

New York State Ethics Commission

Advisory Opinion No. 97-10: Conditions under which IBR can seek private financial assistance to support its training and education programs.

INTRODUCTION

The following advisory opinion is issued in response to a request submitted by Patricia Podgorski, Assistant Counsel in the Office of Mental Retardation and Developmental Disabilities ("OMRDD"), on behalf of the New York State Institute of Basic Research in Developmental Disabilities ("IBR"), an entity within OMRDD. She asks whether and under what conditions IBR may accept grants and other financial assistance from pharmaceutical companies and other private sector entities to support its training and education programs.

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 IBR may not accept grants or other financial support from its vendors. When one division of a corporation serves as a vendor, the entire corporation, including all of its divisions, is deemed a vendor. IBR may accept donations from other private sector entities subject to the conditions provided in the Federal Drug Administration's Draft Policy Statement on Industry-Supported Scientific Educational Activities and to the other restrictions set forth in this opinion.

BACKGROUND

IBR, which is one of fourteen developmental disability services offices within OMRDD, seeks to clarify the conditions under which it may seek grants and other financial assistance from pharmaceutical companies and other private sector entities to support its training and education programs. Funds are needed to pay for speakers' travel and honoraria, as well as for materials, as the level of funding which can realistically be obtained through registration fees for these programs is inadequate to meet their costs.

Training and education are part of the mission of IBR. It is designated as an institute for the conduct of medical research and other scientific investigation directed toward furthering knowledge of the etiology, diagnosis, treatment and prevention of mental retardation and developmental disabilities (Mental Hygiene Law §13.17[b]). Since its inception, it has organized programs and undertaken to share information, often through conferences, with people studying developmental disabilities and with the parents of individuals with such disabilities.

To insure the success of its programs, it is often necessary for IBR to invite outside experts and to pay for their travel and honoraria. In addition, it must pay for materials provided to participants. To fund these programs, IBR has sought grants from public agencies, such as the New York State Developmental Disabilities Planning Council and the National Institute of

Health, and from foundations, such as the March of Dimes Birth Defects Foundation. However, its funding applications are not always successful, and, even if successful, often provide only limited funding.

Because IBR cannot rely solely on grants from public agencies and private foundations, it wishes to apply for educational grants from pharmaceutical and other private sector companies with a potential interest in its programs. It asks whether it may seek from these companies assistance in the form of educational grants; rent for commercial exhibition space at a meeting site; in-kind contributions of folders, bags, pens, pads, etc., which may bear a company logo or slogan; or support of travel for those invited to speak by the program committee.

Before it seeks such grants, IBR requests that the Commission clarify the conditions under which solicitation may occur so as to eliminate any perception of a conflict of interest. It has suggested conditions which might apply.

First, IBR has stated that it will seek neither grants nor other financial support from a corporate division that is one of its vendors, nor will it select a private sector entity as a vendor in exchange for such support.

If it is permissible to accept such funding, IBR proposes that checks for the educational grants, rent or fees would be made payable to the Research Foundation for Mental Hygiene, Incorporated ("RFMH").⁽¹⁾

Any private entity providing support would have to agree to adhere to the terms of IBR's "Agreement for Commercial Support of Continuing Medical Education." The most significant of these terms are that the funding entity:

- will not influence the content of the program or selection of presenters or moderators other than responding to requests from the Program Committee for suggestions of presenters or sources of possible presenters;
- will not have ancillary promotional activities such as exhibits or presentations by sales personnel in the same room as or in an obligate path to the educational activities, unless the exhibit is within the area that is designated for general exhibit and includes exhibits from different companies marketing alternative or competing therapies; and
- agrees to abide by the Food and Drug Administration's Draft Policy Statement of Industry-Supported Scientific and Educational Activities.

Furthermore, IBR, as the Sponsor of the educational program, would be solely responsible for:

- insuring that the program is scientific and educational, not promotional in nature;
- exercising full control over the planning of the program's content, including speakers;
- disclosing to all attendees the financial relationships between the company or companies funding the program and any relationships between the company and individual presenters or moderators;
- insuring that discussions of the company's products or competing products will be fairly presented and balanced;

- providing meaningful opportunities for scientific debate and questions at live presentations;
- abiding by the Food and Drug Administration's Draft Policy Statement on Industry-Supported Scientific and Educational Activities in conducting the program; and
- providing, upon request, to the funding entity a report covering the expenditure of funds provided.

