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CITIZEN ACTION OF WISCONSIN

Issue Paper #3: Conflict of Interest and Non-Competitively Awarded Grants

Introduction:

ABC for Health, Citizen Action of Wisconsin, and Disability Rights Wisconsin have joined forces to express our concerns about the Medical College of Wisconsin and the University of Wisconsin School of Medicine and Public Health's stewardship over the public health resources designated for the benefit of the people of Wisconsin. The Wisconsin United for Health Foundation (WUHF) Board will meet to review a Legislative Audit Bureau Report that raised serious questions and validates longstanding concerns about the oversight and the designated use of these public resources. Our agencies have concerns about the schools' current system for distributing the Blue Cross-Blue Shield conversion funds-the money that is supposed to represent Blue Cross-Blue Shield's payback to the people of Wisconsin as part of the company's 2001 conversion to a for-profit entity. The purpose of the funds is to promote public health initiatives that will benefit the people of Wisconsin. However, the recent Legislative Audit Bureau Report suggests that these funds were periodically used to benefit their own institutions, rather than the public's health.

I. The Medical Schools Failed to Implement Adequate Conflict of Interest Policies

A decade ago, Blue Cross Blue Shield of Wisconsin (BCBS) converted from a nonprofit health insurance provider to a for-profit business. As part of the conversion, Insurance Commissioner Connie O'Connell required that BCBS pay back to the public the more than \$600 million¹ that the company accrued as a result of its tax-exempt status. According to the Commissioner's Order, the purpose of these funds was to "promote public health initiatives that will generally benefit the Wisconsin population."² The Commissioner has authority to issue further orders to enforce this mandate.³

¹ The original conversion value was estimated at \$250 million. Stock value fluctuations since 2000 have increased the total amount of the conversion funds.

² Final Order of the Commissioner of Insurance Re: Blue Cross & Blue Shield United of Wisconsin, Case No. 99-C26038, p. 30. Available at <http://oci.wi.gov/bcbsconv/bcbsdec.pdf>.

³ See Wis. Stat. § 601.41 (granting the Commissioner of Insurance authority to "issue such prohibitory, mandatory, and other orders as are necessary to secure compliance with the law"); *Homeward Bound Servs. V. Office of the Ins. Comm'r*, 2006 WI App 208, p44 (Wis. Ct. App. 2006) (construing § 601.41 broadly).



The Commissioner assigned the task of administering this \$600 million of public money to Wisconsin's two medical schools, Medical College of Wisconsin and the University of Wisconsin School of Medicine and Public Health. The Commissioner did not give the funds to the schools as a gift; instead, she explained that "the conversion funds are best viewed as public capital charged with a particular purpose."⁴ The Commissioner's Order charged the medical schools with overseeing the conversion funds and allocating the money to projects that promote Wisconsin's public health. Over the years, however, the medical schools have betrayed the public's trust.

As ABC for Health, Citizen Action of Wisconsin, and Disability Rights Wisconsin have noted in the past, the medical schools have often mischaracterized the conversion funds as gifts to their institutions.⁵ And the schools have often spent the funds as if it were their money, rather than money belonging to the public. Our organizations call for stronger oversight of the medical schools. The Commissioner of Insurance should order the Wisconsin United for Health Foundation (WUHF), along with the Legislative Audit Bureau (LAB), should take a more active role in monitoring the granting activities of both medical schools to ensure that these public funds are spent in the public's interest.

This paper focuses on the problems caused by the failure of UW and MCW to implement effective conflict of interest policies.⁶ Five of the forty public health projects reviewed by the LAB involved a recipient that was affiliated with a member of the oversight and advisory

⁴ *Id.*

⁵ Memorandum from ABC for Health, Inc. and Wisconsin Citizen Action to Board Members of Wisconsin United for Health Foundation Re: "How MCW and UW Medical School Plans for BC/BS Conversion Funds violated the Insurance Commissioner's Order, pp.3-8" (June 24, 2003) (on file with author).

