

# New York State Ethics Commission

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**Advisory Opinion No.**    Application of Public Officers Law §74.  
**94-17:**

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## Introduction

The following advisory opinion is issued in response to an inquiry from [a personnel administrator] at [a Developmental Disabilities Services Office ("DDSO")], a unit of the New York State Office of Mental Retardation and Developmental Disabilities ("OMRDD"), concerning the Commission's application of Public Officers Law §74 to a [DDSO employee]. The Commission previously rendered an informal opinion in response to the inquiry from [the personnel administrator]. She has since requested a formal advisory opinion.

Pursuant to the authority vested in the New York State Ethics Commission ("Commission") by Executive Law §94(15), the Commission hereby renders its opinion that the provisions of Public Officers Law §74 apply to [the DDSO employee] and that she must choose between continuing her outside activity as a family care provider or securing a position with [the DDSO's] Family Care Division.

## Background

[The DDSO employee] is currently employed as a [ ] Developmental Aide with [the DDSO]. She is also engaged in an approved outside activity as a family care provider for an individual with developmental disabilities. As a provider, she has had one client at her home since August 1993. Her family care participation is supervised by [the DDSO's] Family Care Division.

[The DDSO employee] has applied for a vacancy in the Developmental Aide title in [the DDSO's] Family Care Division. Her duties in this title would require her to:

Help consumers obtain, retain and improve skills related to activities of daily living;

Provide transportation to medical appointments, community activities and habilitation program sites;

Provide training in performance of personal hygiene tasks, self-care tasks, household tasks, etc; and

Provide training which would enhance and maximize independent living skills such as travel training, financial management training, personal health care training, etc.

According to [the personnel administrator], if she were appointed, [the DDSO employee] would be working directly with family care providers, assisting them in the provision of services to consumers and providing recommendations on individual placements. She would also participate in ongoing team meetings where recommendations would be made regarding family care policy and placements.

The question presented to the Commission is whether [the DDSO employee] could continue as a family care provider and accept appointment to the position she is seeking.

### **Applicable Statute**

Public Officers Law §74 sets forth the Code of Ethics for State officers and employees. Section 74(2) contains the rule with respect to conflicts of interest:

No officer or employee of a state agency . . . should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

Following the rule with respect to conflicts of interest, Public Officers Law §74(3) provides standards of conduct which address not only actual but apparent conflicts of interest. Of relevance to this inquiry are the following:

. . . .

- c. No officer or employee of a state agency . . . should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.
- d. No officer or employee of a state agency . . . should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.

. . . .

- h. An officer or employee of a state agency . . . should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

. . . .

Public Officers Law §74 bars activities that create even the appearance of a conflict of interest; an actual conflict is not necessary for there to be a violation of the law.

### **Discussion**

OMRDD regulations concerning family care homes for developmentally disabled individuals require that family care 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>(1)</sup> In [Advisory Opinion No. 91-11](#), the Commission permitted OMRDD employees to become certified as family care providers for individuals subject to the agency's jurisdiction. However, the Commission established two exceptions to this general grant of permission. First, it held that Public Officers Law §74 prohibited OMRDD employees who had been designated by the agency as serving in policymaking positions from serving as family care providers because, as policymakers, these employees occupied positions of authority and significant responsibility within the agency.<sup>(2)</sup> Second, and relevant here, the Commission concluded that Public Officers Law §74 precludes OMRDD employees involved in the certification process or in the administration of the family care program from serving as such providers.

The rationale for this conclusion was that an employee should not be a private licensed provider in a program when he or she works in the division of an agency that certifies or oversees providers. The public could reasonably perceive that such an employee would receive preferential treatment from other OMRDD employees in her division with respect to certification or operational review. In addition, such an employee may be privy to confidential information, including agency policy, concerning the program, not available to other family care providers.

Applying these principles to the matter before us, the Commission concludes that [the DDSO employee] cannot become employed in [the DDSO's] Family Care Division *and* be a family care provider under that Division's jurisdiction.

### **Conclusion**

The public could reasonably perceive that [the DDSO employee], if she were to assume a position with the Family Care Division at [the DDSO], could receive preferential treatment from OMRDD as a licensed family care provider. Therefore, to avoid a violation of Public Officers Law §74, [the DDSO employee] would have to choose between continuing her outside activity as a family care provider or securing a position with the Family Care Division. She cannot do both.

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,  
Angelo A. Costanza,  
Robert E. Eggenschiller,  
Donald A. Odell, Members

Dated: September 26, 1994

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## Endnotes

1. For more background about OMRDD's family care provider program, *see* [Advisory Opinion No. 91-11](#); Mental Hygiene Law §§16.00, 16.05 and 16.23; and 14 NYCRR 687 *et seq.*
2. For a general discussion of policymaking status, *see* [Advisory Opinion No. 90-25](#).