

42 IAC 1-5-6 Conflict of economic interests (IC 4-2-6-9)

42 IAC 1-5-10 Benefiting from confidential information

42 IAC 1-5-11 Divulging confidential information

An ICSB Board Member sought advice regarding a conflict of interests if she voted on matters related to a specific charter school that would be located (or potentially located) in the school district that employs her. SEC determined the Board Member would have a potential conflict of interests. The SEC further determined that the screening mechanism proposed by ICSB is adequate to ensure that the Board Member does not violate IC 4-2-6-9.

September 12, 2019

2019-FAO-016

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 appointing authority for the Indiana Charter School Board (ICSB), along with ICSB's Ethics Officer, are requesting an advisory opinion on behalf of a board member on ICSB.

ICSB was established by Public Law 91-2011 for the purpose of authorizing charter schools throughout Indiana. IC 20-24-2.2-1(a). It is composed of the following nine (9) members appointed to four (4) year terms:

- (1) Four (4) members appointed by the governor. Not more than two (2) members appointed under this subdivision may be members of the same political party.
- (2) One (1) member who has previous experience with or on behalf of charter schools appointed by the state superintendent of public instruction.
- (3) Four (4) members, who may not be legislators, appointed as follows:
 - a. One (1) member appointed by the president pro tempore of the Senate.
 - b. One (1) member appointed by the minority leader of the Senate.
 - c. One (1) member appointed by the speaker of the House of Representatives.
 - d. One (1) member appointed by the minority leader of the House of Representatives.

IC 20-24-2.2-1(b).

Members appointed to ICSB must collectively possess strong experience and expertise in: 1) public and nonprofit governance; 2) management; 3) finance; 4) public school leadership; 5) higher education; 6) school assessments, curriculum, and instruction; and 7) public education

law. IC 20-24-2.1-1(f). A majority of the members appointed to ICSB constitutes a quorum. The affirmative votes of a majority of the members present are required for ICSB to take action. IC 20-24-2.1-1(d).

ICSB's specific duties include: 1) reviewing proposals to establish a charter school; 2) making decisions on proposals to establish charter schools; 3) monitoring charter schools authorized by the board; and 4) making decisions on the renewal, nonrenewal, and revocation of charters granted by the charter board. IC 20-24-2.1-2. ICSB typically meets four to five times a year. Specific voting matters include:

- 1) Approval of charter applications;
- 2) Approval of charter activation;
- 3) Renewal of existing charter agreements;
- 4) Approval of charter school closure;
- 5) Approval of material changes to charter agreements; and
- 6) Approval of board policies and procedures.

The Indiana Senate Minority Leader appointed the Board Member to ICSB. The Board Member is currently employed by a school corporation as dean of students at an elementary school and is a member of the executive board of the local Teachers Union, which is an affiliate of the American Federation of Teachers (AFT).

ICSB currently authorizes three operating charter schools located within the school district, has received numerous applications for charter schools located within the school district in the past, and anticipates that it will continue to receive applications for charter schools located within the school district.

Both charter public schools and traditional public schools receive state funding through application of Indiana's tuition support formula. The funding formula uses two count dates, one in September and one in February, to determine a school's Average Daily Membership (ADM), a physical count of students enrolled and attending the school on a particular day. A school's total tuition support is based on a school's ADM count multiplied by several grants, including the "basic grant," comprised of a base amount per student, and the "complexity grant," which is additional funding based on the school corporation's percentage of students who qualify for Supplemental Nutrition Assistance Program, Temporary Assistance for Needy Families, or who received foster care services.

Because school funding is based on a school's current year ADM count, student mobility from year to year, or between the September and February count dates, directly impacts the amount of funding a school receives, e.g. funding follows the child. As a result, any time a child leaves a

traditional public school to attend a public charter school, or vice-versa, the former school corporation or school receives less funding than it would have if the child had remained. This economic reality is often used by opponents of charter schools, including teachers unions, to argue that charter schools are directly harming the traditional public school system.

ICSB is seeking advice to determine whether the Board Member would have a conflict of interests under IC 4-2-6-9 if she voted on matters including but not limited to approval, renewal, monitoring, and closure related to a specific charter school that is currently located in, or proposing to locate in the school district.

ICSB further requested the Commission's guidance on whether the Board Member would have a conflict of interests under IC 4-2-6-9 if she voted on matters including but not limited to approval, renewal, monitoring, and closure related to a specific charter school that is currently located in, or proposing to locate in, a school corporation adjoining the school district. This concern stems from the fact that every nearby open-enrollment school corporation and every currently operating charter school located in an adjoining school corporation serves at least some students with a legal settlement in the school district and on the assumption that it is highly likely that any new school that is authorized would draw students (and thus funding) from the school district.