The FDA's Draft Policy Statement on Industry-Supported Scientific and Educational Activities ("Draft"), referred to above, describes categories of educational activities that may be funded by industry but that are not subject to regulations covering advertising or promotional labeling. Both the funding entity and IBR would agree to abide by its requirements.

This Draft is currently being considered in order to permit industry to support educational activities embracing a full exchange of scientific views. The FDA has distinguished between those activities supported by companies that are promotional and those that are educational. The Draft also imposes conditions on the acceptance of funding by a sponsor from a supporting company. It was first published in the Federal Register in late 1992, and the FDA expects to issue a final Policy Statement in the summer of 1997.

IBR has also brought to the Commission's attention the American Medical Association's Accreditation Council for Continuing Medical Education Standards for Support of Continuing Medical Education. These Standards mirror the FDA's Draft Policy and are also reflected in IBR's proposed guidelines.

APPLICABLE STATUTES

Mental Hygiene Law §13.29 authorizes the OMRDD Commissioner, acting on behalf of the State and in the public interest to:

accept, hold in trust, administer, apply, execute, or use gifts, devises, bequests, grants, powers or trusts of personal or real property made to the state, the office of mental retardation and developmental disabilities, a facility within the office, the commissioner, or the directors or visitors of facilities which are to be used or may be used for purposes of the office of mental retardation and developmental disabilities, including, but not limited to, the maintenance, support, or benefit of one or more patients in a facility.

Public Officers Law §73(5) provides:

No statewide elected official, state officer or employee, member of the legislature or legislative employee shall, directly or indirectly, solicit, accept or receive any gift having a value of seventy-five dollars or more whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part. No person shall, directly or indirectly, offer or make any such

gift to a statewide elected official, or any state officer or employee, member of the legislature or legislative employee under such circumstances.

Portions of the State's Code of Ethics, contained in Public Officers Law §74, are applicable to gifts in certain circumstances. The provision that sets forth the rule with respect to conflicts of interest is found in subdivision (2), which reads as follows:

No officer or employee of a state agency, member of the legislature or legislative employee 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.

DISCUSSION

In its recently issued [Advisory Opinion No. 97-6](#), the Commission discussed the applicable precedents that govern gifts made to State agencies. Reference is made to that Opinion for a discussion of prior Commission opinions related to this subject.⁽²⁾

A review of these opinions demonstrates that the Commission has permitted a State agency to accept gifts from private sector entities under the agency's regulation or jurisdiction, subject to certain conditions. Here, IBR has represented that it will not accept gifts that do not meet the conditions it has imposed. One of those conditions is that IBR will not accept a gift from a division of a corporation where the division is one of its vendors. For example, since IBR has a contract with the laboratory testing services division of a large pharmaceutical company, it would not seek funding from that division. However, it would like to seek funding support from the company's pharmaceutical division, with which it does not have a contractual relationship.

In the context of gifts to State employees, the Commission has always treated a donor as a unified entity. A large corporation would be a disqualified source even if only one of its divisions had a contract with the recipient's agency (See [Advisory Opinion No. 94-16](#)). However, in the Commission's prior opinions, it has treated gifts to State agencies differently from gifts to individual employees. It must, therefore, consider whether one division of a corporation can be disqualified as to IBR while the corporation's other divisions are not.

It appears to be IBR's position that divisions of large corporations are sufficiently independent to allow them to be segregated, so that the disqualification of one should not taint the others. This, however, is inconsistent with the nature of the corporate structure. While corporate divisions may be separate, they are all part of a single entity, and they all report to the same top corporate officials. No matter how disparate their day to day operations, they each operate under an integrated corporate strategy designed to best serve the corporate owners and customers, as well as the public.

One division of a corporation may well have knowledge of the contracts of the other divisions. This information can usually be obtained by nothing more than reading the corporation's annual report. In addition, corporate compensation will be dependent, at least in part, upon the operations and profits of all divisions. Many divisions can have overlapping management or

promotional lines. Given this integration, the public could reasonably perceive that a corporate division with which IBR has contracts will receive more favorable treatment or continued good will if a different division of the same corporation provides IBR with financial support for its programs. Thus, IBR may not seek financial support from an entity, or any division of an entity, where one of its divisions is a vendor. This bar also applies to any entity which is seeking a contract from IBR, as the timing of a donation could lead to the appearance of favoritism in the selection process.

