



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

February 25, 2014

Hon. Mark W. Eves
Speaker of the Maine House of Representatives
2 State House Station
Augusta, ME 04333

Dear Speaker Eves:

I am writing to respond to your February 16, 2014 letter asking for advice concerning whether your advocacy for the proposed expansion of the MaineCare program in L.D. 1578 constitutes a conflict of interest according to the standards set by the Maine Legislature in 1 M.R.S.A. § 1014(1). Your letter indicated that until December 20, 2013, you were employed in an administrative capacity at Sweetser, a non-profit corporation based in Saco, which provides behavioral health services to patients in Maine. You stated that you are presently not employed there, but intend to return to the same position after the conclusion of the Second Regular Session. The expansion of MaineCare would likely result in an increase in services provided by Sweetser and many other health care providers in Maine.

Applying the Legislature's own standards, it is the opinion of the Ethics Commission staff that your past and ongoing support of L.D. 1578 in the 126th Legislature is not a conflict of interest, because of the broad effect of the proposed legislation on health care providers in Maine generally and the lack of any personal benefit to you. Please bear in mind that this advisory letter is provided on behalf of the staff of the Maine Commission on Governmental Ethics and Election Practices. It is not binding on the members of the Commission, if a complaint alleging a violation were filed.

Role of Commission in Providing Advice

The Maine Legislature has authorized the Commission to issue advice to Legislators on ethical issues, such as whether it would be a conflict of interest to vote on or influence legislation. (1

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M.R.S.A. § 1013(1)(A)) The Commission bases its advice on the Legislature's definition of a "conflict of interest" set forth in 1 M.R.S.A. § 1014(1). It is a violation of legislative ethics for a Legislator to attempt to influence a bill or other legislative matter if the member has a conflict of interest in connection with that matter. (1 M.R.S.A. § 1014(1))

Advice from the Commission and its staff is based, in large part, on factual information provided by the Legislator requesting the guidance. If the Legislator provides incomplete or inaccurate information, the Commission's assessment of the question and its advice may change if the Commission receives additional, contrary information.

Factual Information Provided

In your letter dated February 16, 2014 requesting the Commission staff's advice, you provided specific facts concerning your employment with Sweetser. I interviewed the Chief Executive Officer (CEO) of Sweetser to better understand the responsibilities of your position, and received additional information concerning your previous work history there. In addition, the Commission staff consulted other sources to gain a better understanding of the MaineCare program, Sweetser, other providers of behavioral health services in Maine, and the potential effects of L.D. 1578 on health care providers in general.

Your employment. Sweetser provides behavioral health services to adults and children in Maine. The term "behavioral health services" encompasses both mental health and substance abuse services. Sweetser administers homes for children with serious emotional and behavioral problems, and learning disabilities. In addition to residential programs, it offers outpatient counseling and therapy to adults and children through offices in different regions of the state.

Sweetser is organized as a non-profit corporation that is tax-exempt under Section 501(c)(3) of the Internal Revenue Code. Although it is among the larger providers of mental health and substance abuse services in Maine not associated with a hospital, Sweetser is one of many providers of these services in the state.

You have been employed as the Director of Business Development at Sweetser since August 2011, except for two periods. By mutual agreement with Sweetser, your employment terminated during the First and Second Regular Sessions of the 126th Legislature, so that you could perform the duties of Speaker of the Maine House of Representatives. During each of these periods (which you have described as a leave of absence), you have received no compensation or employment benefits from Sweetser.

You describe the position as “primarily responsible for developing relationships with primary care providers and hospitals to integrate behavioral health services with physician’s primary care practices.” According to Sweetser’s CEO, in 2011 the organization wanted to move in the direction of improving the delivery of behavioral health services by better integrating with physical health care providers. The goal of the position is to deliver state-of-the-art care by providing “one place to go” for patients to receive both types of services. You develop partnerships with hospitals and physician practices to improve mental health services for their patients. In addition, you are available to work with school systems that see a need for Sweetser to provide social workers in the schools.

