

42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)

42 IAC 1-5-7 Prohibition against a financial interest in a contract; exceptions (IC 4-2-6-10.5)

The ISDH Ethics Officer sought advice to determine whether a special state appointee who is the Founder, Executive Director, and Board Member of an organization that receives funding from the Indiana Spinal Cord and Brain Injury Research Board (Board) could serve as a member of the Board. The SEC found that a conflict of interest under IC 4-2-6-9 would arise for the special state appointee if he participated in any decisions or votes regarding the Board's allocation of funds. The SEC further found that ISDH's proposed screening mechanism would not be sufficient to prevent a conflict of interest because the Board has discretion to determine the percentage of funding allocated to each organization, so the special state appointee would have a financial interest in most, if not all, matters that come before the Board. The SEC also found that the special state appointee's position on the Board would result in a conflict of interest under IC 4-2-6-10.5 because the special state appointee has official responsibility through his position on the Board, and he would have a financial interest in any funding that the Board awards to his organization. The SEC recommended that the special state appointee resign from the Board if he wishes to continue to pursue funding for his organization from the Board.

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The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics 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

A state employee who is the Deputy Director, Office of Legal Affairs, and Ethics Officer, for the Indiana State Department of Health (ISDH) is requesting an advisory opinion on behalf of a special state appointee who is the Founder, Executive Director and Board Member of a 501(c)(3) charitable organization that provides individualized physical therapy and wellness programs for people living with and recovering from spinal cord injury, brain injury, and stroke. The special state appointee was appointed to serve on the Indiana Spinal Cord and Brain Injury Research Board (Board) in 2015. The Board falls under the purview of the ISDH.

The Board was established in 2008, under IC 16-41-42.2-5, for the purposes of administering the Spinal Cord and Brain Injury fund (Fund). The Board's duties include: considering research applications relating to spinal cord and brain injury research projects; considering applications and making grants to health care clinics that provide long-term activity-based therapy services to individuals with spinal cord or brain injuries that require extended post acute care; formulating policies and procedures concerning the operation of the Board; reviewing and authorizing spinal cord and brain injury research projects and programs to be funded under the chapter; and reviewing progress reports on said research, among other duties.

During the 2015 legislative session, the Indiana General Assembly passed SEA 166, which amended IC 16-41-42.2. This bill required the Board to allocate 10-15% of the Fund to "post acute extended treatment and services for an individual with a spinal cord injury or facilities that offer long-term activity-based therapy services at affordable rates to an individual with a spinal cord injury that requires extended post acute care," and another 10-15% of the Fund to "post acute extended treatment and services for an individual with a brain injury or facilities that offer

long-term activity-based therapy services at affordable rates to an individual with a brain injury that requires extended post acute care.” See IC 16-41-42.2-4(4) and (5). The remainder of the Fund is used for operating the state medical surveillance registry for traumatic spinal cord and brain injuries, fulfilling the statutory duties of the Board, and funding research related to the treatment and cure of spinal cord and brain injuries. The special state appointee advocated for SEA 166, testified at committee hearings for the bill, and ultimately advocated for and received a specified allocation in the biannual budget through HEA 1001. His father was the parliamentarian for SEA 166 as well.

The Board currently consists of eleven members, six of whom are appointed by the Governor. One of these positions, which was added in the 2015 legislation, is a member “who owns or operates a facility that provides long-term activity-based therapy services at affordable rates to individuals with traumatic spinal cord or brain injuries” (IC 16-41-42.2-5 (b)(6)). This is the position that the special state appointee currently fills.

The other five Board members appointed by the Governor are as follows: one member who has a spinal cord or head injury or who has a family member with a spinal cord or head injury; one member who is a physician licensed under IC 25-22.5 who has specialty training in neuroscience and surgery; one member who is a board-certified physiatrist; one member representing the technical life sciences industry; and one member who is a physical therapist licensed under IC 25-27 who treats individuals with traumatic spinal cord injuries or brain injuries. (IC 16-41-42.2-5(b)(1)-(4)).

There are also five other Board members: one member representing and appointed by Indiana University; one member representing and appointed by Purdue University; one member representing and appointed by the National Spinal Cord Injury Association; one member representing the largest freestanding rehabilitation hospital for brain and spinal cord injuries in Indiana to be appointed by the Rehabilitation Hospital of Indiana located in Indianapolis; and one member representing the American Brain Injury Association to be appointed by the Brain Injury Association of Indiana. (IC 16-41-42.4-5(c)(1)-(5)).

At the time the 2015 legislation was passed and enacted into law, it appeared that the only facility in the State of Indiana to fit the new requirements of funding for activity-based therapy services was the charitable organization. Therefore, the charitable organization appears to be the only facility eligible for the new funding as designated by SEA 166, although it does not appear that the charitable organization is eligible for other types of funding offered by the Board (such as research). Further, if the charitable organization is the only facility in the State that “provides long-term activity-based therapy services at affordable rates to individuals with traumatic spinal cord or brain injuries,” it appears that the special state appointee, as its owner and operator, is the only person in the State that is eligible for appointment to the Board under IC 16-41-42.2-5(b)(6).

