

# New York State Ethics Commission

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**Advisory Opinion No. 91-11:** Application of Public Officers Law §§73(4)(a) and 74 to employees of OMRDD on approved leaves of absence who serve as certified family care providers.

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## Introduction

The following advisory opinion is issued in response to an inquiry from the New York State Office of Mental Retardation and Developmental Disabilities ("OMRDD") concerning the application of Public Officers Law §§73 and 74 to the circumstance where OMRDD employees, on approved leaves of absence from the agency, serve as certified family care providers in the employees' homes for persons with developmental disabilities. Public Officers Law §73(4)(a) precludes State employees from selling goods or services valued in excess of \$25 to any State agency unless such goods or services are provided pursuant to an award or contract let after public notice and competitive bidding. Section 74 contains rules with respect to conflicts of interest and standards clarifying that rule.

Pursuant to Executive Law §94(15), the State Ethics Commission ("Commission") concludes that it would be a violation of Public Officers Law §§73(4)(a) and 74 for OMRDD employees on approved leaves of absence to serve as certified family care providers under the agency's current proposal. The Commission would reconsider the propriety of the OMRDD family care program if modifications are made to the proposal consistent with the conditions set forth in this opinion.

## Background

The Commissioner of OMRDD regulates and assures the quality of services provided within New York to its mentally retarded and developmentally disabled citizens.<sup>(1)</sup> One of the agency's programs to serve these individuals is family care homes which are subject to OMRDD certification, visitation and inspection. Individuals authorized under the program provide residential services to OMRDD clients in non-institutional settings. These clients are enrolled in day programs at OMRDD or OMRDD licensed facilities, which enables a family care provider to be regularly employed outside the home during the daytime, if he or she chooses.

OMRDD regulations concerning family care homes for developmentally disabled individuals require that providers obtain an operating certificate issued by the Commissioner and operate a family care home in accordance with the certificate's terms and OMRDD regulations.<sup>(2)</sup> Any person age 21 or older is eligible to apply for a certificate to operate a family care home; for profit corporations are not eligible. An operating certificate shall not be issued "unless there is satisfaction as to: (i) the need for the family care home; (ii) the character, competence and standing in the community of the person and/or entity responsible for operating the family care home; (iii) the adequacy of the financial resources of the applicant and the stability of the source

of future revenues; . . ."<sup>(3)</sup> Under the family home care system in place, OMRDD employees have not been eligible to become certified as family care providers.

OMRDD is now considering the development of a Specialized Home Service Program ("Program") which will allow OMRDD employees to serve as family care providers. Under this program, OMRDD employees will take approved leaves of absence without pay from State service and, during this absence, become certified as family care providers and enter into contracts with OMRDD for the care of OMRDD clients in the employees' homes. The employees on leave, as providers, will receive a reimbursement rate for services provided and will function exactly like any other family care provider. It is contemplated by the agency that each qualifying employee would receive only one placement.

In addition to the reimbursement rate, which generally is in the form of Social Security Income ("SSI") or Medicaid payments not under the administration of OMRDD, the agency anticipates paying an additional sum to participating OMRDD employees. OMRDD refers to this sum as a "stipend." Stipends are not now paid to current family care providers nor would they, under this proposal, be available to non-OMRDD employee family care providers.

The proposed stipend, available only to participating OMRDD employees, would vary (from about \$3,700 to \$13,000 per annum) depending on the location in the State where the family care services are to be provided and the amount of reimbursement funds available to the provider from non-OMRDD sources. From all sources, the participating OMRDD employee will receive approximately \$20,000 annually to care for one client in his or her home, not to exceed his or her OMRDD salary.<sup>(4)</sup>

Currently, treatment teams of OMRDD employees at local developmental disabilities services offices ("DDSO") are assigned to each client and decide when a client can be placed. The teams match the client with an appropriate family care provider in the locale, considering any special needs of the client and any special skills of the provider. The agency states that team selection allows the best matches to be made, since the DDSO employees are familiar with both the providers and the clients in need of placements. In the case of this new program, the treatment teams would choose from non-employee/providers and, for the first time, OMRDD employee/providers.

