



HENRY McMASTER
ATTORNEY GENERAL

January 5, 2011

The Honorable John Courson
Senator, District No. 20
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Courson:

You seek an opinion from this Office, questioning “what is the extent, if any, of the legal authority of the South Carolina Commission on Higher Education (CHE) to require its approval of the USC School of Medicine’s expansion of the existing medical school program in Greenville to include first and second year medical students? More specifically, is USC legally obligated to submit its plan for the School of Medicine expansion to the CHE for review and approval in order to proceed with the project, or may the University move forward in Greenville simply with a notification of change in program status to CHE?”

In our opinion, CHE approval is not required in order to proceed with the project. Instead, the University may move forward in Greenville with a notification to CHE of change in program status.

Factual Background

In your letter, you set forth the factual background of the proposed USC project in Greenville. Therein, you state the following, by way of background:

[i]n 1983, the University of South Carolina, through its School of Medicine, and the Greenville Hospital System established an affiliation for the cooperative pursuit of programs in undergraduate, graduate, and continuing medical education, for research, and for developing better systems of health care delivery and community service. Beginning in 1991, and every year since then, students of the USC School of Medicine have had the option to complete their required third and fourth year elective opportunities at the Greenville Hospital System. In recent years, the number of USC School of Medicine students completing their third and fourth years of study in Greenville has grown to 45-50 annually.

As has been widely reported in local media outlets, the USC School of Medicine plans to modify its existing program of study in Greenville to include first and second year students, along with the current third and fourth year students. According to USC and its School of Medicine, this plan will not involve the conferral of a new degree that is not already offered in Greenville, it will not require any additional new appropriation from the State (nor will any be requested), and it will constitute an expansion of an existing, approved program to the same site in Greenville that has been authorized for undergraduate and graduate medical education for USC School of Medicine students since 1991. In addition, the University will seek separate accreditation for the expanded School of Medicine program in Greenville and a new ... [dean] will be appointed for the program.

You further note that, in 2007, the CHE “adopted and approved formal policies and procedures for new academic program approval.” You advise that such policies and procedures “set forth the CHE’s pronouncement of its organizational perspective as to the extent of its own power and authority as it specifically relates to approval of new programs.” In this regard, you state:

[u]nder the CHE’s policies and procedures, only “new programs” and “program modifications” require Commission approval. See Section IV, *Policies and Procedures*, page 13. USC’s planned expansion of an existing program does not appear to be a “new program.” “Program modifications” are defined in pertinent part as “the transfer of an existing, approved program to a new site that is different from the location(s) or site(s) already authorized, including out-of-state or out-of-country sites (page 4).” The USC School of Medicine has been educating students at the Greenville location continuously since 1991. CHE requests “program notification,” not an application for approval when there are changes in existing programs involving, in pertinent part, “off-site delivery of existing programs (page 5).” Significantly, the policy manual goes on to state that “Commission approval is **not required** for units where no additional new appropriation from the state is requested or required (emphasis included in policy manual).”

Finally, you point to a particular CHE precedent as particularly important in any interpretation of CHE’s authority. You observe that

[f]rom a historical perspective, it may also be instructive to note the facts and circumstances surrounding the establishment of the South Carolina College of Pharmacy in conducting an analysis of the CHE’s role in the matter. The SCCP was formed in 2004 through the integration of the Colleges of Pharmacy at the University in Columbia and at MUSC in Charleston. With the merger of the two schools, separate accreditation was

sought and obtained for the SCP. Significantly, the CHE determined that only notification of the merger for the two Colleges of Pharmacy was required, rather than submission of the planned merger for CHE approval as a “new program” or “program modification.” Moreover, the notification of change in program status that was provided to CHE in conjunction with the merger of the two pharmacy schools specifically noted that Greenville was an anticipated future site of delivery of the program.

Law / Analysis

The South Carolina Commission on Higher Education is bestowed certain limited approval authority with respect to public college and university programs in South Carolina. S.C. Code Ann. Sec. 59-103-35 provides in pertinent part as follows:

[n]o new program may be undertaken by any public institution of higher education without the approval of the commission. The provisions of this chapter apply to all college parallel, transferable and associate degree programs of technical and comprehensive education institutions. All other programs and offerings of technical and comprehensive education institutions are excluded from this chapter.