The ISDH, Board, and the special state appointee have concerns that as a member of the Board, he may have conflicts of interest regarding the determinations the Board makes regarding the charitable organization funding. As the agency Ethics Officer, the Deputy Director wants to ensure the ISDH and the Board are following all of the ethics precautions available regarding the special state appointee’s membership on the Board. As such, the Deputy Director proposes measures to screen him from participation in decisions and votes,

and matters related to such decisions and votes, in which he or the charitable organization would have a financial interest in the outcome, for the Commission's consideration.

First, the Deputy Director proposes that the Board members, absent the special state appointee, adopt a written policy to determine what percentage of the funds (10-15%, per IC 16-41-42.2-4) will be awarded to fund "post acute extended treatment and services...or facilities that offer long-term activity-based therapy services...to an individual with a spinal cord injury..." and what percentage (another 10-15% of the fund) to fund "post acute extended treatment and services...or facilities that offer long-term activity-based therapy services...to an individual with a brain injury..." This policy would provide an objective way to distribute funds that would decrease the potential of a financial conflict of interest because the special state appointee would not be part of a decision in how much funding was distributed to research versus the activity-based therapy facilities.

Second, when possible, the Board would make decisions regarding funding of activity-based therapy services and facilities prior to the issuance of research grant awards, to ensure that those funds have been distributed as required by law, but without any influence from the special state appointee.

Lastly, at all times, the special state appointee would recuse himself from participation in any decisions, votes, or discussions involving funding for activity-based services or facilities. He would not communicate with other Board members regarding this funding or any applications sent by his or other facilities for these funds.

ISSUE

Would a conflict of interest arise for the special state appointee under the Code given his dual roles as a member of the Board and the owner and operator of the charitable organization, an entity that is seeking funding from the Board?

RELEVANT LAW

IC 4-2-6-1 Definitions

Sec. 1. (a) As used in this chapter, and unless the context clearly denotes otherwise:

...

(10) "Financial interest" means an interest:

- (A) in a purchase, sale, lease, contract, option, or other transaction between an agency and any person; or
- (B) involving property or services.

The term includes an interest arising from employment or prospective employment for which negotiations have begun. The term does not include an interest of a state officer or employee in the common stock of a corporation unless the combined holdings in the corporation of the state officer or the employee, that individual's spouse, and that individual's unemancipated children are more than one percent (1%) of the outstanding shares of the common stock of the corporation. 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.

42 IAC 1-5-6 Conflicts of interest; decisions and voting

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-6-9; IC 4-2-7

Sec. 6. Decision and voting restrictions are set forth in IC 4-2-6-9.

IC 4-2-6-9

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 1-5-7 Conflicts of Interest; contracts

Authority: IC 4-2-7-3; IC 4-2-7-5

Affected: IC 4-2-6-9; IC 4-2-7

Sec. 7. Contracting restrictions are set forth in IC 4-2-6-10.5.

IC 4-2-6-10.5

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).

ANALYSIS

The Board's enabling statute requires that the Board be composed of specific members, including a member who "owns or operates a facility that provides long-term activity-based therapy services at affordable rates to individuals with traumatic spinal cord or brain injuries" (IC 16-41-42.2-5 (b)(6)). The Governor appointed the special state appointee of the charitable organization to fill this particular position on the Board.

The Founder is a special state appointee by virtue of his appointment to the Board, a body designated by statute that functions in an advisory role in the executive branch of state government. *See* IC 4-2-6-1(a)(18). As a special state appointee, he is subject to the Code, including the conflict of interests provisions set forth in IC 4-2-6-9 and IC 4-2-6-10.5. The application of both conflict of interests' provisions to the special state appointee is analyzed below.

A. Conflict of interests – Decisions and votes

Generally, IC 4-2-6-9 prohibits a special state appointee from participating in any decision or vote, or matter relating to that decision or vote, if the special state appointee has knowledge that various persons may have a "financial interest" in the outcome of the matter, including the special state appointee or a business organization in which he is serving as an officer, director, a member, a trustee, a partner, or an employee. The term financial interest as defined in IC 4-2-6-1(a)(11) includes an interest involving property, services, or a transaction between an agency and any person; 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.

In this case, the Founder as a member of the Board, is a special state appointee. As Founder, Executive Director, and Board Member of the charitable organization, the special state appointee also has an ownership interest in and serves as an officer and director for a business organization. The special state appointee has submitted a funding application on behalf of the charitable organization to the Board. Consequently, both the special state appointee and the charitable organization would have a financial interest in the Board's determination of the amount awarded to fund post acute extended treatment and services...or facilities that offer long-term activity-based therapy services...to an individual with a spinal cord injury..." and the amount to fund "post acute extended treatment and services...or facilities that offer long-term activity-based therapy services...to an individual with a brain injury..." per IC 16-41-42.2-4.

