

OHIO ETHICS COMMISSION

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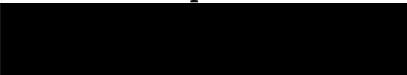


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David E. Freel, *Executive Director*

May 25, 2005

Informal Opinion 2005-INF-0525

Kimberly C. Anderson, Chief Legal Counsel
Ohio Department of Mental Retardation
and Developmental Disabilities


Dear Ms. Anderson:

In a letter received by the Ohio Ethics Commission on February 28, 2005, you have requested an advisory opinion concerning employees of the Ohio Department of Mental Retardation and Developmental Disabilities (Department) who currently work at the Springview and Apple Creek Developmental Centers. The Commission commends the Department for seeking an advisory opinion in this matter.

As you explain, Governor Taft has adopted the Developmental Center Closure Commission's recommendation for the closure of these developmental centers. Further, the Governor has encouraged the Department to retrain staff to provide services to disabled individuals in the community. The Department intends to train employees at the affected centers to become certified providers for individuals with mental retardation and developmental disabilities. The Department is seeking guidance from the Ohio Ethics Commission on the parameters of employee training and the ability of former Department employees to become private providers of services certified by the Department.

Brief Answer

As explained more fully below, in light of the unique and specific facts presented, the Ethics Law does not prohibit Department employees who work at the closing Developmental Centers from being retrained to become providers of services to individuals with mental retardation and developmental disabilities, or from soliciting or accepting employment with contract agencies that will provide these services, within the protections against individual conflicts described in this opinion. The Department should make sure it sets up an oversight process, including some independent review of any complaints raised, to assure that Department employees comply with these protections.

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Further, because the Revolving Door statute provides an exception, the law does not prohibit Department employees who work at the closing Developmental Centers from representing individuals with disabilities before the Department or other public agencies after the Department employees leave their public positions after the closure of these Centers.

Facts

In your letter to the Ethics Commission, you explained that the Department operates twelve developmental centers for the care and treatment of individuals with mental retardation and developmental disabilities, and certifies and regulates private providers of services to such individuals. The Department certifies providers of supported living services and Medicaid waiver services. The Department also regulates private providers through the licensure of facilities and through provider compliance reviews of non-licensed providers.

Over the next fifteen months, two of the developmental centers operated by the Department as intermediate care facilities for the mentally retarded (ICF/MR) will be closed. The Springview Developmental Center will be closed on July 1, 2005, and the Apple Creek Developmental Center will be closed on July 1, 2006.

You explain that these two ICF/MR receive approximately 58% of their funding from the federal Medicaid program and the remainder from the Department. You state that an ICF/MR uses a team approach for providing services to individuals with mental retardation and developmental disabilities. The team meets at least annually and develops an Individual Plan to address each resident's individual service needs. You explain that, for individuals residing at Springview and Apple Creek Developmental Centers, the team will address all issues regarding the individual's relocation to another developmental center or to a licensed facility or supported living placement.

You indicate that most individuals currently residing at Apple Creek and Springview will be moving to some type of Medicaid-funded setting. Individuals selecting a placement funded by the Individual Options Waiver will receive a list of qualified providers from the county board of mental retardation and developmental disabilities where the individual will reside. The county board may use funds that the Department distributes to the county boards to pay the nonfederal share of the services.

You request an advisory opinion from the Ohio Ethics Commission addressing whether current or former employees of Springview or Apple Creek may work for established licensed or certified agency providers or obtain certification as either agency or individual providers and start their own provider businesses. You also request guidance from the Ethics Commission regarding the Department-sponsored training of employees at Springview and Apple Creek.

Conflict of Interest Prohibitions—R.C. 102.03(D) and (E)

Your questions raise issues under the conflict of interest laws, set forth in R.C. 102.03(D) and (E), which provide:

- (D) No public official or employee shall use or authorize the use of the authority or influence of office or employment to secure anything of value or the promise or offer of anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.
- (E) No public official or employee shall solicit or accept anything of value that is of such a character as to manifest a substantial and improper influence upon the public official or employee with respect to that person's duties.

A Department employee is a "public official or employee," as that term is defined in R.C. 102.01(B) and (C), and is subject to the prohibitions of R.C. 102.03(D) and (E). Ohio Ethics Commission Advisory Opinion No. 84-009.

The term "anything of value" is defined for purposes of R.C. 102.03 in R.C. 1.03 to include money, the promise of future employment, and every other thing of value. R.C. 1.03, 102.01(G); Adv. Ops. No. 82-002 and 89-003. The promise of future employment offered by private service providers to Department employees would constitute a thing of value for purposes of R.C. 102.03(D) and (E).

The Ethics Law does not prohibit a public official or employee from engaging in private employment or business activity, provided that there is neither a conflict of interest between his or her public duties and private financial interests nor a misuse of the authority or influence of his or her public office or employment. Adv. Op. No. 96-004. Whenever private employment or business activity is not prohibited, the Ethics Law imposes general limitations on all public officials and employees who engage in private employment or business activity.

