

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

An Indiana State Board of Education (Board) member was seeking an employment opportunity with a not-for-profit company operating Turnaround Academies for a state contractor. The Board had voted to direct the Department of Education to intervene in these schools and hire the main contractor in 2016. SEC determined that the Board member would not have a conflict of interests under IC 4-2-6-9 if he negotiated and accepted employment with the Company, so long as the proposed screen provided by the Board's Ethics Officer was revised to include additional conditions.

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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

General Counsel and Ethics Officer for the Indiana State Board of Education (Board) seeks a Formal Advisory Opinion on behalf of a Board Member. The Board member is an appointed member of the Board, which operates under the Executive branch of Indiana state government and is a special state appointee for purposes of the Code of Ethics (Code). The Board member has recently been approached by Noble Education Initiative (NEI) about a possible employment opportunity with NEI.

The Board is composed of eleven members, including the Superintendent of Public Instruction, and it oversees K-12 education policymaking in the State. Pursuant to IC 20-19-2, the Board's responsibilities include authorizing the distribution of state education funds to local schools, adopting rules to implement various programs and requirements, determining a school's P.L. 221 performance and improvement category designation, accrediting public and nonpublic schools, and implementing interventions to improve school performance. In addition, IC 20-19-2-14 explains that "the state board shall do the following: (1) establish the educational goals for the state, developing standards and objectives for local school corporations; (2) assess the attainment of the established goals; (3) assure compliance with established standards and objectives; (4) coordinate with the commission for higher education (IC 21-18-1) and the department of workforce development (IC 22-4.1-2) to develop entrepreneurship education programs for elementary and secondary education, higher education, and individuals in the work force; (5) make recommendations to the governor and general assembly concerning the educational needs of the state, including financial needs; (6) provide for reviews to ensure the validity and reliability of the ISTEP program." The Board is not responsible for teacher licensing matters because IC 20-28-2-1 vests the Indiana Department of Education (IDOE) with "sole authority and responsibility for governing teacher education and teacher licensing matters, including professional development."

The Board is responsible for intervening in Indiana's lowest performing schools, and the Board may authorize the State to intervene in a school to improve a school's performance. One intervention the Board may prescribe is to assign an operator to manage and operate a school to

improve school performance. As a result, IDOE enters into contracts with private entities that the Board approves.

In August 2011, the Board ordered the State to intervene in a number of chronically failing schools, which included three Indianapolis schools (the Turnaround Academies). The Board directed IDOE to contract with Charter Schools USA (CSUSA) to serve as the operator, and the Board voted to approve the requisite contracts to accomplish the intervention. The Board member was not a Board member at the time of the initial intervention, but the Board member did vote to reaffirm the intervention status of the Turnaround Academies at the April 15, 2016 Board meeting. During subsequent Board meetings, the Board member voted to approve the CSUSA contract extensions for the Turnaround Academies.

The Board is also responsible for determining the amounts of state tuition support that are necessary to fund the Turnaround Academies. Except as provided by IC 20-31-9.5-3(c), the manner or methodology by which the Board makes this determination is not otherwise prescribed. Thus, based on IDOE's recommendation, the state tuition support is calculated by utilizing the current child count as the child count multiplier. The Board votes to approve the state tuition support on a biannual basis. The Board, including the Board member, most recently voted to approve funding for the Turnaround Academies on June 7, 2017, and the Board will vote again in December.

NEI is a Delaware not-for-profit company that does business in Florida and other states across the country. NEI provides a wide range of services including leadership, curriculum, career-tech program development, classroom and grant management, data analysis, auditing/evaluation, eight step process implementation, and full school operations. NEI's mission statement states, "our mission is to create a collaborative group of professionals who will boldly rethink education, making success attainable for all students, while preparing the next generation to solve the challenges of tomorrow." NEI contracts with CSUSA to provide services as a subcontractor for CSUSA for its schools in seven states including Indiana. CSUSA is owned and operated by the spouse of NEI's owner; however, neither spouse has an ownership interest or a role in the management of the other spouse's business. Moreover, there is no parent-subsidary relationship between CSUSA and NEI. NEI's main office is in Florida, but it maintains a regional office at one of the Turnaround Academies. Although NEI has other work bids circulating, its primary client is CSUSA, with NEI performing the majority of its work in CSUSA schools throughout the country.