(emphasis added). Likewise, § 59-123-10 additionally provides in pertinent part that “[i]t is further intended that *any new programs* undertaken by the institution [of higher education] will first be approved by the Commission on Higher Education and that no organizational changes in the operation and management of the institution shall be made as a result of the change in name.” (emphasis added). And, § 59-101-150 states that “[n]o *new program* shall be undertaken by any State-supported institution of higher learning without the approval of the Commission [on Higher Education] or the General Assembly.” (emphasis added).

It is noteworthy that these various statutes have been on the books for many years, dating back in one form or another virtually to the creation of the Commission on Higher Education, in 1967. See Act No. 194, § 4 of 1967. The language, above-referenced, which is now codified in § 59-101-150, was part of the original 1967 Act. During the 1973 session of the General Assembly additional legislation was enacted concerning the Commission on Higher Education. See Act No. 395, § 2 of 1973. Section 2 thereof repeated verbatim that portion of § 59-101-50, quoted above. In 1978, § 59-103-35 was added, pursuant to Act No. 410, § 8. The latter Act revamped the composition of the Commission and also dealt with higher education matters generally.

As an aside, we note that the heading for Section 8 of Act No. 410 is entitled “Submission of budget - *new and existing programs*. (emphasis added). Moreover, Section 8’s last sentence stated: “No *existing program* may be terminated by the Higher Education Commission until the Master Plan has been approved by the General Assembly.” (emphasis added). From this it can be seen that the Legislature itself

expressly recognized a distinction between the initiation of a “new program” and the expansion or addition to an existing program.

Thus, the issue here is the meaning of the term “new program” for purposes of the foregoing statutes. There is no definition of this term contained in any of the applicable enactments. Accordingly, we must resort to the rules of statutory construction. As our Supreme Court explained in *SCANA Corp. v. South Carolina Dept. of Revenue*, 384 S.C. 388, 392, 683 S.E.2d 468, 470 (2009),

[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).” All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute.” *Broadhurst v. City of Myrtle Beach Election Comm’n.*, 342 S.C. 373, 380, 537 S.E.2d 543, 546 (2000). The Court should give the words their plain and ordinary meaning, without resort to subtle or forced construction to limit or expand the statute’s operation. *Sloan v. S.C. Bd. of Physical Therapy Exam’rs*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006).

In addition, it is well recognized that “[a] statute should not be construed by concentrating on any isolated phrase.” Instead, “[i]n construing statutory language, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.” *South Carolina State Ports Authority v. Jasper County*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). As our Supreme Court long ago wrote: “If any part of a statute be obscure, it is proper to consider the other parts; the words and meaning of one part of a statute frequently lead to the sense of another.” *Davenport v. Caldwell*, 10 S.C. (Rich.) 317 (1878), quoting 9 Bac. Abr. Stat. 239.

Further, it is important to note, as we emphasized just recently, that “governmental agencies ... can exercise only those powers conferred upon them by their enabling legislation or constitutional provisions expressly, inherently or impliedly. Moreover, as set forth, “... an administrative agency – either through regulation or policy – may not amend, modify or add to a statute.” *Op. S.C. Atty. Gen.*, September 16, 2010. As our Supreme Court has frequently observed, an agency, “[a]s a creature of statute ... is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged.” *Captain’s Quarters Motor Inn Inc. v. S.C. Coastal Council*, 306 S.C. 488, 413 S.E.2d 13, 14 (1991).

As referenced above, none of the statutes cited, either §§ 59-103-35, 59-101-50 or 59-123-10, define expressly the term “new program.” However, it is worthy of note that when Section 8 of Act No. 410 of 1978 was enacted, reference was made therein to the procedure for termination of an “existing program” at public institutions of higher education. Thus, it is reasonable to conclude that when the Legislature used the term

“new program” in § 59-103-35, such term was meant to be contrasted with an “existing program.”