Prohibitions Imposed By R.C. 102.03(D)

R.C. 102.03(D) prohibits a public employee from using the authority or influence of his or her position to secure anything of value for the employee, a family member, a business associate, or others where there is a conflict of interest. Adv. Ops. No. 79-002, 80-004, and 89-006. The Ethics Commission has determined that, under certain circumstances, the public interest could be adversely affected when a public official or employee seeks future employment as a result of his or her use of, or failure to exercise, his or her official authority, or if the receipt of compensation could impair the performance of his or her public duties. Adv. Op. No. 96-004.

Prohibitions Imposed By R.C. 102.03(E)

R.C. 102.03(E) prohibits a public official or employee from soliciting or accepting anything of value that would have an improper influence upon him or her with respect to his or her duties. Unlike R.C. 102.03(D), which prohibits a public official or employee from using the authority or influence of his or her office to secure a thing of value, R.C. 102.03(E) prohibits a public official or employee from merely soliciting or accepting an improper thing of value even if he or she does not use his or her official authority or influence to secure it. Adv. Op. No. 90-004. As noted above, the promise of future employment and any compensation received in connection with a private business are within the definition of "anything of value" for purposes of the conflict of interest law.

The Ethics Commission has determined that the relationship between a public official or employee and the source of the thing of value determines whether the receipt of the thing of substantial value may improperly influence the public official or employee with respect to his or her official duties. Adv. Ops. No. 86-011 and 92-015. Generally, R.C. 102.03(E) prohibits a public official or employee from soliciting or accepting employment or future business opportunities from any party that is interested in matters before, regulated by, or doing or seeking to do business with his or her own public agency. Adv. Op. No. 83-007. Agencies providing services to the Department are doing business with the Department. A person with mental retardation or developmental disabilities who is receiving services from the Department is interested in matters before the Department. The family members and guardians of persons with mental retardation or developmental disabilities who are receiving services from the Department are also interested in matters before the Department.

Relevant Commission Precedent

In Advisory Opinion No. 84-009, the Commission considered an issue related to the one you have raised. In that opinion, the Commission was asked whether the Ethics Law prohibits an employee of the Department, working at a developmental center, from accepting employment with a private corporation that provides services (the operation of group homes) for the Department. The Commission concluded that R.C. 102.03(D), as it read prior to amendment in 1986, prohibited a Department employee from "serving as an employee of, or consultant to, a corporation that operates group homes under contract with the Department to provide residential services in the community for clients under the Department's jurisdiction." After 1986, when R.C. 102.03(D) was amended, and R.C. 102.03(E) was enacted, the Commission has reached the same conclusion in other employment situations. Adv. Op. No. 96-004.

While there are similarities between the facts in the situation considered in Advisory Opinion No. 84-009 and the situation you have presented, there are also very notable differences. The Commission has explained that application of the prohibitions in the Ethics Law is dependent upon the facts and circumstances of each situation. Adv. Op. No. 87-008.

In this situation, the individuals with mental retardation and developmental disabilities who are residents of Springview and Apple Creek *will no longer be able to receive services* from those ICF/MR, as the centers will be closed. It is in the state's interest and the best interest of individuals who had been residents of the centers to receive the needed level of care upon relocation either to another developmental center, another licensed facility, or a supported living placement. You note in your request that, in many cases, close ties have developed between direct care staff members at these centers and the families and guardians of center residents because of the routine and continuous interactions among the staff members, families, and residents. The Department and the state have an interest in ensuring that there is continuity of care for former residents as they move into other care settings. Further, the Governor and the Commission on Developmental Center Closure have encouraged the Department to retrain Department staff to provide services to these individuals. In contrast to the facts considered in Advisory Opinion No. 84-009, Department employees who are retrained to become certified providers will not have a continuing obligation to the public as employees of the Department.

Based on these facts and circumstances, the Commission determines that the Department employees at Springview and Apple Creek Developmental Centers who will be participating in retraining efforts sponsored by the Department and becoming certified care providers for former residents of the two ICF/MR are not soliciting, accepting, or using their positions to secure anything of value that are of such a character as to manifest a substantial and improper influence upon them in the performance of their duties. R.C. 102.03(D) and (E) also do not prohibit the Department employees from soliciting or accepting employment with existing licensed or certified agency providers in the communities they serve, because, under these circumstances, the offers of employment are not things of value that are of such character as to manifest a substantial and improper influence upon the employees. However, it must be clear that the Department employees will not begin to work for the agency providers until they are separated from state service.

However, it must be clear that fundamental protections against conflicts of interest are observed to assure that Department employees do not use their public positions at the Department, including their close relationships with the served population and their family members or guardians, to secure future benefits for themselves. In other words, if a Department employee has made the decision that he or she will be retrained to become a certified care provider, or will work for an existing residential or supported living facility, the Department employee is prohibited from using his or her position on an individual service team to encourage a resident or the resident's family or guardian to select a placement option with the employee or his or her future employer. Please note, in order to assure no conflict of interest occurs, that the Department must make sure it sets up an oversight process, including some independent review of any complaints raised, to assure that this does not occur.