You previously worked at Sweetser between July 2004 and January 2010 as a home-based clinician and were promoted to clinical supervisor. According to Sweetser’s CEO, when the organization decided to hire someone in 2011 for the Director of Business Development position, the management of Sweetser thought that you would be a good match because of your previous work for the organization.

You work as a salaried employee of Sweetser. You are not a member of the board of directors of the organization or an officer, and you have no ownership interest in Sweetser.

L.D. 1578. MaineCare is the name for the Medicaid program administered by the State of Maine. It provides health insurance coverage for low-income individuals. According to a MaineCare caseload report provided on February 19, 2014 by the Office of Fiscal and Program Review, 267,920 people are enrolled in MaineCare and receive full benefits. In addition, 43,292

receive partial benefits (*e.g.*, financial assistance with Medicare premiums and participation in Maine's Drugs for the Elderly Program).

MaineCare assists its members by covering a wide variety of medical services, including doctor's visits, hospital care, immunization, prescription medicine, surgery, laboratory services, dental services, home health, medical equipment, physical and occupational therapy, ambulance, family planning, prenatal care, and transportation to medically necessary services.¹

You are the lead sponsor of L.D. 1578, entitled "An Act to Increase Health Security by Expanding Federally Funded Health Care for Maine People." The bill would increase the income cap to qualify for MaineCare, with the predicted effect that more people would enroll in the program. Advocates for the bill estimate that 70,000 more Maine residents will participate in MaineCare if L.D. 1578 is enacted. In its testimony in opposition to L.D. 1578, the Maine Department of Health and Human Services estimated that the bill would result in 98,000 more members. Regardless of the actual number, if enrollment were to increase, some health care providers would provide more services financed with MaineCare.

L.D. 1578 was the subject of a public hearing on January 15, 2014, at which you testified in favor of the bill. A work session was held on January 22, 2014. As of today, the bill has not been reported out of the Joint Standing Committee on Health and Human Services.

¹ Maine Department of Health and Human Services, *MaineCare Member Handbook*, at 34-55, available at <http://www.maine.gov/dhhs/oms/member/#Res>.

Applicable Conflict of Interest Standards

Recusal on bills relating to a Legislator's profession or trade

The Maine Legislature has set its own standards for when a member must recuse himself or herself due to a conflict of interest. The Legislative Ethics Law defines the term "conflict of interest" in 1 M.R.S.A. § 1014(1) to cover a number of situations which are set forth in paragraphs (1)(A) through (1)(F). If a member has a conflict of interest in connection with a bill or other legislative matter, it is a violation of legislative ethics for the Legislator to attempt to influence that bill or matter. (1 M.R.S.A. § 1014(1))

Two of the paragraphs apply to legislation that relates to a Legislator's employment:

E. When a Legislator or a member of the Legislator's immediate family accepts or engages in employment that could impair the Legislator's judgment, or when the Legislator knows that there is a substantial possibility that an opportunity for employment is being afforded the Legislator or a member of the Legislator's immediate family with intent to influence the performance of the Legislator's official duties, or when the Legislator or a member of his immediate family stands to derive a personal private gain or loss from employment, because of legislative action, distinct from the gain or losses of other employees or the general community; and

F. When a Legislator or a member of the Legislator's immediate family has an interest in legislation relating to a profession, trade, business or employment in which the Legislator or a member of the Legislator's immediate family is engaged, and the benefit derived by the Legislator or a member of the Legislator's immediate family is unique and distinct from that of the general public or persons engaged in similar professions, trades, businesses or employment.

These two paragraphs contain a number of tests for determining whether a Legislator has a conflict of interest. In summary, a Legislator has a conflict of interest in influencing legislation related to his profession or trade, if (1) the legislation would result in a financial benefit to the Legislator, and (2) that benefit is unique or distinct from other individuals in the same trade or profession as the Legislator.

