

New York State Ethics Commission

Advisory Opinion No. 95-8: Application of Public Officers Law §73(8) and Commission's
[Advisory Opinion No. 94-15.](#)

INTRODUCTION

The following advisory opinion is issued in response to a request from [], a former employee of the New York State Office of Mental Retardation and Developmental Disabilities ("OMRDD"). [The requesting individual] asks whether [Advisory Opinion No. 94-15](#) of the State Ethics Commission ("Commission"), prohibiting former OMRDD employees from treating OMRDD patients residing in community facilities operated by OMRDD, prohibits him from providing services to such patients under an independent case manager program.

Pursuant to its authority under Executive Law §94(15), the Commission hereby renders its opinion that [the requesting individual] may provide psychological services to patients residing in OMRDD facilities who participate in the Home and Community Based Services ("HCBS") waiver program as long as the case manager is from an agency other than OMRDD and neither the former employee nor the OMRDD facility had a role in the selection of the case manager.

BACKGROUND

[The requesting individual] is a former OMRDD employee and a licensed psychologist providing clinical services to mentally retarded and developmentally disabled individuals living in the community. He asks whether he may participate in the recently established HCBS waiver program.

According to [the requesting individual], this program authorizes a resident of a group home, whether operated directly by OMRDD or licensed by the agency, to choose an independent case manager from one of several private agencies to represent him or her. The function of the HCBS case manager is to develop, implement and monitor the participant's treatment service plan. The case manager functions independently of the facility in which the client resides. Under the program, it is the responsibility of the case manager to initiate, procure and monitor the implementation of treatment services.

In the catchment area of the [] Developmental Disabilities Services Office, the geographical area in which [the requesting individual] practices, there are twenty-six agencies that provide HCBS case management services, only one of which is operated directly by OMRDD. The other twenty-five agencies are operated by private, not-for-profit voluntary agencies licensed by OMRDD.

[The requesting individual] notes that if a group home resident is represented by an independent community based HCBS case manager from an agency other than OMRDD who coordinates all treatment arrangements, and if billing is directly routed to third party insurance payors, such as Medicare or Medicaid, with OMRDD having no responsibility for the processing of or making payment, he would have no contact with anyone employed by OMRDD. He, therefore, argues that it should be permissible for a former OMRDD employee to provide clinical services to OMRDD patients under the HCBS program, even if the patient resides at an agency operated group home.

APPLICABLE LAW

Public Officers Law §73(8)(a) provides that:

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.

The above provision is broad in scope. It prohibits appearing, practicing or the rendering of services for compensation on any matter before one's former State agency for a two year period.

DISCUSSION

In [Advisory Opinion No. 94-15](#), the Commission held that former OMRDD employees could not provide clinical services to individuals residing in OMRDD facilities, as the former employees, in providing such services, would be appearing, practicing and/or rendering services for compensation in matters before their former agency during the two year post-employment period. However, in that opinion, the Commission permitted former OMRDD employees, during the two year period, to provide clinical services to individuals residing in community facilities licensed, but not operated, by OMRDD under conditions not relevant to this opinion.

The rationale for prohibiting former OMRDD employees from performing clinical services for individuals residing in OMRDD facilities was set forth as follows:

. . . . the former employees would not only be physically appearing at their former agency and interacting with OMRDD employees there, but they would be rendering services for compensation pursuant to a contract with or a referral from OMRDD. . . .

Under the HCBS waiver program, the HCBS case manager from the private sector, rather than an OMRDD employee, would initiate, procure and monitor the implementation of treatment services. Critically, the case manager functions independently of the facility in which the disabled individual resides. Without independence, the case manager would, in essence, be an extension of OMRDD, and Advisory Opinion No. 94-15 would be applicable. For purposes of this opinion, the Commission is assuming that neither [the requesting individual], either during or after his State employment, nor the facility in which the disabled individual resides had any

role in the selection of the case manager. Were either to have played a role, the Commission would not consider the manager to be truly independent.

With an independent manager, [the requesting individual], in treating an individual residing in an OMRDD operated group home, would not have contact with any employee of his former agency. In addition, OMRDD would not be involved in the billing for clinical services, as bills would be routed directly to a third party payor, such as an insurance carrier or Medicaid. Therefore, under the waiver program there is no prohibited appearance before his former agency as long as the independent case manager is not an OMRDD employee.

CONCLUSION

A former OMRDD employee may, without violating Public Officers Law §73(8)(a), provide clinical services to residents of OMRDD facilities under the HCBS waiver program as long as the case manager is from an agency other than OMRDD and neither the former employee nor the OMRDD facility had a role in the selection of the case manager.

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

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

Dated: March 7, 1995