If it is determined that the Board Member would have a potential conflict of interests, ICSB would apply the following proposed screening process that they developed for ICSB members to the Board Member, to ensure she does not violate IC 4-2-6-9:

“To address any potential conflicts that may arise with respect to [board member] and [the entity or organization in which the member has financial interest], and to ensure compliance with the conflict of interest laws, the board member shall notify his or her appointing authority of [the relationship leading to the conflict]. ICSB's Ethics Officer has established the following procedures to screen the board member from participating in any decision or vote, or a matter relating to that decision or vote relating to [the entity or organization in which the member has financial interest]:

- 1) ICSB's Ethics Officer shall monitor the board member's involvement in any matter relating to [the entity or organization in which the member has financial interest] to ensure that the screening procedures are followed.
- 2) If any matter related to [the entity or organization in which the member has financial interest] is presented to ICSB for a discussion and vote, the board member will recuse him or herself from the discussion and vote, as well as submit an “Ethics Disclosure Statement” to the OIG.
- 3) The board member will not be permitted access to any confidential information concerning [the entity or organization in which the member has financial interest] without the written approval of ICSB's Ethics Officer.
- 4) ICSB staff will screen the board member from any and all involvement in matters involving [the entity or organization in which the member has financial interest], including refraining from any discussion in the Board member's presence that might be

related to matters involving [the entity or organization in which the member has financial interest].

- 5) The fact that the individual is both an ICSB board member and has a financial interest in [the entity or organization in which the member has financial interest] does not serve as an endorsement by ICSB of [the entity or organization in which the member has financial interest], other than that which normally exists between [the entity or organization in which the member has financial interest] and ICSB as a charter school authorizer.
- 6) ICSB's Ethics Officer will provide written notice to the OIG anytime the screening procedures are implemented.

ISSUE

What ethics issues, if any, arise for the Board Member as a special state appointee (and member of the ICSB), who is also employed by the school district?

RELEVANT LAW

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.

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.

ANALYSIS

A. Conflict of interests - decisions and votes

Under IC 4-2-6-9, the Board Member, as a special state appointee, is prohibited from participating in a decision or vote, or matter relating to that decision or vote, if she has knowledge that any of the following has a financial interest in the outcome of the matter:

- (1) The special state appointee;

- (2) Any of the special state appointee's immediate family members;
- (3) A business organization in which the special state appointee is serving as an officer, a director, a member, a trustee, a partner or an employee; or
- (4) Any person or organization with whom the special state appointee is negotiating or has an arrangement concerning prospective employment.

The Code defines "financial interest" in IC 4-2-6-1(a)(11) to include "an interest . . . in a purchase, sale, lease, contract, option, or other transaction between an agency and any person; or . . . involving property or services. . . ." The term does not include an interest that is not greater than the interest of the general public or any state officer or any state employee.

If a matter requiring a decision or vote comes before ICSB and the Board Member knows that any of the persons outlined above would have a financial interest in the outcome of ICSB's actions, she cannot participate in the matter. Further, she must disclose the interest and be screened from the matter under the supervision of the agency's Ethics Officer. The disclosure and screening process must be carried out through the filing of an ethics disclosure form with the OIG or the request for a formal advisory opinion from the Commission.

The Commission finds that the Board Member's employer, the school district, would have a financial interest in the outcome of decisions/votes related to charter schools located in or proposing to locate in the school district and possibly in decisions/votes concerning charter schools in the districts adjoining the school district. Specifically, votes to approve, renew, monitor, or close a charter school would have a financial impact on the school district; any time a child leaves a traditional public school within the school district or an adjoining district to attend a public charter school, or vice-versa, the school district or the school receives less funding than it would have if the child had remained.

The Commission understands that the Board Member's role on the ICSB is to provide a voice for the students in public schools, and these restrictions limit her involvement as a voting member of the ICSB when matters involving charter schools in her region come before the ICSB. The Commission suggests that ICSB consider pursuing a legislative solution to allow the Board Member to participate in discussions on these matters in some limited capacity; however, under the Code of Ethics, specifically IC 4-2-6-9(a), she is prohibited from participating in any decisions or vote, or matter related to any such decision or vote, in which her employer would have a financial interest in the outcome.

The Commission finds that her employer would have a financial interest in decisions/votes related to charter schools located within the school district. The Commission further finds that her employer would possibly have an interest in decisions/votes regarding charter schools in adjoining districts based on the information provided by the appointing authority.

Accordingly, the Board Member is not permitted to participate in any discussions or decisions/votes coming before the ICSB regarding a charter school within the school district and must follow all of the requirements in IC 4-2-6-9 each time a potential conflict of interests is identified. Further, the Commission advises that the Board Member should use caution and also follow the requirements in IC 4-2-6-9(b) any time there is a possibility her employer would have a financial interest in decisions/votes regarding charter schools that come before the ICSB, including matters concerning charter schools in adjoining districts.

In order to comply with the requirements in IC 4-2-6-9(b), the Board Member must provide a public disclosure of the potential conflict of interests and a description of the screen in place to ensure she does not participate in these matters through either the filing of a disclosure form with the OIG or through a formal advisory opinion request to the Commission.

ICSB had requested this formal advisory opinion on the Board Member's behalf and submitted a proposed screen for the Commission's approval. The Commission finds that this screen is adequate to ensure that the Board Member is screened from all matters before the ICSB in which her employer would have a financial interest.

B. Confidential information

The Board Member 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. To the extent that the Board Member will possess information of a confidential nature by virtue of her position with ICSB that could be used to benefit the school district, or any other person, she must ensure that she complies with these rules.

CONCLUSION

The Commission finds that the Board Member would have a potential conflict of interests under IC 4-2-6-9 if she were to participate in decisions/votes regarding charter schools (e.g. approval, renewal, monitoring, closure, etc.) in which her employer, the school district, would have a financial interest in the outcome. The Commission further finds that the screening mechanism proposed by ICSB is adequate to ensure that the Board Member does not violate IC 4-2-6-9.

Respectfully Submitted,

Jennifer Cooper

Ethics Director