As to the solicitation of companies which are not its vendors, IBR should adopt a policy that any gift or support that it may receive will be given no consideration whatsoever at such time as it may select a vendor in the future.

Based on the Commission's prior opinions, IBR could not accept a gift of support from any company, or from any of its various divisions, with which it is in litigation. (See Advisory Opinion Nos. [92-1](#) and [95-38](#).)

Furthermore, IBR must have discretion as to the use of any donation. (See [Advisory Opinion No. 95-38](#).) This would, in large part, be assured by its following the FDA's Draft Policy Statement.

The form of support that a private sector entity could give may vary. Basic funding, without restriction, is preferable because it leaves to IBR complete discretion as to its use. However, a gift of materials or in kind contributions is acceptable as long as IBR, and not the donor, decides that the goods are needed in connection with a conference or program.

With regard to a logo or other identifiable mark of a donor, it may be displayed at a conference or on materials distributed to attendees, but only to acknowledge the private entity's support. It may not be used primarily as a form of advertising. (See [Advisory Opinion No. 95-38](#))

Solicitation of donations must be conducted with care. There may not be any threat of retribution against an entity that declines to offer its support. In addition, there should be no solicitation whatsoever by those employees of IBR who are involved in the contracting process or the selection of vendors. They may well be perceived as favoring a bidder who has responded to such a solicitation.

Finally, any proposed agreement between IBR and a supporting company should require both parties to abide by both the FDA Draft and the AMA's standards. This will avoid any appearance that the funding source is in control of a conference program. Should the FDA's final policy statement on the subject, when released, provide substantially less in the way of protection than does the current Draft, the Commission would reconsider the matter at that time.

CONCLUSION

The Commission concludes that IBR may not accept grants or other financial support from its vendors. When one division of a corporation serves as a vendor, the entire corporation, including all of its divisions, is deemed a vendor. IBR may accept donations from other private sector

entities subject to the conditions provided in the FDA's Draft and the other restrictions set forth in this opinion.

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:

Evans V. Brewster
Angelo A. Costanza
Robert E. Eggenschiller
Donald A. Odell
Paul L. Shechtman, Members

Dated: April 29, 1997

Endnotes

1. RFMH was organized in 1952 under the Not -for-Profit Corporation Law and is under contract with to receive, hold and administer grants and other funds. RFMH is empowered by its by-laws:

- a. To be the agency authorized by the Office of Mental Health, the Office of Mental Retardation and Developmental Disabilities and the Division of Alcoholism and Alcohol Abuse to assist in developing and increasing the facilities of New York State Department of Mental Hygiene, the institutions, commissions, boards and agencies within such Department or associated therewith to provide more extensive conduct of studies, teaching, training and research into the causes, nature and treatment of diseases, disorders and defects affecting the mind, brain and nervous system and to discover and apply more efficient measures of prevention, treatment and cure of nervous and mental disorders by encouraging gifts, grants, bequests, devises, contributions and donations of real and personal property to the corporation for such purposes;
- b. To receive, hold and administer gifts or grants for the purposes of the corporation and in keeping with the research, prevention and treatment purposes and objectives of New York State Department of Mental Hygiene, the institutions, commissions, boards and agencies within such Department or associated therewith;
- c. To conduct and finance the conduct of studies, teaching, training, and research in any and all fields of the arts and sciences and in keeping with the purposes and objectives of New York Department of Mental Hygiene, the institutions, commissions, boards and agencies with such Department or associated therewith;. . .

2. Both Public Officers Law §73(5) and §74 are specifically applicable to gifts made to individual State employees. They are not enforceable with respect to gifts to agencies. (See

[Advisory Opinion No. 95-38](#).) In [Advisory Opinion No. 94-16](#), in which the Commission discussed in detail how these sections are to be interpreted and applied, it stated that the opinion was inapplicable to gifts to agencies. However, in [Advisory Opinion No. 97-6](#), the Commission noted that these statutes have been used as guidelines with respect to gifts to agencies.