by the Ethics Officer, the Director's employment at Eskenazi would not create a conflict under this provision. The Director has not and will not serve in a supervisory or leadership role with Eskenazi or IU Health Physicians, his direct employer. Instead, he will be providing patient care in the Emergency Department.

His other outside employment/professional activity would not provide the Director with compensation of a substantial value. The Director is taking an unpaid 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 Director 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 Director would use or attempt to use his state position for any unwarranted privileges or exemptions for anyone, including Eskenazi, IU Health Physicians or the IU School of Medicine. The Director held both of his outside positions prior to becoming the OMPP Director of Clinical Operations.

Accordingly, the Commission finds that the Director's outside employment positions with Eskenazi 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 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 decision or vote, or matter relating to that decision or vote, if 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 Director is serving as OMPP's Director of Clinical Operations and will be working in the Emergency Department at Eskenazi periodically. The Director will serve as a supplemental employee, and IU Health Physicians will pay him on an hourly basis for his work at Eskenazi through IU Health Physicians.

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

The Ethics Officer explains that Eskenazi and IU Health Physicians are Indiana Medicaid enrolled Providers. Each have Indiana Health Coverage Program provider agreements

with FSSA and receive Medicaid reimbursement. Eskenazi has five active contracts with FSSA, specifically with DMHA. DMHA also certifies Eskenazi's community mental health center. IU Health Physicians is affiliated with IU Health. FSSA's divisions have three active contracts with IU Health. The contracts with Eskenazi and IU Health are at the division level, and none are with OMPP. The FSSA divisions have ownership of the contracts. The Ethics Officer writes that the Director will not sign or negotiate these contracts as OMPP's Director of Clinical Operations.

The Commission finds that the Director does not have an identified potential conflict of interests at this time. Should the Director as OMPP's Director of Clinical Operations be in a position to participate in a matter that could uniquely affect Eskenazi, IU Health Physicians or IU Health, FSSA must institute a screening mechanism whereby it would delegate any such decisions, and matters related to such decisions, to an FSSA colleague.

### *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 Eskenazi has five active contracts with FSSA's DMHA. FSSA's divisions have three active contracts with IU Health.

The Ethics Officer and the Director informed the Commission that IU Health will not compensate the Director with funds from a state contract or state grant. They advised that the Director's fees may be paid from general Medicaid funds; such funds are not considered to be derived from a state contract.

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

### *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 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 his new position at 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 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/professional activities, his outside positions would not violate these ethics laws.

**CONCLUSION**

Subject to the foregoing analysis, the Commission finds that the Director's continued outside employment positions with Eskenazi and IU School of Medicine would not create a conflict of interests under the Code of Ethics so long as FSSA implements a screen that would prohibit the Director from participating in any matters in which Eskenazi, IU Health Physicians or IU Health would have a unique financial interest.

Respectfully Submitted,

A handwritten signature in cursive script that reads "David Cook". The signature is written in black ink and is positioned above the printed name and title.

David Cook  
Inspector General  
For the State Ethics Director (position currently vacant)