⁶ Legislative Audit Bureau of Wisconsin, *An Evaluation: Medical Education, Research, and Public Health Grants*, Report 10-6, p.87-88 (May 2010). Hereinafter "Report 10-6."



committee.⁷ Hence, conflicts of interest taint over 10% of the *reviewed* public health awards and may afflict an even higher percentage of the *total* grants made. Additionally, the LAB did not review at least two public health grants involving a board member as the principle investigator.⁸ The high percentage of tainted grants creates exactly the appearance of impropriety that effective conflict of interest policies prevent.

a. The Policies As Written Are Inadequate

The schools' policies are both inconsistent and ineffective. The LAB report details the inconsistency, writing,

The policies state, however, that members cannot be deemed to have conflicts of interest with respect to the entities that nominated them to the oversight and advisory committees. Because committee members may be employed by the entities that nominated them, these provisions appear to be in conflict with the requirement that members abstain from voting when a project proposal from their organization is being considered.⁹

Assuming, as any conflict of interest policy must, that members generally favor their employers, it makes no sense to think that this bias will disappear when it comes to their nominating employers. On the contrary, members are more likely to favor those employers, precisely because those employers nominated them to the board. Even in absence of direct pressure from the employer, a board member may feel obligated to vote for the organization that gave him his position. On the other hand, a non-nominating employer may not even know that it has an employee on the board.

The LAB reports also noted the inefficacy of the conflict of interest policies,

In addition, neither school's policy requires the individuals with potential conflicts of interest to be absent during discussions of those proposals.¹⁰

⁷ Report 10-6, p.87.

⁸ See *infra* at p.7

⁹ *Id.*

¹⁰ *Id.*



This stands in contrast with standard, generally accepted foundation conflict of interest policies.¹¹ It is common philanthropic knowledge that “strong conflict of interest policies are among the most important elements to include in governing documents.”¹² Hence the failure of each medical school to implement this standard feature of foundation conflict of interest policies is outrageous and inexcusable.

b. The Policies As Applied Create an Appearance of Impropriety

In addition to the defects in the plain language of the schools’ conflict of interest policies, the factual circumstances surrounding the awards made under these policies create a further appearance of impropriety. A community based foundation simply cannot afford to appear to abuse the public’s trust in such a flagrant manner. Each tainted award merits its own discussion, beginning with the tainted public health award issued by the MCW.

The MCW awarded a 2006 grant for \$449,700 to Fighting Back Inc.’s project, “Targeting Adolescent Problems: Substance Abuse Crisis Hotline and Program” (TAP), when Fighting Back, Inc.’s executive director, Tasha Jenkins, served on the Consortium on Public and

¹¹ See Minnesota Council on Foundations, *Sample Conflict of Interests Policy for Community/Public Foundation*, <http://www.mcf.org/mcf/resource/ConflictofInterest1COMM.pdf>; Board Source (formerly the Nation Center for Nonprofit Boards), *Conflicts of Interest at Foundations: Avoiding the Bad and Managing the Good*, http://www.givingforum.org/s_forum/bin.asp?CID=4115&DID=6604&DOC=FILE.PDF, p.15; Consumers Union of U.S., Inc. and Community Catalyst, Inc., *Sample Foundation Conflict of Interest Statements*, http://www.communitycatalyst.org/doc_store/publications/sample_foundation_conflict_of_interest_statements_sep04.pdf; Maine Health Access Foundation, *Conflict of Interest Policy*, www.mehaf.org/pictures/misc/Conflicts_Policy_07-26-07.doc; Foundation For A Healthy Kentucky, Inc., *BYLAW XI: Conflict of Interest*, [; Endowment for Health New Hampshire, *Conflict of Interest 9-21-09*, <http://www.endowmentforhealth.org/uploads/Conflict%20of%20Interest-9-21-09.pdf>, p.3; California Endowment, *Conflict of Interest Policy-Board Approved 04-15-08*, \[http://www.calendow.org/uploadedFiles/About_Us/Governance/Conflict%20of%20Interest%20Policy-Board%20Approved%204-15-08.pdf\]\(http://www.calendow.org/uploadedFiles/About_Us/Governance/Conflict%20of%20Interest%20Policy-Board%20Approved%204-15-08.pdf\), p.4-5.](http://www.healthy-kentucky.org/docServer.aspx?f=ODk1MTI3MTE=)

¹² Consumers Union of U.S., Inc. and Community Catalyst, Inc., *BUILDING AND MAINTAINING STRONG FOUNDATIONS: Creating Community Responsive Philanthropy in Nonprofit Conversions*, http://www.communitycatalyst.org/doc_store/publications/building_and_maintaining_strong_foundations_2004.pdf, p.25-26.



Community Health (the grant making board).¹³ The MCW claims that Jenkins abstained from voting on the project, which would violate even the MCW's conflict of interest policy, but it has no record of abstention in the minutes of the Consortium's meeting.¹⁴ The MCW's conflict of interest policy allowed her to participate in the discussion of whether to give her organization money.