NEI performs day-to-day operations for the Turnaround Academies that CSUSA operates. This includes providing students with instructional rigor, managing employees within the schools, and general budget oversight. Though NEI performs the day-to-day operations, CSUSA provides administrative, accounting, budgeting, purchasing, and financial support. Further, CSUSA maintains ultimate authority to accept or deny NEI recommendations regarding the operations of the Turnaround Academies.

The General Counsel and Ethics Officer explained that the Board member's potential responsibilities with NEI are not specific to the Turnaround Academies or Indiana. Instead, the Board member would be responsible for educator recruitment and professional development for

NEI's nationwide operations. The Board member's leadership position would be limited to educator recruitment and professional development, and he would not have a management role regarding NEI as an organization. Further, he would not be responsible for soliciting business on behalf of NEI. The General Counsel and Ethics Officer provided a more detailed job description for the Board member's potential position as part of his request.

On November 1, 2017, the General Counsel and Ethics Officer requested an informal advisory opinion on behalf of the Board member from the Indiana Office of Inspector General (OIG). The informal advisory opinion stated that the Board member should seek a Formal Advisory Opinion regarding the scope of the screen that would need to be implemented when any potential conflict of interests arose for the Board member under IC 4-2-6-9. The General Counsel and Ethics Officer provided a proposed screening process for the Commission's review prior to the meeting at which this request was considered.

The proposed screening process is as follows:

To address any potential conflicts that may arise due to the Board member's affiliation with NEI and the Board, and to ensure compliance with the conflict of interest laws, the Board member shall notify his appointing authority of his NEI employment. Further, the Board's Ethics Officer has established the following procedures to screen the Board member from all involvement with issues relating to CSUSA and NEI:

1. The Board's Ethics Officer shall monitor the Board member's involvement in any matter involving CSUSA or NEI to ensure that the screening procedures are followed.
2. If any matter regarding CSUSA, including CSUSA's current contract, is presented to the Board for a vote or decision, the Board member will recuse himself from the vote and discussion, as well as submit an "Ethics Disclosure Statement" to the OIG.
3. If any matter regarding NEI is presented to the Board for a vote or decision, the Board member will recuse himself from the vote and discussion, as well as submit an "Ethics Disclosure Statement" to the OIG.
4. The Board member will not be permitted access to any confidential information concerning CSUSA or NEI without the written approval of the Board's Ethics Officer.
5. Board staff will screen the Board member from any and all involvement in matters involving CSUSA and NEI; further Board staff refrain from any discussion in the Board member's presence that might be related to matters involving CSUSA or NEI.
6. The involvement of the Board member on the Board and employment with NEI shall not serve as an endorsement by the Board of NEI or CSUSA.
7. The Board's Ethics Officer will provide written notice to the OIG anytime the screening procedures are implemented.

8. These screening procedures shall remain in place for the duration of the Board member's employment with NEI and his service as a Board member.

ISSUE

- 1) Would a potential conflict of interests arise for the Board member under IC 4-2-6-9 given his position on the State Board of Education and his prospective employment with NEI?
- 2) If so, would the proposed screening process provided by the SBOE Ethics Officer satisfy the requirements set forth in IC 4-2-6-9(b) and prevent the Board member from having conflict of interests in violation of IC 4-2-6-9?

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.

ANALYSIS

Conflict of interests - decisions and votes

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

- (1) Himself;
- (2) A member of his immediate family;
- (3) A business organization in which he is serving as an officer, a director, a member, a trustee, a partner, or an employee; or
- (4) Any person or organization with whom he is negotiating or has an arrangement concerning prospective employment.