OMRDD takes the position that current family care providers are independent contractors, even though such providers are not required to sign contracts with the agency because no direct funds flow from OMRDD to the family care provider (with the exception of some dedicated OMRDD funds used for special events). The reimbursement funds come from entitlement programs not administered by OMRDD. In the case of the proposed program, OMRDD has developed a contract for participating OMRDD employees to sign with the agency, since OMRDD will directly provide the participating employee with a stipend out of OMRDD funds. These contracts would have to be approved by the Office of the State Comptroller.<sup>(5)</sup>

## Discussion

The Public Officers Law restricts certain business or professional activities of State officers and employees and prohibits any State officer or employee from engaging in acts that have the appearance of a conflict of interest. In Advisory Opinion No. 90-1, the Commission concluded that a State employee on leave without pay is still in State service for the purpose of Public Officers Law §73 and remains so until the employee has terminated employment with the State or has been terminated from such employment by appropriate State action.<sup>(6)</sup> Therefore, OMRDD employees on approved leaves of absence are subject to all the provisions of Public Officers Law §§73 and 74 with the exception of the post-employment restrictions of §73(8).<sup>(7)</sup>

Pertinent to the OMRDD proposal is the application of Public Officers Law §73(4)(a) which provides:

No . . . state officer or employee . . . shall

(i) sell any goods or services having a value in excess of twenty-five dollars to any state agency . . . unless such goods or services are provided pursuant to an award or contract after public notice and competitive bidding.

The proposed program would cause participating employees to "sell" home care services to OMRDD valued in excess of \$25 in the absence of public notice and competitive bidding, in violation of Public Officers Law §73(4)(a).<sup>(8)</sup>

In reaching its decision, the Commission finds useful opinions issued by the Board of Ethics of the City of New York ("Board") which permit certain City employees to serve as foster parents. These cases carved a limited exception from New York City Charter ("Charter") provisions similar to those contained in the Public Officers Law, that would prohibit the arrangements.<sup>(9)</sup>

In Opinion No. 672, the Human Resources Administration for the City of New York ("HRA") requested a determination from the Board whether HRA employees may be foster parents. Because foster parents receive no compensation, except reimbursement for the living expenses of their foster children, the Board determined that being a foster parent was not "doing business" with the City or any City agency, and therefore did not contravene the relevant Charter provision. The Board also noted that, in most cases, it was a private agency that made foster care placements and not HRA. However, the Board prohibited employees of the HRA division (Special Services for Children or "SSC") who specifically deal with foster care matters from being foster parents because there would be a prohibited financial interest in conflict with the performance of their official duties.

In Opinion No. 677, SSC, emphasizing the urgent need for foster parents for "AIDS Babies" and "Boarder Babies" and the fact that SSC has thousands of employees who might be foster parents, asked the Board to reconsider its prior determination with respect to SSC employees. The Board recognized that certain employees of divisions within SSC could serve as foster parents under certain circumstances. In sum, the Board stated that SSC employees should only take foster children placed by private agencies, that SSC employees should be subject to the same standards

imposed by the private agencies on other foster parents, and that no SSC employee should deal in an official capacity with a foster care agency if the employee had a foster child from that agency.

Finally, in Opinion No. 677A, the Division of Child Welfare Administration (formerly SSC), requested that the Board modify its prior Opinions to permit a larger class of SSC employees to be eligible to become foster parents due to "unprecedented demands on the City's foster care system." The Board modified its prior opinions, stating that all clerical and administrative support staff at SSC's Central Administration and Emergency Children's Services units, but not employees with direct official dealings with foster care agencies, may be foster parents.

In reviewing these opinions, the Commission identified three conditions the Board required to allow City employees, and particularly SSC employees, to become foster parents:

1. that HRA employees provided a potential pool of eligible foster parents;
2. that foster parents receive no compensation other than the prescribed allowance for the children's living expenses; and
3. that no City agency employee who has direct official dealings with foster care agencies is eligible to become a foster parent.

The Commission agrees with these standards and has applied similar conditions to its analysis of whether OMRDD's proposed program complies with the provisions and spirit of Public Officers Law §§73(4)(a) and 74.<sup>(10)</sup>

OMRDD has satisfied the first condition. The agency has sufficiently indicated that many OMRDD employees have developed special relationships with particular clients and that it can best serve the clients' needs if clients are placed with providers familiar with their cases.

The proposed program does not meet the second condition because OMRDD proposes to pay "stipends" to employee/providers. That is, OMRDD employees would be "selling goods or services" to their State agency without public notice and competitive bidding, in violation of Public Officers Law §73(4)(a). Furthermore, as presently proposed, the program appears to be inherently unfair to non-employees/providers ineligible for OMRDD "stipends," in violation of Public Officers Law §74. For no discernible reason the plan would allow the OMRDD employee the additional benefit of a stipend not available to a non-employee. If this stipend is offered in consideration for extra service these providers will render, the agency has not so indicated. As current providers, this new category of provider would also be allowed to secure outside employment, so one cannot construe the stipend is in payment for the provider devoting all his/her time to the client.

