1982 S.C. Op. Atty. Gen. 24 (S.C.A.G.), 1982 S.C. Op. Atty. Gen. No. 82-20, 1982 WL 154990

Office of the Attorney General

State of South Carolina
Opinion No. 82-20
April 2, 1982

***1 Subject: Education, Higher**

Act No. 201, Joint Acts and Resolutions of South Carolina, 1977, codified as § 59–46–10, et seq., which provides for the licensing and regulation of certain nonpublic educational institutions is unconstitutional only in its application to nonpublic educational institutions established outside of South Carolina, and operating within the state by means of televised or correspondence instruction.

To: Executive Director
South Carolina Commission on Higher Education

Question:

Are the licensing and regulation requirements of § 59–46–10 et seq. for nonpublic educational institutions applicable to and constitutionally valid for nonpublic educational institutions established outside South Carolina, and operating within South Carolina by means of televised or correspondence instruction?

The question has been presented as to whether the licensing and regulation requirements for nonpublic educational institutions are applicable to and constitutionally valid for nonpublic educational institutions established outside South Carolina, and operating within South Carolina via the media or the mail. An initial determination must be made as to whether schools of this character are encompassed by the requirements of the act.

Act No. 201, Joint Acts and Resolutions of South Carolina, 1977, codified as § 59–49–10 et seq., Code of Laws of South Carolina, 1976, as amended, provides for the licensing and regulation of certain nonpublic educational institutions. Pursuant to § 59–46–20, the South Carolina Commission on Higher Education is the '. . . sole authority for licensing nonpublic educational institutions established in this state and for those established elsewhere to operate in or confer degrees in this State.' (Emphasis added.)

The term 'nonpublic educational institution' is defined in § 59–46–10(3) as follows:
'Nonpublic educational institution' includes, but is not limited to, any educational entity that is wholly or partly located in or operating in this state and is not owned or operated in whole or in part by the State, that is maintained and operated as a school, institute, college, junior college, university or entity of whatever kind which furnishes or offers to furnish a degree as defined herein or which furnishes or offers to furnish instructions leading toward or prerequisite to a degree beyond the secondary level and which requires that in order to obtain a degree the recipient partially or satisfactorily completes appropriate courses or classes or laboratories or research studies in person or by correspondence. 'Nonpublic educational institutions' shall not include any degree granting school, institute, college, junior college, university or entity which was chartered by the Secretary of State before 1953, or colleges of chiropractic. (Emphasis added)

Based on the language of § 59–46–20 and § 59–46–10(3), it was determined in a previous opinion of this office that either physical location or operation in this state, and not both, is all that is required for a nonpublic educational institution to come

within the terms of the statute and that an institution's use of media or mail offerings should be construed as operation within the state. The opinion concluded that institutions which are physically located outside of South Carolina but which furnish a degree or instruction leading to a degree to students within South Carolina by means of televised or correspondence instruction are encompassed by the licensing provisions of § 59–46–10 et seq. (See Opinion to the Executive Director of the South Carolina Commission on Higher Education from Paul S. League dated January 15, 1980.)

***2** While this opinion was written without consideration being given to its impact on interstate commerce and the statute's subsequent constitutionality, the language used in the definition of nonpublic educational institution contained in § 59–46–10(3) and the terms used in § 59–46–20 clearly express an intention on the part of the legislature for nonpublic educational institutions located outside of South Carolina and operating in or conferring degrees in South Carolina to be licensed. There being no ambiguity in the language used, a review of the previous interpretation, even in light of a potential conflict with the interstate commerce clause, lends itself to no other interpretation.

The question then becomes one of whether the act as applied to the licensing of nonpublic educational institutions located outside South Carolina and operating within South Carolina is constitutionally valid. Article I § 8 cl. 3 of the United States Constitution gives to the Congress the power to regulate commerce among the states. This constitutional grant to Congress has been held to operate of its own force to curtail state power in some measure. South Carolina State Highway Department vs. Barnwell Bros. 303 US 177, 58 S.Ct. 510, 82 L Ed 724, reh. denied 303 US 625, 58 S.Ct. 483, 82 L Ed 702.

The United States Supreme Court, as well as various courts throughout the land, have found that activities and operations involved in the conduct of a correspondence school constitute commerce within the meaning and operation of the constitutional provision relating to interstate commerce, and consequently the interstate business of such a school is not subject to state regulation or licensing requirements. International Textbook Co. vs. Pigg, 217 US 91, 54 Ld 628, 30 S.Ct. 481; State v. Williams, 253 NC 337, 117 SE 2d 444; 92 ALR 2d 522. In the Pigg case the highest court of the land stated that the regulation and control of correspondence schools is a subject which belongs to the jurisdiction of the national, and not the state legislature. It has been stated that to carry on interstate commerce is not a privilege granted by the state and therefore subject to the control of the state, but rather it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States.