Although the statute provides percentage ranges for this funding (10-15% of the total Fund to facilities that offer the specified treatment and services to individuals with spinal cord injury; 10-15% of the total Fund to facilities that offer the specified treatment and services to individuals with a brain injury), the Board must still determine the exact percentage to provide to these facilities and which facilities to award the funding. The charitable organization was the only facility that met the criteria in IC 16-41-42.2-4 when this legislation was passed, but it is not clear if other facilities may also qualify for the funding now or in the future.

Further, though the Board's enabling statute provides that one of the appointed members of the Board be a member who "owns or operates a facility that provides long-term activity-based therapy services at affordable rates to individuals with traumatic spinal cord or brain injuries" (IC 16-41-42.2-5 (b)(6)), the statute does not specifically designate that the owner or operator of the charitable organization shall serve on the Board. Therefore, it does not appear that the special state appointee is required by statute to serve on the Board.

Accordingly, the special state appointee would be prohibited from participating in any Board decision or vote, or matters relating to such decision or vote pertaining to the determination of the amount of funding awarded to the activity-based treatment facilities. As such, he should refrain from all decisions, votes, communications, discussions and other matters regarding the Board's funding determinations to avoid a conflict of interest under IC 4-2-6-9.

IC 4-2-6-9(b) requires that when a potential conflict of interest is identified, a special state appointee shall notify their appointing authority and ethics officer in writing and either (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; or (2) file a written disclosure to be filed with the Commission meeting the requirements of IC 4-2-6-9(b)(2)(A)-(D).

The Deputy Director has requested an advisory opinion on the special state appointee's behalf and informed the ISDH Commissioner, as well as the Governor's Office, of his identified potential conflict of interests. IC 4-2-6-9(b)(1)(A) provides that the Commission, with the approval of the special state appointee's appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the special state appointee seeking the advisory opinion from involvement in the matter. The Deputy Director has provided proposed screening procedures for the Commission's approval.

The Commission finds that the proposed screening procedures would not prevent a conflict of interest from arising for the special state appointee under IC 4-2-6-9. The Board's primary function is to make determinations regarding the allocation of the Fund, and the Board's enabling statute provides the Board with discretion as to the amount of funding provided to facilities such as the charitable organization. Consequently, the special state appointee's participation in any of the Board's decisions and votes, and matters relating to such decisions and votes, would create a potential conflict of interest as he and the charitable organization would have a financial interest in the outcome of most, if not all, matters that come before the Board. Accordingly, the Commission recommends that the special state appointee resign from the Board if the charitable organization plans to continue to pursue funding in order to avoid any potential conflict of interests under this rule.

B. 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 (including a grant agreement) made by an agency. This prohibition, however, does not apply to an employee that does not participate in or have official responsibility for any of the

activities of the contracting agency, provided certain statutory criteria are met. The term “official responsibility” has been interpreted by the Commission as contracting responsibilities.

The charitable organization has submitted an application to the Board for the funding available to “facilities that offer long-term activity-based therapy services...to an individual with a spinal cord injury...” and the amount to fund “post acute extended treatment and services...or facilities that offer long-term activity-based therapy services...to an individual with a brain injury...” per IC 16-41-42.2-4. Given that the special state appointee has an ownership interest in the charitable organization as its founder and executive director, the special state appointee would have a financial interest in the funding grant agreement if the charitable organization is selected as the spinal cord injury treatment facility and/or the brain injury treatment facility receiving the funding available through IC 16-41-42.2-4.

Because the Board makes determinations regarding these grants agreements it is likely that the special state appointee would have official responsibility for the Board in his capacity as a Board Member. Therefore, he would be prohibited from having a financial interest in a contract made by the Board for the charitable organization. Accordingly, the Commission recommends the special state appointee resign from the Board if the charitable organization is awarded a funding grant from the Board.

CONCLUSION

The Commission finds that conflict of interests would arise for the special state appointee as a member of the Indiana Spinal Cord and Brain Injury Research Board given his concurrent relationship with the charitable organization. Specifically, a potential conflict of interest would arise for him under IC 4-2-6-9 if he were to participate in decisions or votes, or matters related to such decisions or vote, on matters in which he or the charitable organization would have a financial interest in the outcome. The Commission further determined that, due the nature of the Board’s functions, the proposed screening mechanisms proposed by the ISDH would not be sufficient to prevent the conflicts of interest.

The Commission further finds that the special state appointee would have a conflict of interest under IC 4-2-6-10.5 if the Board awarded the charitable organization a contract. Accordingly, the Commission recommends that the special state appointee resign from the Board to avoid any potential conflicts of interests.