Such a reading is consistent with the common and ordinary meaning of the term “new program.” Numerous authorities have recognized the distinction between a “new” program or facility and the expansion of an existing one, See, *Township of Readington v. Solberg Aviation Co.*, 976 A.2d 1100, 1114 (2009) [“point of contention here involves the expansion of an existing airport, not the location of a new facility.”]; *Nicastro v. United States*, 206 F.2d 89, 92 (10th Cir. 1953) [“It was not a new business, but the expansion of an existing restaurant.”]; *Oregon Natural Resources Council v. Goodman*, 505 F.2d 884, 896 (9th Cir. 2007) [“Emphasizing that the ski area construction began in 1963, the Forest Service asserts that the project is not a ‘new’ recreation site but the expansion of an existing site, and that the Riparian reserve restriction does not apply. We agree with the Forest Service.”]. *Christenbury Surgery Center v. N.C. Dept. of Health and Human Services*, 138 N.C. App. 309, 531 S.E.2d 219, 222 (2000) [“Thus, the Center’s proposal is not a ‘new institutional health service’ requiring a certificate of need, rather it is an expansion of an existing health service facility within the limitations permitted by the statutes which does not require a second certificate of need.”].

The decision of the South Carolina Supreme Court in *Davis Mechanical Contractors, Inc. v. Wasson*, 268 S.C. 26, 231 S.E.2d 300 (1977) is particularly instructive in this regard. The issue in *Davis* was whether corporate income taxes paid under protest could be recovered on the basis of the establishment of a “new business or industry.” According to the Court, the sole question before it was “whether the taxpayer has ‘established a new business or industry in this State’ which would warrant a net loss carry-over deductions from gross income” The Court concluded that *Davis Mechanical Contractors* was not entitled to recovery, explaining as follows:

[i]t is uncontested that New Davis launched several business activities diverse from those of Old Davis. However, we are not confronted with a situation in which only an insignificant portion of any existing enterprise is perpetuated. It is stipulated that the billings on the Old Davis’ completed contracts in the first year alone exceeded five million dollars. There was no hiatus in the portion of the business of Old Davis purchased by respondent. *A continuation of a pre-existing concern even with major additions and expansions is not the establishment of a new enterprise within the meaning of Section 65-259(12).*

231 S.E.2d at 302. (emphasis added). See also *Chronicle Publishers, Inc. v. South Carolina Tax Commission*, 244 S.C. 192, 195, 136 S.E.2d 261, 262 (1964) [quoting with approval *Morris v. Riley*, 135 Miss. 1, 99 So. 466, 468 (1924) [“... still it will be a continuation of the old business under the old name and a new ownership. It will be the old establishment repaired and added to. We hold that this is not the establishment of a new enterprise in the meaning of the statute There has been no cessation in the business. The establishment has never ceased to be an establishment as shown by the agreed facts.”]; *Op. S.C. Atty. Gen.*, April 14, 1959 [“the fact that the mode of

manufacturing electricity has been broadened from a hydro system to include a steam system does not make the steam addition a new enterprise. It follows that the McMeekin Plant is an addition to an existing enterprise and not a new enterprise. No exempting statute exists in Lexington County for the addition to existing enterprises.”].

Accordingly, it is well settled that there is a clear distinction between a “new” program or institution (or business) and the expansion of an “existing” program or entity. As the Supreme Court of South Carolina long ago stated,

... the power of the board [of commissioners of roads] to make alterations and deviations in a road, cannot well be doubted. It is not making a new road, it is only the making of such alterations and deviations in a road already existing, as in their judgment the public interest may require; and as such alteration is not a new road, I do not suppose that that part of the Act of 1825 which requires a public notice to be given, has any application. But, as was said by the circuit judge in his charge to the jury, this must be done in good faith, and not, under the pretence of alteration, to make a new road, and thus elude the giving of notice as require by law.

Murray v. Lower Bd. of Com'rs of Roads for St. Bartholomew's, 1 Rich. 335, 1845 WL 2508 (1845).

In addition, we must be cognizant of the fact that the Commission on Higher Education has, as you observe, applied the statutes in a manner which distinguishes between new programs and the expansion of existing ones. Such an application of the law is entitled to considerable deference. We noted in an opinion of this Office, dated October 26, 2006 that

[t]his office as a matter of policy, typically defers to the administrative interpretation of the agency charged with the enforcement of ... (a) ... statute in question. See, e.g., Ops. Atty. Gen. dated March 9, 2000 and November 25, 1998. As noted in a prior opinion of this office dated October 20, 1997, “construction of a statute by the agency charged with executing it is entitled to the most respectful consideration ... and should not be overruled absent cogent reasons.” Moreover, where an administrative interpretation is long-standing and has not been expressly changed by the General Assembly, the agency interpretation is entitled to even greater deference. *Marchant v. Hamilton*, 279 S.C. 497, 309 S.E.2d 781 (Ct. App. 1983). As recognized in another prior opinion of this office dated March 12, 1997, if an administrative interpretation is reasonable, courts will defer to such construction even if that construction is not the only reasonable one or the one a court would have adopted in the first instance.

