1976 S.C. Op. Atty. Gen. 363 (S.C.A.G.), 1976 S.C. Op. Atty. Gen. No. 4505, 1976 WL 23122

Office of the Attorney General

State of South Carolina
Opinion No. 4505
October 28, 1976

***1** Dr. Cyrill B. Busbee
State Superintendent of Education
Department of Education
1429 Senate Street, Rutledge Bldg.
Columbia, South Carolina 29201

Dear Dr. Busbee:
Your letter of September 8, 1976, to the Attorney General regarding the effects of South Carolina's newly adopted administrative procedure act, Act R790 of 1976, has been forwarded to me for reply.

The State Board of Education as the State Board for Vocational Education (Section 21–691, Code of Laws of South Carolina) is required by Public Law 90–576, the Vocational Educational Amendments of 1968, to submit a 'State plan' for approval by the Commissioner of Education as a prerequisite to receiving a federal grant under P.L. 90–576. Section 123 of P.L. 90–576 states in great detail the steps that must be taken by the State Board in preparing the State plan as well as what information must be contained in the report if it is to receive the Commissioner's approval. Among other things, Section 123 requires: (1) reasonable notice and an opportunity for a public hearing (Section 123(1)); (2) a detailed statement of the allocation of Federal and State funds to various educational programs, (Section 123(5)); (3) the policies and procedures to be followed by the state in the distribution of funds (Section 123(6)); (4) provide minimum teacher qualification (Section 123(7)); (5) establish fiscal control and accounting procedures (Section 123(12)); and (6) provide that any dissatisfied local agency shall be afforded reasonable notice and an opportunity for a hearing.

In order for the provisions of Act R790 of 1976 to be held applicable to the South Carolina State Plan, an initial determination must be made as to whether the State Board of Education is an 'agency' within the meaning of Section 1(1) of Act R790.

Section 1(1) defines 'agency' or 'State agency' as used in Act R790 as:
(E)ach State board, commission, department, executive department or officer, other than the legislature or the courts, authorized by law to make rules or to determine contested cases.

Although the State Board is required by P.L. 90–576 to submit a State plan for approval, the Federal act does not actually create a State board in any state. The South Carolina State Board exists under the laws of this state, not those of the federal government, and is authorized by the laws of this state to make rules and regulations. See Section 21–691, Section 21–45, 1962 Code of Laws of South Carolina, as amended. Thus, the State Board is an 'agency' or 'State agency' within the meaning of Section 1(1) of the Act R790.

Among other things, Act R790 requires each agency as defined in Section 1(1) of the act to file with the legislative council:
Section 5
(3) Policy statements, eligibility requirements and rules of procedure relating to State agency expenditures of federal funds.

Since the purpose of the State Plan is to comply with the eligibility requirements set forth in P.L. 90–576 for the receipt and expenditure of federal funds, the State Plan will have to be filed with the legislative council pursuant to Section 5 of Act R790, if adopted on or after January 1, 1977, the effective date of R790.

***2** Any document or rule as defined by Section 1(3) and (4) of Act that is required to be filed by the Act is not valid against any person who does not have actual knowledge of the rule until the rule is filed with the Legislative Council as provided in Section 7 of the Act.

Since the State Plan involves a 'matter relating to . . . the public property, loans, grants, benefits or contracts' (Section 11(a) of the Act) or 'general statements of policy or rules of agency organization, procedure or practice (Section 11(b)(3)(i) of the Act), the notice requirements of Section 8 of the Act, and not those of Section 11, will apply to the State Plan. Thus, notice of a hearing or opportunity to be heard regarding the State Plan that is published in the State Register in accordance with Section 8 will be sufficient for the purposes of the administrative procedure act.

Section 12 of the Act provides that all rules and regulations promulgated by State agencies are null and void unless they are approved by the legislature 'at the session of the General Assembly following their promulgation.' As defined in Section 1(8) of the Act, a 'rule means each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency.' The State Plan easily falls within this definition of a rule, and as such would be null and void until approved by the General Assembly, if adopted on or after the effective date of this act.

As you point out, the provision of Act R790 of 1976 closely parallel the requirements of Section 1–11, et seq., of the Code of Laws. Act R790 does not expressly repeal Sections 1–11, et seq., but a close reading of the two statutes reveals many inconsistencies which would have to be resolved in favor of Act R790 as it is the most recent expression of the legislature.

As for your last paragraph regarding administrative provisions going beyond. State Board regulations or being in conflict with such regulations, further clarification or a specific example is needed in order for us to respond to this question.
Sincerely,

Hardwick Stuart, Jr.
Assistant Attorney General

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