

# New York State Ethics Commission

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**Advisory Opinion No. 94-1:** Application of the post-employment restrictions of Public Officers Law §73(8) to former OMRDD employees who wish to continue service as certified family care providers after leaving State service.

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## Introduction

The following advisory opinion is issued in response to a request by Office of Mental Retardation and Developmental Disabilities ("OMRDD") Commissioner Howe before she resigned (effective September 30, 1993) that the Commission reconsider that part of [Advisory Opinion No. 91-11](#) in which the Commission held that Public Officers Law §73(8) precludes former OMRDD employees from continuing to serve as family care providers for OMRDD clients.

Pursuant to its authority under Executive Law §94(15), the Commission hereby concludes that Public Officers Law §73(8) would not be violated if those OMRDD employees who are certified as family care providers prior to their separation from State service continue to so serve after terminating their employment with the State agency.

## 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 longstanding programs to serve these individuals is family care homes which are subject to OMRDD certification, visitation and inspection. The size of the family care program has increased as OMRDD has shifted its population from institutional to residential placements.

Individuals authorized under the family care program provide residential services to OMRDD clients in non-institutional settings. These clients typically are enrolled in day treatment programs at OMRDD or OMRDD licensed facilities. This enables a family care provider to be regularly employed outside the home during the daytime, if he or she chooses.

Family care providers do not receive compensation for their service. Rather, the director of the local OMRDD disabilities service office authorizes the payment of the individual's monthly social security income to the family care provider to offset the provider's expense of boarding the OMRDD client. According to OMRDD, the average family care provider has two OMRDD clients in its home.

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 the 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>

Any individual or entity <sup>(4)</sup> requesting to be certified must submit to a home study which includes a visit from an OMRDD social worker and a fire safety officer, background checks of the individual and any other individuals residing in the home and a search of the State's child abuse registry. In most cases, the applicant is married and both spouses are listed on the operating certificate. In addition, any individual who receives an operating certificate must undergo a preliminary training requirement consisting of 48 hours of instruction. A family care provider must also undergo re-training every six months.

The certification process generally takes from four to six months but may take up to a year. According to OMRDD, only about one in four applicants is approved to be a family care provider. Because many OMRDD employees already possess the necessary training and commitment to care for individuals with developmental disabilities, OMRDD finds that its employees are generally well suited to become family care providers.

Once an operating certificate is issued to a family care provider and an individual is placed in the home, an OMRDD case manager visits the home at least once a month. The case manager also makes at least one unannounced visit annually. An OMRDD employee will also make an annual fire safety inspection of the residence. OMRDD has agency staff on 24 hour call to respond to emergency situations that can occur in the home.

Once issued, an operating certificate is good for two years at the end of which time OMRDD considers recertification by reviewing updated information about the provider's home or individuals residing with the provider, and the OMRDD case manager's monthly visit reports. OMRDD also conducts a "walk through" of the residence. OMRDD has the authority to deny a re-certification application although such denials, according to the agency, are rare.

### **Applicable Statute**

Public Officers Law §73(8) provides in relevant part:

No person who has served as a state officer or employee shall within a period of two years after the termination of such service or employment appear or practice before such state agency or receive compensation for any services rendered by such former officer or employee on behalf of any person, firm, corporation, or association in relation to any case, proceeding or application or other matter before such agency.

### **Discussion**

In [Advisory Opinion No. 91-11](#), the Commission held that current OMRDD employees on leaves of absence may serve as family care providers for agency clients without violating Public

Officers Law §73(4)(a) as long as the clients' monthly social security income received by the employees from OMRDD was for the employees' expenses in housing and maintaining the agency's clients. The Commission concluded that the transfer of the clients' social security income was not compensation to the OMRDD employees; rather any monies received were reimbursement for expenses.

The Commission also held that certain OMRDD employees, such as those designated as policymakers and those involved in the licensing and inspection of family care providers, were not eligible to serve as family care providers. The Commission cited several opinions by which the New York City Conflict of Interest Board reached a similar conclusion to permit certain New York City Department of Health and Human Services employees to become foster parents for agency clients.<sup>(5)</sup>

In a subsequent opinion, [Advisory Opinion No. 91-15](#), the Commission permitted current non-policymaking employees of the New York State Division for Youth ("DFY") to become foster parents (a program similar to family care providers) without any requirement that they take approved leaves of absences from State service. Since the issuance of Advisory Opinion Nos. [91-11](#) and [91-15](#), approximately 200 OMRDD employees, who, prior to the Commission's determinations were not permitted by OMRDD to become family care providers, have become certified pursuant to the agency's requirements and have remained current OMRDD employees. According to OMRDD, there are currently approximately 2,000 family care providers, including the 200 current OMRDD employees, who serve a population of 4,500 individuals with developmental disabilities.