As our Supreme Court has often stated, “[t]he construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should

not be overruled absent compelling reasons.” *Emerson Elec. Co. v. Wasson*, 287 S.C. 394, 397, 339 S.E.2d 118, 120 (1986). The Court particularly applies such rule of deterrence where, as here, the agency’s construction lies within its area of expertise. *See, Knight v. Bd. of Trustees of Firemen’s Retirement and Pension Fund*, 269 S.C. 671, 239 S.E.2d 720 (1977).

In this instance, CHE appears to have interpreted § 59-103-35 and the accompanying statutes, referenced above, in accordance with the common and ordinary understanding or meaning of the words “new program” as already discussed. In other words, CHE has applied the term “new program” in contradistinction to the expansion of or addition to an already existing program or programs. For example, as you recite in your letter, the University of South Carolina and the Medical University of South Carolina combined the resources of their Pharmacy programs to create the South Carolina College of Pharmacy. In the Notification of Change in Program Status form, submitted to the CHE on October 31, 2006, it was stated in describing the rationale for and objectives of this program, that:

[t]he South Carolina College of Pharmacy has created unique opportunities for shared resources between the two campuses. The development of courses using distance education technologies has resulted in our being able to offer courses using the faculty expertise from both campuses with minimal travel costs. In addition, faculty expertise is shared between each campus. Finally, new elective courses can be developed as faculty are able to more effectively teach core courses.

The combined program offered the “Doctor of Pharmacy” degree, and the sites enumerated were Columbia, Charleston and Greenville.

It is important to note here, as you indicate in your letter, that this coordinated program, in which USC and MUSC combined their resources did not involve CHE approval. Instead, in what could be argued to be a more substantive revamping of a program even than here, CHE simply sought a “Notification of Change In Program Status” form to be submitted to it. The letter submitting this form to the CHE Interim Executive Director, on October 31, 2006, which contained the signatures of both MUSC and USC officers, stated as follows:

Attached is the “Notification of Change in Program Status, form submitted by the South Carolina College of Pharmacy at the Medical University of South Carolina and the University of South Carolina to offer the Doctor of Pharmacy in Columbia, Charleston, and Greenville via Distance Education Technology.

In short, this is a clear example in which CHE interpreted § 59-103-35's requirement that it approve any “new program,” (as opposed to the modification of or addition to an existing program), to be inapplicable. The reason CHE saw no need for its approval is readily apparent: the resources of USC and MUSC, both of which theretofore offered pharmacy programs, were combined to offer the Doctor of Pharmacy Degree

from the South Carolina College of Pharmacy at three sites in South Carolina, including Greenville. CHE thus undoubtedly interpreted this combination to be the expansion of existing programs, rather than the creation of a “new program.” Accordingly, only a “notification of change in programs status” was required.

Further evidence of CHE’s interpretation of the statutes at issue is found in that agency’s recently developed “Policies and Procedures for New Academic Program Approval and Program Termination.” (“Policies and Procedures.”) These “Policies and Procedures” were approved by CHE on October 4, 2007. Pursuant to these, CHE approval is necessary only for “new programs” and “program modifications.” (P. 13). On the other hand, only “Program Notification” to the Commission is necessary where there are “changes in existing programs that do not fall under the requirements of Program Modification.” In other words, according to CHE, if only a “Program Notification” is involved, notice to CHE of the change is all that is necessary. Among the criteria for the applicability of a “Program Notification” is “off-site delivery of existing programs.” By contrast, CHE deems its approval to be required for a “Program Modification.” The criteria for the necessity of CHE approval in this regard are as follows:

- (1) the transfer of an existing, approved program to a new site that is different from the location(s) or site(s) already authorized, including out-of-state or out-of-country sites.
- (2) addition of new concentrations, tracks, options, specializations, emphases, or cognates offered within an existing major that total more than 18 credit hours;
- (3) substantive changes in program goal, purpose or target audience that do not require a change in the CIP code;
- (4) a change in the degree designation of a program when the change involves a significant shift in the programs purpose (e.g. B.A. to B.F.A, M.A. to M.F.A. or M.S. to M.B.A., but not B.A. to B.S., M.A. to M.S. or A.A. to A.S.; or,
- (5) reconfiguration of a number of existing degrees into a single degree (e.g., B.A. in French, B.A. in German, B.A. in Spanish collapsed into a B.A. in Modern Languages).