The Consortium had clear notice that Jenkins presented a conflict of interest with respect to Fighting Back, Inc., because even the Consortium's own website lists her title as "Executive Director, Fighting Back, Inc."¹⁵ Further, MCW's Director of Community Relations at the time, Thomas Brophy,¹⁶ served as a director of Fighting Back, Inc. in 2006.¹⁷ Thus, the appearance of self-dealing within the MCW endowment is made all the more compelling.

Even more troublingly, the program itself was a failure, as it "appears at risk of not meeting most of its objectives... The initial proposal failed to request funding to pay for implementation of a hotline, and the hotline that was established is falling substantially short of the number of calls anticipated."¹⁸ TAP had projected 2,000 calls to its hotline in its first year and got 15. It cannot even begin its proposed evaluation survey because such a survey requires at least 30

¹³ Report 10-6, p.87.

¹⁴ *Id.*

¹⁵ MCW, *Consortium Board Member Profiles: Tasha Jenkins*, <http://www.mcw.edu/ahw/consortium/jenkins.htm>).

¹⁶ See City of Wauwatosa, *Common Counsel Regular Meeting Minutes*, April 19, 2005, <http://www.wauwatosa.net/archives/36/CC041905CC.pdf>, p.3 (establishing that Thomas Brophy was the Director of Community Relations in 2005); and Medical College of Wisconsin News Release, *Medical College of Wisconsin Promotes Kathryn Kuhn to Vice President of Government and Community Affairs*, <http://www.mcw.edu/Releases/2010Releases/KuhnPromoted.htm> (establishing that Brophy held this position until his retirement on June 30, 2010).

¹⁷ Fighting Back Inc., *2006 IRS Form 990*, http://207.153.189.83/EINS/391881826/391881826_2006_03496610.PDF, p.22. Brophy had previously served as president. See Fighting Back Inc., *2005 IRS Form 990*, http://207.153.189.83/EINS/391881826/391881826_2005_026C0CE6.PDF, p.17.

¹⁸ Legislative Audit Bureau of Wisconsin, *Review of Selected Projects: Medical Education, Research, and Public Health Grants*, Report 10-7, p.81 (May 2010). Hereinafter "Report 10-7."



calls.¹⁹ When the endowment awards a large sum of money in the face of obvious conflicts of interest, and the grantee program proceeds to fail spectacularly, the public rightly becomes suspicious that the grant was really just a self-dealing hand-out.

Turning to the UW's public health awards, the LAB found four instances, within the 20 UW health projects it reviewed, in which a public health organization affiliated with members of the UW School of Medicine and Public Health's Oversight and Advisory Committee (hereinafter, "the Committee")²⁰ received a grant. Thus, conflicts of interest tainted 20% of the reviewed grants. Two of these four awards involved the school giving money to itself as a grantee, with a member of the Committee serving as the principle investigator.²¹ These awards were the 2004 award of \$932,900 to "Healthy WI Leadership Institute" and the 2004 award of \$2,012,000 to "WI Population Health Fellowship Program."²² Dr. Patrick Remington, who was a board member in 2004,²³ served as principle investigator for both programs. This means that in 2004, the Committee voted to give its parent organization and a Committee member over \$3 million, which amounted to over 1/4 of all the public health grants awarded in 2004.²⁴ While the minutes of the Committee's meeting show that Dr. Remington abstained from voting, the Committee's own conflict of interest policy allowed him to participate in the discussions leading up to the vote.

While the Healthy Wisconsin Leadership Institute and the Wisconsin Population Health Fellowship Program were generally successful,²⁵ the sheer size of these grants, combined with the taint of conflict of interest, creates an appearance of self-dealing. Moreover, the LAB found

¹⁹ Report 10-7, p.81.

²⁰ Report 10-6, p.87.

²¹ *Id.*

²² Report 10-6, Appendix 6.

²³ Partnership for a Healthy Wisconsin, *2006 Annual Report*, <http://www.uwsa.edu/bor/agenda/2007/may.pdf>, p.48.

²⁴ Report 10-6, p.67.