“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.

Employment negotiations between the Board member and NEI have begun; therefore, the Board member is prohibited from participating in any matter related to a decision or vote in which NEI has a financial interest. Based on the information provided, NEI subcontracts with CSUSA, who has the contract that was approved by the Board, with IDOE to serve as an operator providing intervention services to a number of failing schools in the State. As part of their subcontract, NEI provides services to schools in Indiana, specifically in performing day-to-day operations for the Turnaround Academies that CSUSA operates. Therefore, decisions or votes that directly target the Turnaround Academies, CSUSA, or NEI and which impact NEI's financial interests would trigger this rule.

Accordingly, the Commission finds that the Board member would have a potential conflict of interests if he was to participate in decisions or votes, or matters related to such decisions and votes, that would directly affect NEI or CSUSA. IC 4-2-6-9(b) requires that an employee who

identifies a potential conflict of interests notify their ethics officer and appointing authority and seek an advisory opinion from the Commission or file a written disclosure statement.

The Ethics Officer for SBOE and the Board member have requested this formal advisory opinion, and the Ethics Officer has proposed the following procedures to screen the Board member from all involvement in issues relating to CSUSA and NEI:

1. The Board's Ethics Officer shall monitor the Board member's involvement in any matter involving CSUSA or NEI to ensure that the screening procedures are followed.
2. If any matter regarding CSUSA, including CSUSA's current contract, is presented to the Board for a vote or decision, the Board member will recuse himself from the vote and discussion, as well as submit an "Ethics Disclosure Statement" to the OIG.
3. If any matter regarding NEI is presented to the Board for a vote or decision, the Board member will recuse himself from the vote and discussion, as well as submit an "Ethics Disclosure Statement" to the OIG.
4. The Board member will not be permitted access to any confidential information concerning CSUSA or NEI without the written approval of the Board's Ethics Officer.
5. Board staff will screen the Board member from any and all involvement in matters involving CSUSA and NEI; further Board staff refrain from any discussion in the Board member's presence that might be related to matters involving CSUSA or NEI.
6. The involvement of the Board member on the Board and employment with NEI shall not serve as an endorsement by the Board of NEI or CSUSA.
7. The Board's Ethics Officer will provide written notice to the OIG anytime the screening procedures are implemented.
8. These screening procedures shall remain in place for the duration of the Board member's employment with NEI and his service as a Board member.

The Commission finds that this proposed screen should be approved with some added conditions. These conditions are as follows:

1. The Board member shall notify his appointing authority, Indiana House Speaker, of the Board member's employment opportunity with NEI and the Commission's formal advisory opinion;
2. The Board member and the General Counsel and Ethics Officer shall notify the members of the SBOE of the Board member's employment opportunity with NEI and the Commission's formal advisory opinion; and

3. General Counsel and Ethics Officer for the SBOE and his successors to the position shall make serious efforts to ensure the screening procedures submitted to and approved by the Commission remain in place and are observed and practiced as long as the Board member remains on the SBOE.

The Commission finds the Board member's and SBOE's strict adherence to the proposed screen and added conditions would prevent the Board member from having a conflict of interest under IC 4-2-6-9.

CONCLUSION

Subject to the foregoing analysis, the Commission finds that the Board member would have a potential conflict of interests under IC 4-2-6-9 if he were to participate in decisions or votes, or matters related to such decisions and votes in matters in which his prospective employer, NEI, or the company through which NEI is serving as a subcontractor, CSUSA, would have a direct financial interest in the outcome of the matter. The Commission further finds that the screening process proposed by SBOE is appropriate so long as it is revised to include the additional conditions imposed by the Commission including notification of the Board member's appointing authority and fellow SBOE members, and due diligence on the part of the SBOE Ethics Officer to ensure the screening procedures are followed for as long as the Board member remains a member of the SBOE.

Respectfully Submitted,

Jennifer Cooper
Ethics Director