1984 WL 249927 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
July 12, 1984

***1** Dr. Howard R. Boozer
Executive Director
South Carolina Commission on Higher Education
Rutledge Building
1429 Senate Street
Columbia, South Carolina 29201

Dear Dr. Boozer:
You have requested the advice of this Office as to whether the State Commission on Higher Education (Commission) has the authority to adopt 'needs' criteria for the licensing of degree granting out-of-state institutions. Such criteria would allow the consideration of the need for such an institution before licensing it.

Present statutory authority is set forth in Section 59-46-10, et seq. of the Code of Laws of South Carolina (1976), as amended, which provides for the licensing of degree granting non-public educational institutions. [1] [2] The Commission is directed to prescribe licensing rules which '. . . shall, among other things, specify the minimum standard required for a license to confer degrees. The standards shall include but not be limited to course offerings, adequate faculty, maintenance of records, adequate personnel and facilities and financial stability.

If the Commission adopted a needs criteria rule under the above statute its validity would depend in part on whether it was reasonably related to the purpose of the enabling legislation. Hunter & Walden Co., Inc. v. S.C. State Licensing Bd. for Contractors, 272 S.C. 211, 251 S.E. 2d 186, 187 (1978). 'Apparently a rule may add to the law as long as it is consistent with the enabling act's scheme and intent and can be characterized as 'implementing' the enforcement scheme rather than creating new legislation.' Ops. Atty. Gen. (November 8, 1982).

Here, the statute in question contains no express authorization of 'needs' criteria not does it contain a complete definition of the 'minimum standards' which the Commission may adopt. The standards include course offerings and other criteria, none of which would appear to include 'need,' but the statute does not limit the standards to these elements. Definitions of 'standard' in other sources vary widely and are not of much guidance here (see, e.g., Words & Phrases, Vol. 39A 'Standard'); however, the express criteria set forth in the statute indicate that this law focuses on factors that are more internal to the institutions to which they apply than is community need. But, cf. Section 44-7-120(d) and (e). Moreover, consideration of 'need' could involve such a considerable amount of fact finding and have such a substantial effect on licensing that a regulation adopting it here might be said to be void by materially altering or adding to the law. Millike v. S.C. Dept. of Labor, 275 S.C. 264, 269 S.E. 2d 763 (1983). Thus, although this matter is not free from doubt, a reasonable reading of the statute in question indicates that the Commission would need express statutory authority to adopt needs criteria such as that applying needs criteria to the approval of hospital construction. See, Sections 44-7-120, 44-7-320, 44-7-376, and 44-7-377; 61 A.L.R. 3d 278.

***2** If any such legislation is desired, careful consideration will need to be given to various constitutional issues that might arise. Although cases have generally upheld the application of needs criteria to the construction of hospitals (61 A.L.R. 3d 278, 281 § 3), a North Carolina decision declared North Carolina's need statute invalid under the due process and anti-monopoly clauses in that state's constitution in the application of the statute to a privately funded hospital. In The Matter of Certificate of Need for Ashton Park Hospital, Inc., 282 N.E. 542, 193 S.E. 2d 729 (1973). This decision was rejected by an Alabama court

in Mount Royal Tower v. Alabama Bd. of Health, 388 So. 2d 1209 (Ala. 1980). That court sustained the needs criteria, in part, because of the 'unquestionable public importance of health care services,' the extensive regulation of the medical profession and hospitals which has been upheld and the waste and costs that can result from oversupply and duplication of services.

Although education is of 'unquestionable public importance,' application of needs criteria to private institutions would raise questions in addition to those noted above from the hospital cases. First Amendment speech considerations as they apply to teaching would need to be considered (see Nova), and Fifth Amendment safeguards for the free exercise of religion and against the establishment of religion would arise if the legislation is applied to church supported schools. [3] Possible Commerce Clause problems could result from the application of this law to institutions operating in this State but established elsewhere. See, Nova and Ops. Atty. Gen., Note 2, supra. If this law were applied only to such out-of-state institutions, privileges and immunities and equal protection problems could result. Finally, consideration would need to be given to how to treat expansion by existing in state, private institutions.

In conclusion, we doubt that Section 59-46-10, et seq. provides adequate authority for the Commission's adopting needs criteria. If clarification of that authority is sought by legislation, we will be glad to assist with consideration of the above questions. We have not attempted to answer the constitutional questions raised concerning the application of needs criteria because such questions can be best considered as they apply to particular legislative proposals.

Yours very truly,

J. Emory Smith, Jr.
Assistant Attorney General

Footnotes

1 We have been advised that the Commission applies its statute to public institutions established out-of-state as well as private institutions established both in state and out-of-state. See, Section 59-46-10(3). The present law expressly requires licensing of these institutions operating in this State even if they confer degrees elsewhere. See, Section 59-46-40; see also, 1980 Ops. Atty. Gen. No. 80-2. Thus, this statute is distinguishable from that reviewed by the North Carolina Supreme Court in Nova University v. Bd. of Governors, 287 S.E. 2d 872 (N.C. 1982) which found that the North Carolina law allowed only the licensing of degree conferrals made in North Carolina. The Court refused to imply authority to license the teaching leading to such conferrals.

2 A previous opinion of this Office found the application of the South Carolina statute to televised or correspondence courses to be a violation of the Commerce Clause of the United States Constitution. 1982 Ops. Atty. Gen. No. 82-20.

3 'Bible institutions' and 'Theological schools' are exempted under the present law but other church supported schools are not exempted. Section 59-46-90. We express no opinion as to the scope of these terms which are not defined in the statute.

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