²⁵ Report 10-7, p.151, 173.



that the Leadership Institute had an impermissible expenditure (the only program of UW Public Health that did) of \$183, and the Institute self-reported another similar expense.²⁶

The LAB report does not indicate if any of the 18 remaining, reviewed UW public health programs were tainted. However, two additional programs, which were not part of the 20 programs reviewed by the LAB, involved a primary investigator that was also a Committee member. The first is a \$66,900 grant made in 2007 to “Healthiest WI 2020: A Partnership Plan to Improve the Health and Safety of the Public,” which had Susan Riesch as its principle investigator.²⁷ Dr. Riesch is no longer on the Committee, but she was in 2007.²⁸ The second is a \$463,000 grant made in 2007 to “Underage Drinking-A Parent Solution,” with Michael Fleming as the principle investigator.²⁹ Dr. Fleming no longer serves on the Committee, but he did in 2007.³⁰ Hence conflicts of interest taint at least six of the UW’s public health grants.

The inadequate conflict of interest policies affect the medical schools’ research and education grants as well. MCW has a Research and Education Advisory Committee that advises the Dean on funding of medical education and research awards.³¹ This committee awarded a non-competitive research grant to a committee member.³² Similarly, the UW established a Medical Education and Research Committee (MERC) that provides oversight and advice on the distribution of medical education and research funds.³³ In four awards, the principal investigator was also on the MERC.³⁴ For two of these four instances, “Innovation in Medical Education”

²⁶ Report 10-6, p.70.

²⁷ Report 10-6, Appendix 6.

²⁸ Partnership for a Healthy Wisconsin, *2006 Annual Report*, <http://www.uwsa.edu/bor/agenda/2007/may.pdf>, p.48.

²⁹ Report 10-6, Appendix 6.

³⁰ *Id.*

³¹ Report 10-6, p.88.

³² *Id.*

³³ *Id.*

³⁴ *Id.*



and “Survey of the Health of Wisconsin³⁵,” there is no record of abstention during the voting by the primary investigators.³⁶ These two projects received a combined \$7,341,900 in funding. Additionally, in a grant that the LAB did not review, the MERC awarded the Survey of the Health of Wisconsin a \$4,116,906 2009,³⁷ while the principle investigator of that program, Dr. Nieto, was still on the MERC.³⁸

In sum: the MCW awarded a \$449,700 public health grant to a Consortium member and it has no record of that member abstaining from voting on the proposal.³⁹ Hence, the MCW may have violated even its own anemic conflict of interest policy. Moreover, the MCW allowed that board member to take part in discussion leading up to the vote, in violation of standard foundation conflict of interest procedures.⁴⁰ The MCW also awarded an education and research grant despite a possible conflict of interest.⁴¹

The UW awarded at least six public health grants, totaling more than \$3,474,800, to programs that presented possible conflicts of interest. In each of these six grants, the UW permitted the board member with the conflict of interest to take part in discussion leading up to

³⁵ There are two reviewed grants to the Survey of the Health of Wisconsin, one from 2004 and one from 2005. The principle investigator for both is Dr. Javier Nieto. The 2004 one was for \$128,700 (10-7, p.118) and the 2005 one was for \$4,116,900 (10-7, p.120). Additionally, the program received a \$4,116,906 grant in 2009 (University of Wisconsin School of Medicine and Public Health, *Medical Education and Research Committee Targeted Awards*, <http://www.med.wisc.edu/partnership/medical-education-and-research-committee-targeted-awards/817#2009>) when Dr. Nieto was still on the MERC (see *DRAFT Minutes UW School of Medicine and Public Health*, p.1, http://www.med.wisc.edu/files/smph/docs/community_public_health/partnership/merc/merc_minutes_01_12_2009.pdf).

Medical Education and Research Committee (MERC)

³⁶ Report 10-6, p.88.

³⁷ University of Wisconsin School of Medicine and Public Health, *Medical Education and Research Committee Targeted Awards*, <http://www.med.wisc.edu/partnership/medical-education-and-research-committee-targeted-awards/817#2009>.

³⁸ See University of Wisconsin School of Medicine and Public Health, *DRAFT Minutes of Medical Education and Research Committee Meeting on 01/12/2009*, p.1, http://www.med.wisc.edu/files/smph/docs/community_public_health/partnership/merc/merc_minutes_01_12_2009.pdf.

³⁹ Report 10-6, p.87.

⁴⁰ Report 10-6, p.87.

