



ALAN WILSON
ATTORNEY GENERAL

May 11, 2011

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

Dear Senator Courson:

You note that in December of 2010 you requested an opinion from this Office "seeking guidance regarding '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.'" You further state in your letter that this Office responded with an opinion dated January 5, 2011. You note that our "review and analysis of the applicable law, regulations and policies determined that the CHE's jurisdiction extended only to approval of 'new programs,' which did not include U.S.C.'s planned expansion of an existing program on an existing campus.'" We concluded in our January 5 opinion that "CHE approval is not required in order to proceed with the project. Instead, the University may move forward in Greenville with notification to CHE of change in program status."

You now seek to determine whether the January 5, 2011 Opinion remains the Opinion of this Office. By way of background, you state the following:

[s]ince that January 5 opinion was issued, the CHE has raised several concerns reflected in a memorandum that disagrees with your Office's conclusion. A copy of this CHE "Staff Analysis" memorandum is enclosed for your review and reference. In light of the points and questions raised in the agency's memorandum, I respectfully request an opinion addressing two questions:

1. After consideration of the CHE "Staff Analysis," do you agree with the conclusions stated in your Office's January 5, 2011 opinion, or do you believe that these conclusions should be modified based on the agency's memorandum?
2. If you determine that the conclusions reached in your Office's January 5, 2011 opinion do not require modification, what are the legally mandated procedural limitations, if any, on the conduct of the University and the CHE for moving forward with the USC School of Medicine's planned expansion?

Law / Analysis

Question 1

Our opinion of January 5, 2011 reviewed numerous authorities concerning the scope of CHE's authority. We reviewed the text of S.C. Code Ann. Section 59-103-35 which provides that "[n]o *new program* may be undertaken by any public institution of higher education without the approval of the commission." (emphasis added). Also reviewed were § 59-101-150 ("No *new program* shall be undertaken by a State-supported institution of higher learning without the approval of the Commission or the General Assembly.") (emphasis added), as well as § 59-123-10 ("any *new programs* undertaken by the institution [i.e. the Medical University of South Carolina] will first be approved by the Commission on Higher Education.") (emphasis added).

Second, our opinion referenced South Carolina authorities, as well as authority from other jurisdictions which concluded that the term "new" excluded expansions to preexisting programs or other activities. See, e.g. *Davis Mech. Contractors, Inc. v. Wasson*, 268 S.C. 26, 30, 231 S.E.2d 300, 302 (1977) [finding that the term "new business" in the Tax Code and concluding that "[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 the statute].

Finally, the January 5 opinion considered a CHE precedent, which concluded that when USC and MUSC combined resources to develop a joint Pharmacy School, CHE asked the Schools to provide only a "Notification of Change in Program Status" form. Importantly, that coordinated pharmacy school received separate accreditation, had its own dean, delivered the curriculum at a new location, and created new elective courses. Despite these expansions to the schools' existing pharmacy programs, the CHE did not attempt to require agency approval in that situation. In this Office's opinion, the CHE's conduct in that instance was consistent with the limited scope of its statutory authority to approve or disapprove only "new programs," not expansions of existing ones.

Based on our review of all applicable authorities, this Office concluded as follows:

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.

Therefore, we concluded 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."

Your letter indicates that upon receipt of our January 5, 2011 opinion, the CHE raised several concerns reflected in a memorandum indicating disagreement with this Office's conclusion. Your letter also enclosed a copy of that "Staff Analysis" memorandum. We have reviewed that memorandum fully and now reaffirm and reiterate the conclusions stated in our January 5, 2011 opinion.

The agency's memorandum did not materially dispute any aspect of our earlier legal analysis. It did not reference any South Carolina statute bestowing upon CHE the jurisdiction to approve anything other than "new programs." Nor did the Memorandum identify any case law from South Carolina's courts or courts from other jurisdictions which interpret the term "new" to include an expansion of an existing concern.

Instead, the "Staff Analysis" memorandum focused almost exclusively upon the agency's internal policies (both past and present). There, the author(s) argued such policies should determine what constitutes a "new program" under the South Carolina Code. This is incorrect.