To satisfy the third condition, the Commission determines that certain OMRDD employees should not participate in the program even during their approved leave of absence periods. Any OMRDD employee who, within the year prior to taking a leave of absence, was directly involved in placing clients with, certifying, inspecting or supervising family care providers is not eligible to participate in the program.

If a participating employee/provider decides to leave the employ of OMRDD, the former OMRDD employee must sever his participation in the program. Once the employment relationship with the agency is terminated, the former employee becomes fully subject to the revolving door provisions of Public Officers Law §73(8) and his participation in the program would constitute an "appearance" or "rendition of services" in a matter that is before his or her former agency within two years of termination from State service.

Finally, the Commission hopes that the conditions set forth in this opinion will not discourage OMRDD from pursuing development of a program to facilitate the commendable policy of placing individuals with developmental disabilities in mainstream residential settings.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the person who requested it and who acted in good faith, unless material facts were omitted or misstated by the person in the request for opinion.

All concur:

Joseph M. Bress, Chair

Norman Lamm

Angelo A. Costanza

Donald A. Odell, Members

Dated: July 29, 1991

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## Endnotes

1. See Mental Hygiene Law §§16.00, 16.05, 16.23.
2. See 14 NYCRR 687.
3. The complete requirements for certification as a family care provider are contained in 14 NYCRR 687.4(b).
4. The following examples have been supplied by the agency:

In upstate New York, a provider would normally receive \$6,666/year in SSI funds for reimbursement to care for a developmentally disabled person in the home. To ensure that the provider receives the full \$20,000 allotment, OMRDD would directly provide a stipend of \$13,334 to the family care provider.

In New York City, a provider caring for a developmentally disabled person requiring increased medical attention would receive joint SSI and Medicaid reimbursement of \$16,200. In this case, OMRDD would directly provide a stipend of \$3,800 to the family care provider.

5. The Commission has learned that it is the policy of the Comptroller to scrutinize any State contract awarded to a State employee without public notice and competitive bidding before approval. According to OMRDD, the agency has not yet submitted a proposed contract for the Comptroller's approval.

6. This conclusion is consistent with other provisions of the law that treat employees on leave without pay as if they were still in State service. For example, Civil Service Law §52 allows any employee on leave of absence from his position to compete in a promotional examination for which he would otherwise be eligible on the basis of his actual service before commencement of the leave of absence. In addition, an employee on leave of absence is permitted to continue health insurance coverage in accordance with 4 NYCRR 73.2.

7. Public Officers Law §73(8) bars for two years former State officers and employees from appearing or practicing before the former State agency or receiving compensation for services rendered on a case, proceeding, application or other matter before the former agency. The law also bars for life a former State officer or employee from appearing, practicing or receiving compensation for services rendered before *any* State agency in relation to a case, proceeding, application or transaction with respect to which such person was directly concerned and in which he personally participated during State service, or which was under his or her active consideration. Clearly, OMRDD employees who actually leave State service (as opposed to those taking leaves of absence) could not, for two years subsequent to termination, serve as a family care provider as those services would require an appearance and rendering of services on a matter (the care of the agency's clients) before OMRDD.

8. Public Officers Law §73(7) would also be implicated were a participating OMRDD employee to appear before the agency to request additional reimbursement or other funding. Under the facts of the present inquiry, the reimbursement funds come exclusively from non-OMRDD sources administered by local agencies.

9. The particular Charter provisions that were at issue were the following:

§2604(b): No . . . employee of the city or any city agency:

(1) shall be or become interested directly or indirectly in any manner whatsoever except by operation of law in any business dealings with the city or any city agency; and

§2604(c): No . . . employee of the city or of any city agency, whether paid or unpaid:

(1) shall engage in any business or transaction or private employment, or shall have any financial interest, which is in conflict with the proper discharge of his official duties.

10. Specific ethical standards, contained in Public Officers Law §74(3), which are pertinent to the Commission's analysis are:

- d. No officer or employee of a state agency, member of those legislature or legislative employee should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.

....

- f. An officer or employee of a state agency, member of the legislature or legislative employee should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.