The law does not prohibit a resident, or the resident's family or guardian, from selecting a placement with a Department employee who will be a certified provider, or with an established licensed or certified agency provider with which a Department employee will accept future

employment. As you note, a basic tenet of Medicaid law is that individuals are entitled to free choice of providers. In essence, the Ethics Law, which prohibits a Department employee from using his or her unique access to, and relationship with, the served population to secure clients for his or her own agency, or an agency with whom he or she will work after leaving the Department, supports this freedom of choice.¹

The Revolving Door Prohibition—R.C. 102.03(A)

Your question also implicates Division (A) of Section 102.03 of the Revised Code, the “Revolving Door” prohibition of the Ohio Ethics Law. R.C. 102.03(A)(1) imposes restrictions upon the ability of former public officials and employees to represent a client or act in a representative capacity for any person after leaving public service. R.C. 102.03(A)(1) provides:

No present or former public official or employee shall, during public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which the public official or employee personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion.

The Franklin County Court of Appeals upheld the “Revolving Door” prohibition as constitutional. State v. Nipps, 66 Ohio App.2d 17 (1979).

R.C. 102.01(B) and (C) define the term “public official or employee” to include any person who is elected or appointed to an office or is an employee of a department or other instrumentality of the state. Employees of the Department are subject to the statutory prohibitions of R.C. 102.03. See Adv. Op. No. 89-013.

Unless there is an applicable exception, R.C. 102.03(A) would prohibit Department employees, for one year after they leave employment with the Department, from representing an individual with mental retardation or developmental disabilities, or new employers or clients, on any matter in which they participated as Department employees through decision, recommendation, investigation, or other substantial exercise of administrative discretion. See Adv. Op. No. 91-009. There is, however, a relevant exception to this prohibition, set forth in R.C. 102.03(A)(6).

¹ R.C. 2921.42(A)(3), which prohibits a public official, during his or her public service and for one year thereafter, from profiting from a public contract authorized by the official or a committee of which he or she is a member, would also prohibit this activity. R.C. 2921.42(A)(3) prohibits an employee of a Department placement center from authorizing a placement, and the attendant funds, if he or she will have an interest in the placement within one year of his or her service to the state.

R.C. 102.03(A)(6) provides:

Nothing contained in division (A) of this section shall prohibit, during such period, a former public official or employee from being retained or employed to represent, assist, or act in a representative capacity for the public agency by which the public official or employee was employed or on which the public official or employee served. (Emphasis added).

The Ethics Commission has explained that the exemption of R.C. 102.03(A)(6) is available to a former public official or employee only with respect to the official's or employee's former public agency. Adv. Ops. No. 91-005 and 91-009. As you have explained, Governor Taft has adopted the recommendation for the closure of the Springview and Apple Creek Developmental Centers and has encouraged the Department to retrain staff to provide services to disabled individuals in the community. The issue is whether the services provided by the Department employees, after they leave public employment, would fall within the exception provided by R.C. 102.03(A)(6).

Under the facts presented, the interests of the Department are served, and there is no conflict of interest or realization of personal gain at public expense, if a former Department employee represents, assists, or acts in a representative capacity for individuals with mental retardation or developmental disabilities at the Governor's recommendation. Therefore, the exception in R.C. 102.03(A)(6) applies and employees of the Department are not prohibited from representing served individuals or the family members or guardians of these individuals before the Department or other public agencies on matters in which the employees participated while employed at the Department. However, while they remain employed by the Department, the employees must adhere to the conflict of interest restrictions described above.

Conclusion

As explained above, in light of the unique facts presented in this situation, the Ethics Law does not prohibit Department employees who work at the closing Developmental Centers from being retrained to become providers of services to individuals with mental retardation and developmental disabilities, or from soliciting or accepting employment with contract agencies that will provide these services, within the protections against individual conflicts described in this opinion. The Department should make sure it sets up an oversight process, including some independent review of any complaints raised, to assure that Department employees comply with these protections.

Further, because the Revolving Door statute provides an exception, the law does not prohibit Department employees who work at the closing Developmental Centers from representing individuals with disabilities before the Department or other public agencies after the Department employees leave their public positions after the closure of these Centers.

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The Ohio Ethics Commission approved this informal advisory opinion at its meeting on April 22, 2005. Once again, the Commission commends the Department for requesting guidance in this matter.

The opinion is based on the facts presented. It is limited to questions arising under Chapter 102. and Sections 2921.42 and 2921.43 of the Revised Code and does not purport to interpret other laws or rules. If you have any questions or desire additional information, please feel free to contact this Office again.

Sincerely,

A handwritten signature in black ink, appearing to read "Jennifer A. Hardin". The signature is fluid and cursive, with the first name being the most prominent.

Jennifer A. Hardin
Chief Advisory Attorney