Recusal on bills affecting a Legislator's business, client, or employer

Paragraph 1(A) relates to situations in which the Legislator has a "close economic association" with an entity that is affected by proposed legislation. This could cover the Legislator's employer, but also other organizations with which the Legislator is affiliated (e.g., if a Legislator serves as a member of a non-profit organization's board of directors, or passively owns more than 10% of a family business).

A. When a Legislator or a member of the Legislator's immediate family has or acquires a direct substantial personal financial interest, distinct from that of the general public, in an enterprise that would be financially benefited by proposed legislation, or derives a direct substantial personal financial benefit from close economic association with a person known by the Legislator to have a direct financial interest in an enterprise affected by proposed legislation

The Commission has taken the view that voting on legislation results in a conflict of interest under § 1014(1)(A) only if the Legislator or immediate family member *personally benefits* from the legislation. In a March 12, 2010 advisory opinion to Rep. Jon Hinck, the Commission endorsed the reasoning of a June 10, 1983 advisory opinion of Maine Attorney General James E. Tierney. In that opinion, a Legislator had inquired whether she was prevented from voting on a bill because her husband had rendered legal advice to a client concerning the bill. After reviewing the legislative history of 1 M.R.S.A. § 1014(1)(A), the Attorney General observed that

[I]t is clear that the Legislature never intended that a member of either House must be disqualified from voting on a proposal merely because she or a member of her immediate family is compensated for work performed for an employer or a client who might be affected by the legislation. The “direct substantial personal financial benefit” referred to in 1 M.R.S.A. §1014(1)(A) must involve a financial reward separate and distinct from the remuneration one receives as an employee or agent for services rendered.

For purposes of this advice letter, the Commission staff must rely on these opinions of the Commission and the Maine Attorney General. These opinions interpret § 1014(1)(A) to mean that a Legislator does not have a conflict of interest merely because his or her employer benefits financially due to legislation. Under this reasoning, a conflict results only if the Legislator *personally* receives a benefit from the legislation.

Advice from the Commission Staff

Based on the standards set by the Maine Legislature in 1 M.R.S.A. § 1014(1) and the facts you have provided, the Commission staff advises that your employment with Sweetser and your past and ongoing advocacy for L.D. 1578 do not constitute a conflict of interest.

Broad impact of L.D. 1578 on providers of medical services

As noted above, MaineCare reimburses providers for a large variety of medical services. Health care offices and professionals that offer these services would have the potential to see more patients, if L.D. 1578 became law. The providers potentially affected by L.D. 1578 would include hospitals, federally qualified health centers, rural health clinics, doctors’ practices, individual doctors, residential care facilities, occupational and physical therapy offices, and pharmacies.

Behavioral health services, provided by Sweetser and others, constitute *a relatively small proportion* of the medical services reimbursed by MaineCare. The Office of Fiscal and Program Review (OFPR) compiles data on MaineCare spending, and publishes reports itemizing the total amount spent for different categories of care. In the most recently published data, mental health services made up roughly 10% of MaineCare spending.²

Thus, if MaineCare were to be expanded under L.D. 1578, the increase in services reimbursed by the program would be spread across thousands of service-providers in Maine. It does not appear that the financial impact on your employer would be unique or distinct from other providers, which is the test for a conflict of interest under 1 M.R.S.A. §§ 1014(1)(E) & (F).

Even within the field of behavioral health services, the impact of L.D. 1578 on Sweetser would not be unique. It would similarly impact other clinics and medical offices providing mental health and substance abuse services, such as hospitals,³ federally qualified health centers that offer mental health services,⁴ and a large number of small, medium, and large community-based social services organizations.⁵ Around 200 agencies are listed as adult mental health service providers on the website of the Maine Department of Health and Human Services.⁶

Lack of personal benefit. In your February 16, 2014 letter, you expressed that you have been advocating for the expansion of MaineCare since January 2013 and that your support for L.D. 1578 is motivated by the need to increase access to health care for Maine families who cannot afford insurance. You stated specifically that you “will receive no personal financial or

² This data can be found at http://www.maine.gov/legis/ofpr/appropriations_committee/materials/MaineCare_Spending_Briefing_2-12-14.pdf. This 10% portion does not include substance abuse services. The OFPR compilation does not break out MaineCare spending on substance abuse services.