Commissioner Howe petitioned the Commission to allow these OMRDD employees, should they terminate from the agency, to continue serving as family care providers. She emphasized that once a good match is established between a family care provider and an agency client, it is impractical to terminate the relationship just because the family care provider is no longer an OMRDD employee. OMRDD officials explain that its goal is for clients to become completely integrated in a family environment. This environment would be significantly harmed if former OMRDD employees must abruptly cease serving as family care providers.

Public Officers Law §73(8), generally referred to as the "revolving door" provision, sets the ground rules for what individuals may do with the knowledge, experience and contacts gained from public service after they terminate their employment with a State agency. In short, subdivision 8 of §73, bars former State officers and employees for two years after termination from appearing or practicing before their former agencies or receiving compensation for any services rendered in relation to any case, proceeding, application or other matter before such agency.

Since former OMRDD employees serving as family care providers would not be said to be "practicing" before their former State agency and because they would receive no compensation for their service (*see* [Advisory Opinion No. 91-11](#)), the remaining question is whether OMRDD's recertification of former employees or their presence at their homes when OMRDD makes site visits are appearances before OMRDD which would be barred by the law.

As evidenced by OMRDD's rules and regulations, anyone, including an OMRDD employee, who wishes to become certified as a family care provider must pass a comprehensive background check and meet all the agency's other requirements. First-time certification entails a high degree of agency review.

Re-certification, on the other hand, is much more routine for both the provider and the agency, consisting mostly of the review of the family care provider and updated information about the home. The Commission concludes that re-certification is a ministerial matter and as such is not an appearance that Public Officers Law §73(8) seeks to prohibit during the two year post-employment period.

Likewise, once an OMRDD employee has been certified as a family care provider, the Commission does not consider OMRDD's continued oversight over its clients as a prohibited appearance before the agency. In reaching this conclusion, the Commission reviewed its prior formal opinions interpreting the term "appearance". For example, in Advisory Opinion No. 91-2, the Commission found that a former State agency employee would not be "appearing" before his former agency were he asked by the former agency for certain information relating to his prior State employment and he received no compensation for providing such information. Those circumstances are similar to the facts before us here; the agency is initiating the site visits to assure program compliance, the former employee receives no compensation for being present.

Further, the Commission considered the several requirements in place to insure that OMRDD employees' participation in the family care program is free from conflicts of interest and their appearance. For instance, OMRDD employees designated as policymakers and those OMRDD employees involved in the certification and inspection of family care providers are not eligible to participate in the program, and OMRDD employees/family care providers are not permitted to receive compensation for their services.

Finally, public policy considerations support the decision to permit OMRDD family care providers to continue such service after they separate from the State agency. The Commission balanced the State's interest that the revolving door provisions be maintained and enforced with the special needs of OMRDD's clients to continue their integration with a particular family care provider, and chooses in favor of the client community.

This opinion is strictly limited to the particular program described herein. 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 or related supporting documentation.

All concur:

Joseph M. Bress, Chair

Barbara A. Black  
Robert E. Eggenschiller  
Donald A. Odell, Members

Dated: February 25, 1994

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## Endnotes

1. See Mental Hygiene Law §§16.00, 16.05 and 16.23.
2. See 14 NYCRR 635-7.4 *et. seq* and 14 NYCRR 687 *et. seq*.
3. The complete requirements for certification as a family care provider are contained in 14 NYCRR 687.4(b).
4. Not-for-profit corporations are eligible to operate family care homes. Since this opinion responds to an inquiry concerning individuals who wish to continue serving as family care providers, all further references will be to individuals.
5. The Commission has researched whether the New York City Conflict of Interest Board has addressed the issue of whether former New York City employees may serve as foster parents for clients of their former New York City agency. The New York City Charter's revolving door provision provides that "no former public servant shall, within a period of one year of termination of such person's service with the city, appear before the city agency served by such public servant." Section 2601(4) of the New York City Charter defines the term "appear" to mean "any communication, *for compensation*, other than those involving ministerial matters." (emphasis added). Therefore, as the New York City Charter prohibits only compensated appearances before one's former agency, former New York City employees can be foster parents for their former agency's clients because foster parents only receive reimbursement for their expenses and do not receive any compensation for their services.

In contrast to the New York City Charter, the Public Officers Law prohibits both compensated and uncompensated appearances before the former State agency.