⁴¹ *Id* at p.88.



the vote, in violation of standard foundation conflict of interest procedures. Furthermore, the UW awarded at least five educational and research grants, for a total of more than \$11,458,806, to MERC members. For at least two of these awards, the UW has no record of the conflicted member abstaining from voting on the proposal.⁴² Hence, the UW may have violated even its own conflict of interest policy with respect to \$7,341,900 worth of funding. Moreover, the UW allows the conflicted board member in each one of these proposals to take part in discussion leading up to the vote, in violation of standard foundation conflict of interest procedures.⁴³

II. The Medical Schools Failed To Show That They Follow Their Existing Conflict of Interest Policies

Neither the UW School of Medicine and Public Health nor the MCW could document their compliance with their existing conflict of interest policies.⁴⁴ As discussed in the preceding section, the LAB uncovered one instance in which the MCW has no record of a member with a conflict of interest abstaining from voting on the relevant proposal.⁴⁵ The LAB also uncovered two instances in which the UW has no record of a member with a conflict of interest abstaining from voting on the relevant proposal.⁴⁶ Thus, the two colleges have no documentation that they followed even their insubstantial conflict of interest policies with respect to at least \$7,791,600 worth of funding.

In addition to preventing actual malfeasance, conflict of interest policies strive to prevent the appearance of impropriety. Failing to document the enforcement of the policies thwarts this purpose just as completely as not following the policy at all. The public cannot view the endowments as neutral grant makers when they cannot be certain that the endowments are

⁴² *Id.*

⁴³ *Id.* at p.87.

⁴⁴ *Id.* at p.87-88.

⁴⁵ *Id.* at p.87.

⁴⁶ Report 10-6, p.88.



following proper procedures. As far as the endowment's records show, they may have inappropriately awarded nearly \$8 million.

III. The Medical Schools' Current Granting Procedures Provide each Dean with a Multi-Million Dollar Slush Fund

The UW awarded over four times more money in medical education and research grants using non-competitive processes than it did using competitive grant processes.⁴⁷ Admittedly, there is some need to award funding on a rolling basis rather than making all applicants wait until a fixed date to apply for funding. However, the ratio of competitive to non-competitive awards is striking, especially given the rate of success for competitively awarded grants: all seven of the UW medical education and research programs reviewed by the LAB were successful in that they had completed or were likely to complete all or most of their proposed goals.⁴⁸

Furthermore, the Dean of the UW Medical School granted a significant portion, \$7 million, of the non-competitively awarded funds.⁴⁹ This portion of the endowment funds amounts to a discretionary fund (a.k.a., slush fund) that the Dean can use to fund his pet projects. The interests of the Dean are not equivalent to the interests of the Wisconsin public and hence the Dean should not have unchecked authority to award grants according to his whims.

At the MCW, the Dean himself awarded \$33.7 million, or more than 70% of that school's medical education and research grants.⁵⁰ Moreover, the MCW intends to give the Dean complete control over the awarding of *all funds from 2009 to 2014*. Giving each Dean such unfettered authority to award grants conflicts with the order of the Commissioner of Insurance,

⁴⁷ Report 10-6, p.57.

⁴⁸ Report 10-7.

⁴⁹ Report 10-6, p.91.

⁵⁰ *Id.*



which states “the focus of the conversion funds will remain on broadly promoting the public health of the Wisconsin population.”⁵¹

IV. Conclusion

The medical schools have betrayed the public trust placed by breaking the cardinal rule of good foundation governance: implement and enforce effective conflict of interest policies.⁵² Their failure to uphold their duties as stewards of conversion funds demonstrates the need for greater oversight and the use of a neutral third party to distribute the funds. The Commissioner of Insurance shall grant the Wisconsin United for Health Foundation, as a neutral third party with a wealth of public health expertise, authority to oversee the distribution of the funds to ensure compliance with the Order. Regardless of what institution distributes the funds, the Legislative Audit Bureau should take a more active role by performing an annual audit of granting activities to ensure that these public funds are spent in the public’s interest.

About the Coalition Agencies:

ABC is a Wisconsin-based, nonprofit, public interest law firm dedicated to linking children and families, particularly those with special health care needs, to health care benefits and services. Citizen Action of Wisconsin is an issue-focused coalition of individuals and organizations committed to achieving social, economic, and environmental justice and Disability Rights Wisconsin is a private nonprofit organization designated by the Governor to ensure the rights of all state citizens with disabilities through individual advocacy and system change.

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⁵¹ Final Order of the Commissioner of Insurance Re: Blue Cross & Blue Shield United of Wisconsin, Case No. 99-C26038, p. 16. Available at <http://oci.wi.gov/bcbsconv/bcbsdec.pdf>.

⁵² See *supra* ft.11.