³ *E.g.*, Acadia Hospital in Bangor, associated with Eastern Maine Medical Center; Spring Harbor Hospital in Westbrook, affiliated with Maine Medical Center; and Maine General Health in central Maine.

⁴ *E.g.*, the Penobscot Community Health Care Center in Bangor.

⁵ Examples of larger community-based behavioral health organizations in Maine would include (in addition to Sweetser): Aroostook Mental Health Center, based in Caribou; Community Health and Counseling Services (Bangor and other locations); Kennebec Behavioral Health (Augusta and other locations); Spurwink, based in Portland; Tri-County Mental Health Services (Lewiston and other locations); Counseling Services, Inc. (Biddiford and other locations); and The Opportunities Alliance (Portland).

⁶ <http://www.maine.gov/dhhs/samhs/mentalhealth/providers/index.html>.

employment benefit” from the enactment of L.D. 1578. This was confirmed by Sweetser’s CEO during my interview of him. He stated that the expansion of MaineCare would result in no employment benefit for you. He said that if Maine expands the population eligible for MaineCare, it would not change the terms or duties of your position. In particular, your compensation will not change if MaineCare is expanded under L.D. 1578. The focus of your position is to build relationships between Sweetser and hospitals and primary care physicians in order to improve the delivery of behavioral health services. He added that if more Maine residents participate in MaineCare, the additional members would be a diverse population served by many health care providers, and that Sweetser is not projecting any large increase in revenue if the State of Maine expands the program.

I have read the letter from your colleagues expressing concern that your promotion of MaineCare expansion could constitute a conflict of interest. The authors do not suggest or provide evidence that you would be personally enriched by Sweetser, if L.D. 1578 were enacted. Rather, the concern is that Sweetser would receive a financial benefit from the legislation. Given the lack of evidence that you would receive any *personal* benefit from the enactment of L.D. 1578, there does not appear to be a conflict of interest under 1 M.R.S.A. § 1014(1)(A) (as interpreted by the Commission and the Maine Attorney General) or 1 M.R.S.A. §§ 1014(E) & (F) with respect to your advocacy on behalf of L.D. 1578.

Appearance of a conflict of interest. You have been urged by some of your colleagues to stop advocating for L.D. 1578 because of an appearance of a conflict of interest arising from your employment with Sweetser.

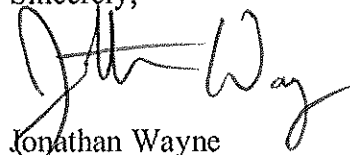
In the circumstances provided here, the Commission staff recommends applying the ethical standards actually set by the Legislature. Under that standard, Legislators who work in a commercial industry (*e.g.*, construction, banking, law) or the public sector (*e.g.*, education) may advocate for and against legislation that has a financial impact on the Legislator’s employer – provided that there is no unique or distinct financial benefit for the Legislator. This standard

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recognizes the nature of Maine's citizen Legislature and encourages members to bring their professional experience and expertise to policy-making in Maine state government. It has been relied upon by Legislators who come from a variety of professional backgrounds in deciding whether or not it is necessary to recuse themselves from voting on legislation. The Commission staff does not see a reason why L.D. 1578 should be viewed under a different standard, particularly when Sweetser stands in a similar position to other providers of medical services and there is no allegation of personal enrichment by you.

Thank you for your consideration of this advisory letter from the staff of the Maine Ethics Commission.

Sincerely,

A handwritten signature in black ink, appearing to read "Jonathan Wayne". The signature is written in a cursive style with a large initial "J" and "W".

Jonathan Wayne
Executive Director