Some statutes and regulations relative to correspondence schools have been upheld. Regulations which are promulgated in a reasonable and proper exercise of the police power, which are local in character, and which affect interstate commerce only incidentally have been found to be constitutionally valid. 15A Am Jur 2d Commerce § 76. For example, a restriction on the distribution in the public street of handbills, cards, etc. by solicitors of a correspondence school was held valid pursuant to an exercise of police power for the purpose of regulating streets and because it affected interstate commerce only incidentally. International Textbook Co. v. Auburn, 163 F 543. However, a regulation requiring the licensing of correspondence schools as a prerequisite of conducting business in the state is a regulation directed toward interstate commerce in particular and generally the regulation has been declared unconstitutional as an infringement on interstate commerce.

***3** Statutes are to be construed in favor of constitutionality, and the court will presume a legislative act is constitutionally valid unless a clear showing to the contrary is made. Henderson vs. Evans 269 SC 127, 232 SE 2d 331 (1977); Casey vs. S. C. State Housing Authority, 264 SC 303, 215 SE 2d 184 (1975); Sutherland, Statutory Construction, Vol. 2, § 45.11. Based on the previous considerations it appears that a clear showing could be made that the act as it applies to the regulation of nonpublic educational institutions located outside South Carolina and operating in South Carolina is an infringement on interstate commerce and constitutionally invalid. Therefore, it is our opinion that the act as it applies to the licensing of nonpublic educational institutions located outside South Carolina and operating in South Carolina would not withstand judicial scrutiny if it were challenged in a court of law.

The factor which renders the act unconstitutional is the resulting infringement on interstate commerce. This type infringement is present only in cases where there is an attempt to regulate interstate commerce. The application of the act to schools established

in South Carolina and operating in South Carolina results in the licensing and regulation of intrastate as opposed to interstate commerce and is not affected by the interstate commerce provision of the constitution.

The question then arises as to whether the courts if presented with the issue would declare the entire act invalid or only that portion which is in our opinion unconstitutional and invalid. It is a fundamental principle that a statute or act may be constitutional in one part and unconstitutional in another part, and that if the invalid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected. Dean vs. Timmerman 234 SC 35, 106 SE 2d 665 (1959). See also Aiken County Board of Education vs. Knotts, 274 SC 144, 262 SE 2d 14 (1980); State ex rel. McLeod vs. West, 249 SC 243, 153 SE 2d 192 (1967). The important precept of statutory construction previously cited which states that statutes should be construed to sustain their constitutionality when it is possible to do so is equally applicable to part of an act or statute which is severable from the other. Sutherland, Statutory Construction, Vol. 2 § 44.01, State vs. Harper, 251 SC 379, 162 SE 2d 712 (1968), Kalber vs. Redfearn 215 SC 224, 54 SE 2d 791 (1949).

Severability questions are essentially questions of statutory construction, to be determined according to either the intent of legislature or its manifested meaning. The legislature's meaning is often manifested through a severability clause, and while the presence of a severability clause is helpful in determining legislative intent, the absence of such a clause does not preclude a holding in favor of severability. Sutherland, Statutory Construction, Vol. 2 § 44.08.

***4** The real test of severability is whether the intention of the legislature can be fulfilled without the invalid provision. Reith vs. South Carolina State Housing Authority, 267 SC 1, 225 SE 2d 847 (1976). A judicial determination of severability may amount to judicial legislation unless it is clear that the result conforms to what the legislature intended. It is clear that the intent of the legislature in passing the act in question here was to provide a statutory vehicle for the licensing and regulating of all nonpublic educational institutions. The language of § 59–46–10(3) indicates an intention on the part of the legislature to include institutions located within or without South Carolina. The language of § 59–46–20 describes two separate situations where licensing is required; the licensing of nonpublic educational institutions established in this state and the licensing of nonpublic institutions established elsewhere but operating in this state. Since the intent of the legislature was to provide for the licensing of as many nonpublic educational institutions as possible, it is reasonable to assume that the legislature would have passed the statute had it been presented with the invalid features removed.

The remaining portion of the act sans that portion found to be unconstitutional is capable of being executed in accordance with the legislative intent, independent of the rejected portion. Furthermore, there is no constitutional basis for declaring the remaining portion of the act invalid since its application in no way infringes upon interstate commerce. Therefore, it is the opinion of this office that § 59–46–10 et seq. which provides for the licensing and regulation of certain nonpublic educational institutions is unconstitutional only in its application to nonpublic educational institutions established outside of South Carolina and operating within the state by means of televised or correspondence instruction.

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