Pp. 4-5. In our view, the addition of first and second year medical studies in Greenville to the existing third and fourth years is the “off-site delivery of existing programs,” rather than a meeting of any of the criteria required for there to be a “program modification” pursuant to CHE policies. Importantly, CHE also specifies that “Commission approval is *not required* for units where no additional new appropriation from the state is requested or required.” p. 8 (emphasis in original). You have advised that no appropriations will be sought for the Greenville expansion. All of these provide strong evidence that CHE

recognizes a clear distinction between the establishment of a “new program” and the addition to an already “existing program,” the latter of which does not require CHE approval.

Conclusion

In our opinion, the proposed addition to the USC Medical School program in Greenville does not require CHE approval. Employing the common and ordinary meaning of the phrase “new program,” as used in the statutes relating to CHE’s authority, we deem the addition of first and second year USC Medical School courses in Greenville to the already established program – one in which third and fourth years of USC Medical School have long been offered in Greenville – to be the addition to an existing program rather than the establishment of a “new program” for purposes of § 59-103-35 and related statutes. USC’s Medical School has been in operation since the 1970s and the Greenville-based third and fourth year offerings by USC’s Medical School in Columbia have been in operation since 1991. In the past, students attending the Columbia campus the first two years could receive their third and fourth year training in Greenville. The principal difference in the future would be that Medical School studies could now be undertaken in Greenville for all four years. However, even though the four year program would now be under the auspices of a separate dean with separate accreditation, the degree from the USC Medical School remains unchanged. In our view, the proposed addition is not a “new program” for purposes of CHE approval, but an expansion or an existing program.

In addition, CHE’s prior application and interpretation of the relevant statutes supports our conclusion. CHE did not require its approval be given in 2005-2006 when the resources of MUSC and USC were combined in order to offer the degree from the South Carolina College of Pharmacy at sites in Charleston, Columbia and Greenville. Even though it could be easily argued that this change, involving the combined Pharmacy Programs, was more substantial than the addition proposed here, it is evident that CHE nevertheless viewed the Pharmacy Schools’ merger as an addition to existing programs.

Moreover, CHE’s recently developed “Policies and Procedures For New Academic Program Approval and Program Termination” are supportive of our conclusion herein as well. As noted above, the Policies and Procedures expressly specify that “Commission approval is *not required* for units where no additional new appropriation from the state is requested or required.” You have advised that no state funds of any kind, appropriated or otherwise, will be employed, nor will any be sought. In such instances, “institutions must still adhere to the Commission’s Notification Policy.” Thus, for this reason alone, – that no state appropriated funds are anticipated or being sought for USC – CHE approval would be inapplicable.

Moreover, according to CHE, the “off-site delivery of existing programs” requires only Program Notification, rather than a Program Modification. The Greenville expansion of the present Medical School program is, in our view, the “off-site delivery of existing programs,” and thus notification to CHE, as opposed to approval by that agency, is all that is necessary. Indeed, it could be argued that the location in Greenville of a satellite medical school program in toto fits easily within CHE’s characterization of the “off-site delivery of existing programs” since the USC Medical School was established in Columbia in the 1970’s. Regardless, in our opinion, what is proposed by USC in this instance is the expansion of the existing Medical School program in Greenville from two years to four. The Medical School at USC has been in operation for decades and the Greenville part of that program has operated continuously since 1991. The expansion of the Greenville program thus would, in our view, clearly comprise the “off-site delivery of existing programs.” Accordingly, CHE approval, as set forth in that agency’s interpretive guidelines, would not be required.

For all of the foregoing reasons, we conclude that a court would likely find that CHE approval for the expansion of the USC Medical School Program in Greenville from a two year program to a four year program is not required. What is required is that notice be given to CHE of this addition.

Yours very truly,

A handwritten signature in black ink, appearing to read "Henry McMaster", written in a cursive style.

Henry McMaster

HM/an