The South Carolina Supreme Court has been clear that, though agencies should be given deference when interpreting their own regulations, they cannot expand or alter their jurisdictional reach by way of internal policy; only the General Assembly may do so. *See, e.g., Ahrens v. State*, Op. No. 26966 (S.C. Sup. Ct. filed May 2, 2011) (Shearouse Adv. Sh. No. 15, at 33) (reiterating that "an agency may not make rules that 'conflict with, or ... change in any way the statute conferring such authority'" (quoting *Fisher v. J.H. Sheridan Co.*, 182 S.C. 316, 326, 189 S.E. 356, 360 (1936))) (ellipses in original); *S.C. Tax Comm'n v. S.C. Tax Bd. of Review*, 278 S.C. 556, 560, 299 S.E.2d 489, 491 (1983). ("An order cannot be made by an administrative body which would materially alter or add to the law."). The CHE, as a state agency, is jurisdictionally limited by the plain terms of its enabling statute. *See, e.g., Captain's Quarters Motor Inn v. S.C. Coastal Council*, 306 S.C. 488, 490, 413 S.E.2d 13, 14 (1991) ("As a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged."). Therefore, prior iterations of the CHE's internal policies or other so-called "longstanding" practices simply do not have any relevance to the agency's subject matter jurisdiction, which has remained statutorily unchanged for over thirty years.

In addition to its comments about the agency's internal policies, the "Staff Analysis" memorandum stated that "[t]he AG does not take into account or reference existing law concerning the role of the Deans' Committee of Medical Education (§ 59-101-190) and its relationship to CHE's authority." This Office is aware of the Deans' Committee on Medical Education. That Committee's mission is a narrow one, and nowhere did the General Assembly bestow upon it jurisdiction to approve or disapprove of expansions of already-existing medical programs.

Finally, the "Staff Analysis" memorandum stated that "the AG's opinion does not consider the fundamental question of whether South Carolina needs another medical school" or whether USC's planned expansion would "meet such a need." When rendering opinions, this Office may not give a view regarding policy decisions made by various state institutions. *See Op. S.C. Atty. Gen.*, June 26, 1992 ("Only the legal questions will be addressed herein; no comment is made as to policy matters or as to the wisdom of the undertaking."); *Op. S.C. Atty. Gen.*, July 31, 1985 ("Of course, this opinion addresses only the legal questions presented and does not comment upon the administrative, budgetary and business decisions which the parties themselves must address."). Our review was, and remains, limited to the scope of the CHE's subject matter jurisdiction over USC's planned expansion. The advisability of whether South Carolina needs another medical school stated in the "Staff Analysis" memorandum is not a proper point of consideration by this Office and we cannot comment upon such policy considerations in our Opinion.

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For these reasons, this Office fully reaffirms its formal opinion of January 5, 2011. The legal authorities that are properly considered when analyzing this issue lead to the conclusion that a court would likely find that the CHE does not have subject matter jurisdiction to approve of the expansion of the USC School of Medicine in Greenville, a location at which it already educates medical students.

Question 2

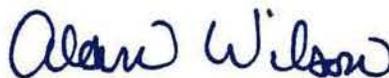
As noted above, this Office believes that the CHE lacks subject matter jurisdiction to consider and approve of the planned expansion of the USC School of Medicine. While this Office cannot require parties to take any steps by virtue of an advisory opinion, we can outline important considerations of which both the CHE and the University should be aware.

First, as discussed above, the CHE only has the authority granted to it by the General Assembly. Anything that it does inconsistent with or outside of these statutory boundaries "is null and void." *Responsible Econ. Dev. v. S.C. DHEC*, 371 S.C. 547, 553, 641 S.E.2d 425, 428 (2007). Therefore, in this Office's opinion, any attempts by the agency to consider for its approval the medical school's expansion would be beyond the scope of its authority and therefore invalid, unenforceable, and *ultra vires*, as the CHE does not have subject matter jurisdiction to approve the expansion of the USC School of Medicine in Greenville.

Second, the South Carolina Supreme Court is clear that subject matter jurisdiction "cannot be waived or conferred by consent." *Atlanta Skin & Cancer Clinic, P.C. v. Hallmark Gen. Partners*, 320 S.C. 113, 121, 463 S.E.2d 600, 605 (1995). Thus, even if the University were inclined to submit to the CHE's approval process, it could not do so. The University does not have the authority to expand the scope of the CHE's jurisdiction or otherwise disregard the jurisdictional parameters that the General Assembly has placed on the agency.

As a result of these considerations, this Office previously advised that the University could provide "notice" to the CHE regarding its plans with the School of Medicine in Greenville. In our view, such notice may be provided either by written communications, an appearance before the Commission, or both. However, in this Office's opinion, both USC and the CHE are legally prohibited from participating in a process whereby the CHE considers for approval the University's planned expansion, and any efforts or attempts to do so would likely be deemed by a court to be null and void.

Sincerely,



Alan Wilson

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